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## Federalism: Essential Concepts in Evolution - The Case of the European Union

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# Federalism: Essential Concepts in Evolution - The Case of the European Union

Koen Lenaerts

## **Abstract**

This Article aims to examine the instrumental aspects of the European Union structure in order to elucidate the degree of federalism that it contains. The analysis considers: the status of the central authority; the constitutional embedding of the division of powers between the central authority and the component entities; the existence of mechanisms to preserve the identity of the component entities; the foundation of the constitutional order on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law; and the enforceability of the constitution.

# FEDERALISM: ESSENTIAL CONCEPTS IN EVOLUTION — THE CASE OF THE EUROPEAN UNION

*Koen Lenaerts\**

## INTRODUCTION

There appears to be no exhaustive list of commonly accepted criteria that a legal order should meet before it can be said to be federal. As such, during the intergovernmental conference which led to the conclusion of the Treaty on European Union<sup>1</sup> ("TEU"), some of the Member States, in particular the United Kingdom, resisted describing the European Union as a further stage in the process leading to a Union with a federal goal.<sup>2</sup> The TEU thus does not contain any reference to federalism and is simply marking "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."<sup>3</sup> This remains the case even after its amendment by the Treaty of Amsterdam signed on October 2, 1997.<sup>4</sup> The question thus arises as to whether, in the absence of any reference to a federal goal, the Union can truly be regarded as an expression of federalism.

The answer depends on what federalism is deemed to stand

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1. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITY (EC Off'l Pub. Off. 1987)).

2. EUROPE DOCUMENTS, December 13, 1991, No. 1750/1751; THE INTERGOVERNMENTAL CONFERENCE ON POLITICAL UNION, MAASTRICHT, EUROPEAN INSTITUTE OF PUBLIC ADMINISTRATION 505 (F. Laursen & S. Vanhoonacker eds., 1992) (providing genesis of Treaty on European Union ("TEU")).

3. Consolidated Version of the Treaty on European Union, art. 1, ¶ 2, O.J. C 340/2, at 152 (1997), 37 I.L.M. 67, 68 [hereinafter Consolidated TEU] (art. A of TEU), incorporating changes made by Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam].

4. Treaty of Amsterdam, *supra* note 3 (amending TEU, *supra* note 1).

for. According to some authors, federalism essentially refers to the structure of a nation-state<sup>5</sup> in which power lies with a directly elected central authority that determines the economic and monetary policy and represents and defends the federation at the international level. The standard means of implementing and enforcing policy are at the disposal of the central authority: it has the power to levy taxes and is equipped with its own administrative and police system which operates throughout the entire territory. In addition, a coherent system of federal courts exists. The component entities for their part constitute cores of sovereign power for subject-matters which are relevant on a regional level only.

On the basis of such an understanding of federalism, the European Union is not federal. First of all, the Member States remain subject to international law and bear primary responsibility for carrying out the "common foreign and security policy" of the Union. Secondly, only the Member States have the power to levy taxes and to use that power as far as it is necessary for the benefit of the Union. Thirdly, the Union has to rely on national administrations and courts to implement and enforce the major part of its policies. Finally, the judicial organization of the Union is restricted to one Court of Justice — to which the Court of First Instance is attached — whose main task is to co-operate with national courts so that the uniform interpretation and application of European law can be assured. In short, the European Union is not a federation whose aim is to construct a nation-state over and above its component entities, the Member States. If this were the case, the "national identity" of the Member States would be seriously undermined, in violation of Article F(1) of the TEU.<sup>6</sup> Indeed, the concept of "nationality" remains exclusively connected with the Member States themselves.<sup>7</sup>

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5. Asteris Pliakos, *La nature juridique de l'Union européenne*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN, 187, 189-208 (1993); Philip Raworth, *Too Little, Too Late? Maastricht and the Goal of a European Federation*, ARCHIV DES VÖLKERRECHTS, 24-55 (1994).

6. TEU, *supra* note 1, art. F(3), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728.

7. See Treaty Establishing the European Community, Feb. 7, 1992, art. 8(1), [1992] 1 C.M.L.R. 573, at 593 [hereinafter EC Treaty], *incorporating changes made by TEU, supra* note 1 (stating that "[e]very person holding the *nationality* of a Member State shall be a citizen of the Union.") (emphasis added). Member States must mutually accept the operation of each other's nationality laws when determining whether a person is a citizen of the Union. See Micheletti and Others, Case C-369/90, [1992] E.C.R. I-4239, I-

However, the federal idea is sufficiently broad that its relevance should not be restricted to the "nation-state."<sup>8</sup> Federalism, as a means of structuring the relationship between interlinked authorities, can be used either within or without the framework of a nation-state. It is a doctrine according to which the exercise of powers within an international body, just as within a nation-state, can be organized.<sup>9</sup> Its basic tenet is that power will be divided between a central authority and the component entities of a nation-state or an international organization so as to make each of them responsible for the exercise of their own powers. By doing so, federalism searches for the balance between the desire to create and/or to retain an efficient central authority that can find its origin in historic, social, or other considerations, and the concern of the component entities to keep or gain their autonomy so that they can defend their own interests. This bal-

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4262, ¶¶ 10-11. The Treaty of Amsterdam has added a further sentence to Article 8(1) of the EC Treaty stating that "citizenship of the Union shall complement and not replace national citizenship." See Consolidated Version of the Treaty Establishing the European Community, art. 17(1), O.J. C 340/3, at 186 (1997), 37 I.L.M. 79, 82 [hereinafter Consolidated EC Treaty] (art. 8 of EC Treaty), *incorporating changes made by Treaty of Amsterdam, supra* note 3. This effectively includes into the Treaty text itself the core of the Decision of the Heads of State or Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union, adopted in Edinburgh on December 11-12, 1992. See O.J. C 348/1, sec. A (governing "Citizenship"). All of this leads to the exact opposite impression of what nationality laws mean in the United States where the grant or loss of U.S. citizenship constitutes a federal matter *par excellence* and logically precedes the question as to which of the U.S. States a person belongs to.

8. Thijmen Koopmans, *Federalism: The wrong debate*, COMMON MKT. L. REV., 1047-1052 (1992). See also Dusan Sidjanski, *Actualité et dynamique du fédéralisme européen*, REVUE DU MARCHÉ COMMUN, 655, 658 (1990).

9. See R. Ladvech, *Parliamentary Democracy and Political Discourse in EC Institutional Change*, REVUE D'INTÉGRATION EUROPÉENNE, 52, 63 (1993) (citing Daniel J. Elazar, *EXPLORING FEDERALISM* 12 (1987)).

[T]he federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal state. The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life. Consequently, federalism is a phenomenon that provides many options for the organization of political authority and power; as long as the proper relations are created, a wide variety of political structures can be developed that are consistent with federal principles.

*Id.* See also Peter Badura, *Willensbildung und Beschlußverfahren in der Europäischen Union*, EUROPARECHT, 9, 10 (1994) (defining Union as "Die Europäische Union ist eine föderative Organisation die eine selbständige politische Vollmacht besitzt und eine Rechtsgemeinschaft darstellt, aber in ihrer Legitimität, ihrem Wirkungskreis und ihren Leistungsfähigkeit von den Mitgliedstaaten abhängt.").

ance depends on the division of powers between the central authority and the component entities and also on the extent to which the component entities can influence the functioning of the central authority. Inevitably, the search for the right balance is a dynamic process. The dynamics underlying every form of federal government can be highlighted by contrasting the models of integrative and devolutionary federalism. Integrative federalism refers to the constitutional order that governs the creation of a new core of sovereignty by previously independent component entities. Such a new core of sovereignty is established alongside the component entities which retain at least part of their previous sovereignty. Devolutionary federalism reflects the opposite movement. It refers to the situation in which the previously unitary authority redistributes its powers to component entities that are created artificially or naturally on a geographic, economic, or sociological basis. This transfer of sovereignty aims at creating entities that enjoy a core of sovereignty alongside the remaining sovereignty of the central authority.<sup>10</sup>

Thus, in both variants of federalism the balance of sovereignty between the central authority and the component entities constitutes the backbone of the constitutional order and indeed one of its essential objectives as a way of constituting a system of limited government based on the rule of law. That objective does not presuppose the simultaneous pursuit of turning the central authority into a nation-state of the type that underlie the ideas of the authors of *The Federalist*, who saw federalism as an important means of building a single nation, based on a single people, administered by a single government, the latter being obliged, however, to respect the remaining sovereignty of the several States.<sup>11</sup> It is sufficient that the central authority be perceived as the most efficient way of pursuing a single set of common values held by a plurality of different peoples that are eager to see their identity preserved in all circumstances. The way in which the balance of sovereignty is to be struck between the central authority and the component entities will vary accordingly, but for that reason the balance will not be less federal in the latter case than in the former. What does matter if federalism is

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10. Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, AM. J. COMP. L., 205, 206 (1990).

11. ALEXANDER HAMILTON ET AL., *THE FEDERALIST. A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* (1868) (Edward M. Earle ed. 1976).

to work outside the context of nation-building, however, is the existence of common values on which the constitutional order is founded. In this respect, Article F(1) of the TEU, as laid down in the Treaty of Amsterdam, states that: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."<sup>12</sup> The Union should contribute to the preservation of these values inside its own legal order as well as inside the national legal orders, as adherence to these values is a condition of membership of the Union.

The common values to be pursued by the European Union are further expressed in an enumeration of objectives which the Union shall set itself. In the version of the Treaty of Amsterdam the common values are worded as follows:

- to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defense policy, which might lead to a common defense; in accordance with the provisions of Article J.7;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;
- to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effective-

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12. Consolidated TEU, *supra* note 3, art. 6(1), ¶ 2, O.J. C 340/2, at 153 (1997), 37 I.L.M. at 69 (art. F of TEU).

ness of the mechanisms and the institutions of the Community.<sup>13</sup>

These objectives are to be achieved through the so-called three-pillar structure of the Union, which shall “be founded on the European Communities, supplemented by the policies and forms of cooperation established by [the TEU]. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.”<sup>14</sup> The three “pillars” are formed by the Community pillar, which reflects the *acquis communautaire*, by the common foreign and security policy (the second pillar), and by police and judicial co-operation in criminal matters (the third pillar).<sup>15</sup> The second and third pillar are characterized mainly by intergovernmental decision-making. The policy areas belonging to the Community pillar are dealt with according to a *sui generis* method of supranational decision-making.<sup>16</sup> By virtue of Article C(1) of the TEU, however, “the Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives.”<sup>17</sup> Thus, the Community institutions exercise powers in the context of the second and third pillar under the conditions set out in the TEU.<sup>18</sup>

From this brief overview of the objectives and structure of the Union, it appears that a federal form of government exists in the sense that, in certain areas, the Member States act as a unity (“the identity of the Union”) whereas in other areas they seek to preserve their “national identities.”<sup>19</sup> It follows that the essential

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13. Treaty of Amsterdam, *supra* note 3, art. B, O.J. C 340/1 at 7, ¶ 5 (1997); Consolidated TEU, *supra* note 3, art. 2, O.J. C 340/2, at 152 (1997), 37 I.L.M. at 68 (art. B of TEU).

14. TEU, *supra* note 1, art. A, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727.

15. The Treaty of Amsterdam has limited the scope of the third pillar relating to co-operation in the fields of justice and home affairs to those aspects which were not transferred to the Community pillar. The Treaty of Amsterdam inserted the new Title IV entitled “Visas, asylum, immigration and other policies related to free movement of persons” into Part III of the EC Treaty. See Consolidated EC Treaty, *supra* note 7, tit. IV, O.J. C 340/3, at 200 (1997), 37 I.L.M. at 89.

16. Renaud Dehousse, *From Community to Union, in EUROPE AFTER MAASTRICHT. AN EVER CLOSER UNION? LAW BOOKS IN EUROPE* 6-12 (Renaud Dehousse ed., 1994).

17. TEU, *supra* note 1, art. C(1), O.J. C 224/1 at 5 (1992), [1992] 1 C.M.L.R. at 727.

18. *Id.* art. E, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 728.

19. *Id.* art. F, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728.



aspect of federalism, namely the balance of sovereignty between the central authority and the component entities, may be said to be present in the case of the European Union.

At first sight, the European Union should be regarded as a form of integrative federalism, as the idea of integration is predominant in the list of objectives of the Union. Before drawing a definitive conclusion in this respect, however, it is necessary to examine whether the balance of sovereignty inherent in the wording of the common values and objectives on which the Union is based is equally present in the instruments created in order to make the system of government work. For federalism to be present at that level, the central authority should be sufficiently efficient and democratic to be credible as a government, while the component entities continue to play a significant role in their own sphere of competence and enjoy the necessary constitutional protection to that effect.

Furthermore, while there is no devolutionary federalism as such in the European Union — one would have needed a previously established central authority to have transferred powers to the component entities — some characteristics peculiar to devolutionary federalism can nonetheless be found in the constitutional order of the Union, such as the concern for the preservation of the identity of the component entities.

This Article aims to examine the instrumental aspects of the Union structure in order to elucidate the degree of federalism that it contains. The analysis considers: the status of the central authority; the constitutional embedding of the division of powers between the central authority and the component entities; the existence of mechanisms to preserve the identity of the component entities; the foundation of the constitutional order on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law; and the enforceability of the constitution.

### I. *THE STATUS OF THE CENTRAL AUTHORITY*

Federalism is characterized by the existence of a central authority that manages the fields of competence entrusted to it. The component entities may somehow be able to influence central decision-making but, in essence, that process enjoys a large

amount of independence, either because of the way in which its organs are composed or because of its working methods.

However, two remarks should be made. Firstly, the creation of a central authority may not impinge upon the responsibilities of the component entities within the fields of competence that they have retained or which have been attributed to them. Otherwise, the component entities would be dissolved into a single entity and one could no longer speak of a federal form of government. Federalism thus can be recognized by the dual structure in which both the central authority and the component entities exercise their respective competences. Secondly, in a federal form of government, both the rules laid down by the central authority and by the component entities are aimed at affecting the legal sphere of individuals. The rules are so aimed because the central authority manifests itself as an autonomous level of government through the creation of rights and obligations for individuals which are judicially enforceable *vis-à-vis* other individuals, the component entities and the central authority itself.<sup>20</sup> To what extent are these conditions met in the European Union?

#### A. *The Central Authority*

The central authority of the European Union essentially consists of the five institutions established by Article 4(1) of the EC Treaty, namely the European Parliament, the Council, the Commission, the Court of Justice, and the Court of Auditors.<sup>21</sup>

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20. See also Koen Lenaerts, *Federalism and Rights in the European Community*, in *FEDERALISM AND RIGHTS*, 139-72 (E. Katz & G.A. Tarr eds., 1996).

21. See Consolidated TEU, *supra* note 3, art. 5, O.J. C 340/2, at 153 (1997), 37 I.L.M. at 69 (art. E of TEU) (stating that these institutions "shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of [the TEU]."). The analysis is restricted to these five main institutions. See also EC Treaty, *supra* note 7, art. 4(2), [1992] 1 C.M.L.R. at 590 (for Economic and Social Committee and Committee of the Regions); *id.* art. 4a, [1992] 1 C.M.L.R. at 590 (for European Central Bank); *id.* art. 4b [1992] 1 C.M.L.R. at 590 (for European Investment Bank). See also TEU, *supra* note 1, art. D, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 728 (noting that European Council "shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."). The European Council brings together the Heads of State or Government of the Member States and the President of the Commission, assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council meets at least twice a year.

The autonomy of the Union is partially reflected in the composition of its institutions.

As Community institutions, these organs are primarily responsible for ensuring the smooth operation of the Communities on which the Union is founded. The Council is also the principal decision-making body for second and third pillar matters. The institutions concerned act in relation to these matters in the same composition and according to the same rules of procedure as provided in the EC Treaty, with the exception of the voting procedures in the Council.<sup>22</sup> Finally, the Court of Justice has no role to play in matters pertaining to the common foreign and security policy (second pillar), but with the entry into force of the Treaty of Amsterdam it will have jurisdiction over police and judicial cooperation in criminal matters (third pillar).<sup>23</sup>

## 1. Composition

### a. The European Parliament

The European Parliament consists of representatives of the peoples of the States brought together in the Community.<sup>24</sup> While Article 138(2) of the EC Treaty determines the number of representatives elected in each Member State, the Parliament should not necessarily be seen as an assembly of representatives of the Member States. This is attributable to the composition of the parliamentary groups, which are formed on the basis of political allegiance and not on the basis of the nationality of their members.<sup>25</sup> Moreover, the number of representatives for

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22. See TEU, *supra* note 1, arts. J.11(1), K.8(1), O.J. C 224/1, at 96, 98 (1992), [1992] 1 C.M.L.R. at 734, 737; *id.* arts. J.8(2), K.4(3), O.J. C 224/1, at 96, 98 (1992), [1992] 1 C.M.L.R. at 733, 737 (as to voting procedures in Council). For the amendment of these provisions by the Treaty of Amsterdam, see respectively, Consolidated TEU, *supra* note 3, arts. 28(1), 41(1), O.J. C 340/2, at 162, 168 (1997), 37 I.L.M. at 73, 76; *id.* arts. 23, 34(2) (3) and (4), O.J. C 340/2, at 160, 164 (1997), 37 I.L.M. at 72, 74-75 (as to voting procedures in Council).

23. See Consolidated TEU, *supra* note 3, art. 46, O.J. C 340/2, at 170 (1997), 37 I.L.M. at 77 (art. L of TEU) (viewed in combination with Articles K.7 and K.12 of the TEU).

24. See EC Treaty, *supra* note 7, art. 137, [1992] 1 C.M.L.R. at 676.

25. The required number of members for the formation of a political group diminishes according to the nationalities represented. By virtue of Article 29(2) of the European Parliament Rules of Procedure, the minimum number of members required is 29 if they come from one Member State, 23 if they come from two Member States, 18 if they come from three Member States, and 14 if they come from four or more Member States.

each Member State is calculated with a view to the size of its population and the scale of its territory, so that one can say that the representatives do not represent the Member State as such but their inhabitants, who are citizens of the Union.<sup>26</sup>

#### b. The Commission

Only nationals of Member States may be members of the Commission.<sup>27</sup> The Commission must include at least one national of each Member State but may not include more than two nationals of any Member State.<sup>28</sup> These nationality requirements might indicate that the Commission is largely dependent on the Member States. However, the EC Treaty requires that the members shall, in the general interests of the Community, be completely independent in the performance of their duties.<sup>29</sup> Moreover, the president and members of the Commission can only be appointed by common accord of the governments of the Member States after approval by the European Parliament.<sup>30</sup> The debate that precedes the vote of approval, where the proposed members of the Commission are heard by the competent parliamentary committees, will often reveal the policy intentions of the proposed members of the Commission and is an opportunity for them to prove their independence from their Member State of origin. Finally, Parliament can force the Commission to resign if a motion of censure on the activities of the Commission is carried by a two-thirds majority of the votes cast, which repre-

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26. The European Parliament constitutes the main expression of representative democracy at the level of the Union. The Court of Justice has stressed this aspect of the Parliament's role. See *Van Gend & Loos*, Case 26/62, [1963] E.C.R. 3, [1962] C.M.L.R. 105; *Roquette v. Council*, Case 138/79, [1980] E.C.R. 3333, 3360, ¶ 33; *Commission v. Council*, Case C-300/89, [1991] E.C.R. I-2867, I-2900, ¶ 20. The Parliament represents the citizens of the Union in that very capacity. That is why "every citizen of the Union residing in a member-State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the member-State in which he resides, under the same conditions as nationals of that State." EC Treaty, *supra* note 7, art. 8b(2), [1992] 1 C.M.L.R. at 593. See also Koen Lenaerts & Eddy De Smijter, *The Question of Democratic Representation: On the democratic representation through the European Parliament, the Council, the Committee of the Regions, the Economic and Social Committee and the National Parliaments*, in *REFORMING THE TREATY ON EUROPEAN UNION - THE LEGAL DEBATE* 173-97 (J.A. Winter et al. eds., 1996).

27. See EC Treaty, *supra* note 7, art. 157(1), ¶ 3, [1992] 1 C.M.L.R. at 682.

28. *Id.* art. 157(1), ¶ 4 [1992] 1 C.M.L.R. at 682.

29. *Id.* art. 157(2), ¶ 1 [1992] 1 C.M.L.R. at 682. See also *id.* art. 157(1), ¶ 1 [1992] 1 C.M.L.R. at 682.

30. *Id.* art. 158(2), ¶ 3 [1992] 1 C.M.L.R. at 682.

sents the majority of the members of the European Parliament.<sup>31</sup>

c. The Court of Justice, Court of First Instance, and Court of Auditors

Although there is no nationality requirement in the Treaty, the Court of Justice and the Court of First Instance are in reality composed of nationals of each Member State.<sup>32</sup> There is also no nationality requirement for the members of the Court of Auditors, but Article 188b(2) of the EC Treaty requires them to belong or to have belonged in their "respective countries" to external audit bodies or to be especially qualified for this office. In practice, here too, one member is selected from each Member State. However, the independence of the members of the Court of Auditors must be beyond doubt, and in the performance of their duties, they shall neither seek nor take instructions from any government or other body.<sup>33</sup>

d. The Council

The composition of the Council suggests that it is not an institution that is independent from the Member States as it consists of a representative of each Member State at ministerial level, authorized to bind the government of the Member State.<sup>34</sup> As discussed below, however, this does not mean that Member States are in all circumstances able to prevent the Council from acting when it is proposing to act against their wishes.

2. Internal Working Methods

The internal working methods of the institutions show that, within the framework of the Community pillar of the Union, the institutions have gained a large degree of independence. This is demonstrated by the fact that many decisions may be taken without the approval of the representatives of the Member States — or at least not approval of *all* the Member States.

The Council acts by a majority of its members, by a qualified majority,<sup>35</sup> or unanimously depending on the Treaty article that

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31. EC Treaty, *supra* note 7, art. 144, [1992] 1 C.M.L.R. at 679.

32. *Id.* art. 167, [1992] 1 C.M.L.R. at 685; *id.* art. 168a(3), [1992] 1 C.M.L.R. at 686.

33. *Id.* art. 188b(2) and (4), [1992] 1 C.M.L.R. at 691-92.

34. *Id.* art. 146, [1992] 1 C.M.L.R. at 680.

35. *Id.* art. 148(2), [1992] 1 C.M.L.R. at 680.

serves as the legal basis for its action. If the Council acts by a simple or qualified majority it binds all the Member States irrespective of the vote cast by their representative.<sup>36</sup>

The Commission takes its decisions by a majority of its members.<sup>37</sup> Even if one of its members — who should be completely independent in the performance of his or her duties — wishes to favor a national interest, he or she cannot prevent the majority of the members of the Commission from taking another decision.

The decisions of the Court of Justice and the Court of First Instance are determined by the conclusions reached by the majority of the judges who have heard the case.<sup>38</sup> Minority or dissenting opinions are not permitted. Moreover, the deliberations of the Court of Justice or the Court of First Instance take place in closed session,<sup>39</sup> so that the personal opinion of the judges involved is never known. This strengthens the judges' independence from their respective Member States. Cases are attributed to the different chambers within the Court without taking into account the nationality of the judges.

The Member States or Community institutions that are parties to the proceedings can request that the Court of Justice sits

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36. The 1966 Luxembourg Accord resolved the political crisis which had erupted out of France's claim that decisions which touch upon the major interests of a Member State should only be taken unanimously. See 3 E.C. BULL., at 5 *et seq.* (1966). In reality, the Accord led to the result that the Council almost never took a decision by majority voting. Although the Council, after the coming into force of the Single European Act (1986), increasingly relied on majority voting, the doctrine of "major interests" never completely disappeared. For instance, the United Kingdom has long considered that the practice born of the Luxembourg Accord had grown into an unwritten constitutional rule belonging to the *acquis communautaire*. However, it should be pointed out that the Council has enhanced its autonomy through an amendment to its Rules of Procedure, according to which the president of the Council shall be required to open voting proceedings on the initiative of a member of the Council or of the Commission provided that a majority of the Council's members so decides. See Article 7(1) of the Rules of Procedure of the Council. In practice, this means that whenever a Member State invokes its major interests to convince the Council to continue its deliberations in order to achieve a consensus, it will only succeed if a majority of Member States agree that that decision should not be taken by vote in any circumstances. Such a hurdle may be difficult to overcome.

37. EC Treaty, *supra* note 7, art. 163, [1992] 1 C.M.L.R. at 684.

38. Article 27(5) of the ECJ Rules of Procedure; Article 33(5) of the CFI Rules of Procedure.

39. Article 27(1) of the ECJ Rules of Procedure; Article 33(1) of the CFI Rules of Procedure.

in plenary session.<sup>40</sup> When a Member State requests this, however, the judge who is a national of that Member State will not necessarily belong to the bench hearing the case, as nine members constitute a full court.<sup>41</sup> In addition, even where one of the parties is a Member State, the parties cannot ask for a change in the composition of the Court of Justice, the Court of First Instance, or one of their chambers, on the grounds of the nationality of the judges or on the basis that a judge of their own nationality is absent.<sup>42</sup> This means that, contrary to the International Court of Justice in The Hague or the European Court of Human Rights in Strasbourg, a Member State may be obliged to submit to the jurisdiction of the Court of Justice in a situation where the bench hearing the case does not include a judge stemming from the Member State in question. Nevertheless, the judgment given will be binding on the State. This is probably one of the most striking characteristics by which the Court of Justice differentiates itself from the classic examples of international jurisdictions and thus moves towards being a federal supreme court.

### 3. Decision-making Procedures

#### a. The Community Pillar of the Union

The Community decision-making process can be divided into legislative, executive, and judicial acts.<sup>43</sup> This functional division has no institutional equivalent, with the exception, however, of judicial acts. Legislative and executive acts are the result of a subtle concertation, on the one hand, between the Community institutions themselves and, on the other hand, between the Community institutions and the Member States.

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40. EC Treaty, *supra* note 7, art. 165, [1992] 1 C.M.L.R. at 684-85.

41. Article 15 of the EC Statute of the Court of Justice.

42. Article 16 of the EC Statute of the Court of Justice; *Lenz v. Commission*, Case T-47/92, [1992] E.C.R. II-2523, II-2531, ¶ 33.

43. The division between legislation and execution of legislation depends on the character of the provision which serves as the legal basis for the Community act. If the act relies on a Treaty article and is of general application, it can be regarded as a "legislative act." Executive acts, on the other hand, implement legislative acts (or a previously adopted executive act). In this regard, the Court of Justice has said that "[t]he concept of implementation for the purposes of (Article 145 of the EC Treaty) comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual 'application'." *Commission v. Council*, Case 16/88, [1989] E.C.R. 3457, 3485, ¶ 11. *See also* Koen Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, *COMMON MKT. L. REV.*, 11, 13-14 (1991) [hereinafter *Reflections on Separation of Powers*].

## i. Legislative acts

The Commission has the exclusive power to initiate legislative acts.<sup>44</sup> It addresses its proposals to the Council or to the European Parliament and the Council when the co-decision procedure stated in Article 189b of the EC Treaty applies. The Commission exercises its right of proposal in a fully independent way. The Member States can only ask the Commission indirectly, through a decision of the Council, to submit a proposal.<sup>45</sup> As long as the Council has not approved the proposal, the Commission can alter<sup>46</sup> or withdraw the proposal, which would bring the decision-making process to an end. The Commission may do so when it is convinced that possible Council amendments to its proposal do not serve the Community interest. In any event, unanimity is required for a Council act constituting an amend-

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44. The partial transfer to the Community pillar of matters relating to the third pillar through the insertion in the EC Treaty of a new title on "Visas, asylum, immigration and other policies related to free movement of persons" could only be obtained at the price of abandoning, for a transitional period of five years, the exclusivity of the Commission's power to take the initiative for the enactment of legislative acts. See Consolidated EC Treaty, *supra* note 7, arts. 61-70, O.J. C 340/3, at 200 (1997), 37 I.L.M. at 89-92. Indeed, Article 67(1) of the Consolidated EC Treaty states that "[d]uring a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament." *Id.* art. 67(1), O.J. C 340/3, at 203 (1997), 37 I.L.M. at 91 (emphasis added). This is the first major encroachment on the monopoly of legislative initiative generally enjoyed by the Commission and should be seen as a concession that had to be made to the Member States to make the transition from the intergovernmental method to the Community method of decision-making acceptable in a particularly sensitive policy field. After the period of five years the Council can act only on proposals from the Commission, which means that the latter's monopoly of legislative initiative will be restored; the Commission will then simply be obliged to examine any request made by a Member State that it submit a proposal to the Council without ever being under a duty to accede to such request. See Consolidated EC Treaty, art. 67(2), O.J. C 340/3, at 204 (1997), 37 I.L.M. at 91 (governing Member State requests for proposals).

45. See EC Treaty, *supra* note 7, art. 152, [1992] 1 C.M.L.R. at 681. The Parliament may, acting by a majority of its members, request the Commission to submit a proposal. *Id.* art. 138b, [1992] 1 C.M.L.R. at 677. However, the Commission is not obliged to submit a proposal at the request of the Council or the Parliament. See RICHARD H. LAUWAARS, *LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS* 108-09 (1973). The Commission has to carefully consider the proposal and, where necessary, explain the reasons why it does not intend to act upon the request (interinstitutional loyalty). The Commission can only be forced to submit a proposal if the Treaty itself contains an obligation to legislate on a precise point. See, e.g., *European Parliament v. Council*, Case 15/83 [1985] E.C.R. 1513, 1600, ¶ 65. See also *Reflections on Separation of Powers*, *supra* note 43, at 21-25.

46. See EC Treaty, *supra* note 7, art. 189a(2), [1992] 1 C.M.L.R. at 694.



ment to the Commission's proposal.<sup>47</sup>

It follows from these rules that neither the Council nor the Member States can take the initiative for Community legislation.<sup>48</sup> However, the Commission must make sure that its proposals have a realistic chance of being accepted. It will therefore have to take into account to a certain extent the Member States' and the Parliament's views.<sup>49</sup> Moreover, by altering its initial proposal, the Commission will often try to gain the required majority in the Council and thus contribute to the decision-making process; it may also use the same tool to back the Parliament's views on the matter to be decided.

The possibility for the Member States to influence legislative decisions depends on the voting requirements in the Council as well as on the prerogatives of the European Parliament in the decision-making process, both of which are laid down in the Treaty article which serves as the legal basis for the proposed legislation.<sup>50</sup> The European Parliament can thus block the en-

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47. See EC Treaty, *supra* note 7, art. 189a(1), [1992] 1 C.M.L.R. at 694. Article 189a(1) of the EC Treaty is subject to Article 189b(4) and (5) of the EC Treaty, which allow the Council to approve the joint text approved by the Conciliation Committee — composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament — acting by a qualified majority, even if that joint text contains amendments to the Commission's proposal. In that case, however, neither the Council nor the representatives of the Member States who compose it act independently but instead decide in conjunction with the directly elected European Parliament. This latter aspect can be seen as an appropriate substitute for the representation of the Community interest as such in the decision-making process, especially considering that the Commission takes part in the Conciliation Committee's proceedings and takes all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. See *id.* art. 189b(4), [1992] 1 C.M.L.R. at 695.

48. Eurotunnel SA and Others v. SeaFrance, Casé C-408/95, [1997] E.C.R. ¶¶ 35-39 (not yet reported).

49. See, e.g., 1966 Luxembourg Accords, 3 E.C. BULL., at 1 (1966) (noting that "[b]efore adopting any particularly important proposal, it is desirable that the Commission should take up the appropriate contacts with the Governments of the Member States, through the Permanent Representatives, without this procedure compromising the right of initiative which the Commission derives from the Treaty.").

50. See Commission v. Council, Case 45/86, [1987] E.C.R. 1493, [1988] 2 C.M.L.R. 131. Over the last ten years an impressive number of judgments have been handed down by the Court of Justice concerning interinstitutional litigation, or litigation between a Member State and a Community institution, on the correct legal basis in the Treaty for Community legislation. The true stakes involved in such litigation invariably concern the balance of power between the institutions and thus, indirectly, between the Member States and the Community in the decision-making process. See K. Bradley, *The European Court and the Legal Basis of Community Legislation*, EUR. L. REV., 379-402 (1988); M. O'Neill, *The Choice of Legal Basis: More Than a Number*, IRISH J. OF EUR. L., 44-58

actment of Community legislation when the co-decision procedure applies.<sup>51</sup> Curiously, when no Community legislation comes into existence Member States mostly retain their power to act unless the subject-matter concerned falls within the exclusive competence of the Community.<sup>52</sup>

The autonomy of the Community legislative process *vis-à-vis* the Member States has been further increased by the Treaty of Amsterdam through the reform of the co-decision procedure which resulted in a more efficient and democratic procedure. The reformed co-decision procedure indeed places the Council and the European Parliament on an equal footing with respect to the need to agree with a proposed legislative text in order to enact the latter into law. To that effect, both institutions have a strong incentive to come to an agreement at the earliest possible stage of the procedure.

During the *first* stage of the reformed co-decision procedure, if the Council approves all the amendments contained in the European Parliament's opinion it may adopt the proposed act as amended. If the European Parliament does not propose any amendments, the Council may adopt the proposed act.

During the *second* stage — when the Council and the European Parliament have not yet reached agreement and the Council thus forwards its own “common position” to the Parliament — the European Parliament may approve the common position or not take a decision — consent by remaining silent — in which case the act in question shall be deemed to have been adopted in accordance with that common position. In the alternative, the Parliament may reject the common position by an absolute majority of its component members, in which case the proposed act shall be deemed not to have been adopted. Finally, the Parliament may propose amendments to the common position by an absolute majority of its component members, in which case the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

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(1994); Nicholas Emiliou, *Opening Pandora's Box: The Legal Basis of Community Measures Before the Court of Justice*, EUR. L. REV., 488-507 (1994).

51. See EC Treaty, *supra* note 7, art. 189b(6), [1992] 1 C.M.L.R. at 695.

52. Commission v. United Kingdom, Case 804/79, [1981] E.C.R. 1045, [1982] C.M.L.R. 543. See also Koen Lenaerts & Patrick van Ypersele, *Le principe de subsidiarité et son contexte: étude de l'article 3B du traité CE*, CAHIERS DE DROIT EUROPÉEN, 3, 13-28 (1994).

During the *third* stage, the Council has the option to approve all the amendments of the European Parliament, in which case the act in question shall be deemed to have been adopted in the form of the common position as amended. If the Council does not approve all the amendments, the Conciliation Committee<sup>53</sup> will be convened. The Conciliation Committee has “the task of reaching agreement on a joint text.” To that effect, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament. If the Conciliation Committee approves a joint text, the European Parliament and the Council must both approve it in order to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act, it shall be deemed not to have been adopted. Similarly, where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

Throughout the co-decision procedure, the Council acts by a qualified majority, except that it shall act unanimously on the amendments proposed by the European Parliament during the second stage on which the Commission has delivered a negative opinion. The Commission is thus maintained in its natural position as guardian of the Community interest, and if need be, even in the face of an absolute majority of the component members of the European Parliament (i.e. the majority needed to propose amendments during the second stage of the co-decision procedure). Even so, the Commission should not be seen in the first place as exercising some sort of censorship on the opinions held by the European Parliament. To the contrary, the reformed co-decision procedure rests, in principle, on the possibility for the Council, acting by a qualified majority, to approve the European Parliament’s views without the Commission first having to alter its initial proposal. Thus, during the first stage of the co-decision procedure, the Council — acting by a qualified majority — may approve the amendments contained in the European Parliament’s opinion without having to wait for the incorporation of these amendments into a new version of the Commission’s proposal. Likewise, during the third stage, the Council and the European Parliament negotiate directly with one another inside

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53. See *supra* note 47.

the Conciliation Committee, the role of the Commission being to "take all the necessary initiatives" with a view to reconciling their positions.

This procedure reflects a subtle federal balance within the operation of the Community legislative process. Legislation comes into being through majority voting in the two houses of the legislature and only after approval by both of them. One house represents the people in their capacity as citizens of the Union, the other house represents the component entities of the federation, the Member States, and — through them — the people in their capacity as citizens of the Member States. That is the reason why the Treaty of Amsterdam has annexed a protocol to the TEU and the Treaties establishing the European Communities on the role of national parliaments in the European Union. The protocol states that the Commission must make a legislative proposal or a proposal for a measure to be adopted under Title VI of the TEU (the third pillar) available in all languages to the European Parliament and the Council. In addition, a six-week period must elapse between the date when the Commission provides the proposal and the date when it is placed on a Council agenda for decision, subject to exceptions on grounds of urgency, the reasons for which shall be stated in the act or common position. The proposal is placed on a Council agenda either for the adoption of an act or for adoption of a common position pursuant to Article 189b or 189c of the EC Treaty.<sup>54</sup> The observance of these rules clearly constitutes "an essential procedural requirement" within the meaning of Article 173 of the EC Treaty, which implies that infringement of that requirement makes the act finally adopted vulnerable to annulment actions or a declaration of invalidity at a later stage.<sup>55</sup> The fundamental character of the procedural requirement in question flows from the fact that it aims to guarantee democracy at the level of the operation of the Council, one of the two branches of the Community legislature. For democratic representation and control to work at that level, national parliaments

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54. This latter provision, relating to the decision-making procedure involving co-operation between the Council and the European Parliament, was included in the EEC Treaty in 1986 by the SEA.

55. See EC Treaty, *supra* note 7, art. 177(b), [1992] 1 C.M.L.R. at 689 (concerning declaration of invalidity and preliminary rulings procedure); Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, [1987] E.C.R. 4199, 4231, ¶ 16, [1988] 3 C.M.L.R. 57, 80.

must be in a position to interact with the representative of the Member State concerned who sits as member of the Council. This does not imply that national parliaments, anymore than national governments, enjoy a veto power in the Community legislative process. National parliaments only have the right to a guaranteed participation in the deliberations taking place throughout the course of operation of that process, which is the essence of democracy, but must thereafter — because of the democratic legitimacy enjoyed by the Community legislative process — accept the outcome reached through the required majority voting in both houses of the Community legislature. This approach combines efficiency and democracy.

The Treaty of Amsterdam makes the reformed co-decision procedure applicable to almost all important subject-matters of Community legislation outside the field of economic and monetary union.<sup>56</sup> In so doing, it has largely standardized the legislative process throughout the several policy fields covered by the Community with some notable exceptions — such as in the field of the common agricultural policy — where the European Parliament still has no more than the mere right to be consulted.<sup>57</sup> In these latter cases the federal balance is tilted in favor of the Council, because the approval of the European Parliament of the final outcome of the legislative process is not required. The federal balance is equally tilted in favor of the Council — and in fact of the Member States, their governments, and parliaments — in a number of particularly sensitive policy areas where the co-decision legislative procedure applies, but the Council is, by way of exception, required to act unanimously throughout that

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56. Henceforth the cooperation procedure stated in Article 189c of the EC Treaty will apply only in a number of cases falling within this latter field. *Compare* EC Treaty, *supra* note 7, art. 189c, [1992] 1 C.M.L.R. at 696, *with* Consolidated EC Treaty, *supra* note 7, art. 252, O.J. C 340/3, at 280 (1997), 37 I.L.M. at 129.

57. The respect of this right can be judicially enforced. *See* Roquette Frères v. Council, Case 138/79, [1980] E.C.R. 3333; *European Parliament v. Council*, Case C-65/90, [1992] E.C.R. I-4593, I-4622, ¶¶ 20-21; *European Parliament v. Council*, Case C-388/92, [1994] E.C.R. I-2067; *but see* *European Parliament v. Council*, Case C-65/93, [1995] E.C.R. I-643, [1996] 1 C.M.L.R. 4. The input of the European Parliament in decision-making still remains rather weak, however, as this institution is not being involved in a real dialogue with the Council. This is contrary to the cooperation procedure laid down in Article 189c of the EC Treaty or, even more strongly, in the co-decision procedure laid down in Article 189b of the EC Treaty, whose object is to reach a consensus between the Council and Parliament. *See* EC Treaty, *supra* note 7, art. 189c, [1992] 1 C.M.L.R. at 696; *id.* art. 189b, [1992] 1 C.M.L.R. at 694-95.

procedure, thereby leaving to each Member State the right to veto the enactment of Community legislation. Examples are the adoption of provisions with a view to facilitating the exercise of the right for citizens of the Union to move and reside freely within the territory of the Member States,<sup>58</sup> the adoption of such measures in the field of social security as are necessary to provide freedom of movement of workers,<sup>59</sup> or the adoption of incentive measures in the cultural sector.<sup>60</sup>

## ii: Executive Acts

Member States are obliged pursuant to Article 5 to the EC Treaty to implement Community legislation. In fulfilling that obligation they ensure the practical operation of such legislation in their domestic legal order. The executive competence of the Member States constitutes a special expression of the duty of federal loyalty.<sup>61</sup> Member States must achieve the outcome sought by Community legislation; they may, however, choose the means by which to obtain that outcome. This reflects a form of "executive federalism" in which the component entities become agents for the application and enforcement of the policy choices made at a central level. That this is still the basic concept underlying the EU variant of federalism follows from Declaration No 43 annexed to the Treaty of Amsterdam:

The High Contracting Parties confirm, on the one hand, the Declaration on the implementation of Community law annexed to the Final Act of the Treaty on European Union and, on the other, the conclusions of the Essen European Council

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58. EC Treaty, *supra* note 7, art. 8a(2), [1992] 1 C.M.L.R. at 593.

59. *Id.* art. 51, [1992] 1 C.M.L.R. at 613.

60. *Id.* art. 128(5), [1992] 1 C.M.L.R. at 662.

61. The Court of Justice has defined the obligation of federal loyalty in several judgments and has specified and detailed the requirements of implementation and enforcement. In the absence of Community rules, Member States have to implement Community law in accordance with the procedural and substantive rules of their own national law. However, the implementation must ensure that Community law is applied uniformly so as to avoid unequal treatment of individuals. *See Deutsche Milchkontor v. Germany*, Joined Cases 205-215/82, [1983] E.C.R. 2633, 2665, ¶ 17, [1984] 3 C.M.L.R. 586, 586. The Member States should further see to it that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which in any event make the penalty effective, proportional, and dissuasive. *See Commission v. Greece*, Case 68/88, [1989] E.C.R. 2965, 2985, [1991] 1 C.M.L.R. 31, ¶ 24; *Hansen*, Case C-326/88, [1990] E.C.R. I-2911, I-2935, ¶ 17.

stating that the administrative implementation of Community law shall in principle be the responsibility of the Member States in accordance with their constitutional arrangements. This shall not affect the supervisory, monitoring and implementing powers of the Community Institutions as provided under Articles 145 and 155 of the Treaty establishing the European Community.<sup>62</sup>

The Community legislature may, however, also confer executive powers on the Commission or, in specific cases, on the Council.<sup>63</sup> When the Council, acting as legislator, confers upon itself the executive powers, a degree of risk exists that it might reduce to a minimum the contents of legislation to be enacted in accordance with the decision-making procedure laid down in the applicable Treaty article. Further policy choices are then to be made at the stage of implementation without respecting such a decision-making procedure. All basic policy choices in a given field have to be made directly on the basis of the relevant Treaty article as part of the legislative process. If that is not the case, the line between legislative and executive measures is blurred, leading to the illegality of these latter measures.<sup>64</sup> Without that sanction the federal balance inherent in the process of enactment of Community legislation could be circumvented through a shift from the legislative to the executive process decided by the Council. This is more likely to happen where the Council, holding the prerogative of legislative decision-making, merely consults the European Parliament than in cases where the Council and the European Parliament act as equal partners in the co-decision procedure. In such cases, the shaping of the executive process necessary to ensure effective implementation of the legislation concerned is fully part of the deliberations preceding the enactment of that legislation.

Powers of implementation are normally conferred on the Commission.<sup>65</sup> But even so, the Council may try to contain the executive powers of the Commission by obliging it to cooperate

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62. Treaty of Amsterdam, *supra* note 3, O.J. C 340/1, at 140 (1997) (Declaration No. 43 relating to the Protocol on the application of the principles of subsidiarity and proportionality).

63. See EC Treaty, *supra* note 7, art. 145, ¶ 3 [1992] 1 C.M.L.R. at 679-80.

64. Köster, Case 25/70, [1970] E.C.R. 1161, 1170-171, ¶¶ 6-7, [1972] C.M.L.R. 255, 307-08; Vreugdenhil and Others v. Minister of Agriculture and Fisheries, Case 22/88, [1989] E.C.R. 2049, [1991] 2 C.M.L.R. 461.

65. If the Council confers the power of implementation upon itself, it has to rea-

with a committee composed of national civil servants. A negative opinion from such a committee may — depending on the nature of the committee — prevent the Commission from enacting the proposed measure and make the powers of implementation flow back to the Council or, at the other extreme, it may have little influence on the exercise and scope of the Commission's powers.<sup>66</sup> In any case, the Commission acts subject to the political control of the European Parliament which can oblige it to resign as a body.

## b. The Second and Third Pillars of the Union

### i. Second Pillar

Decision-making concerning the common foreign and security policy is still strongly intergovernmental and does not reveal a great amount of autonomy *vis-à-vis* the Member States.

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son its decision. See *Commission v. Council*, Case 16/88, [1989] E.C.R. 3457, 3485, ¶ 10.

66. See Council Decision of 13 July 1987, O.J. L 197/1, at 33 (1987) (concerning comitology and laying down procedures for exercise of implementing powers conferred on Commission). If the Council confers implementing power on the Commission, it may stipulate that the Commission will be assisted by an advisory committee, a management committee, or a regulatory committee. If the Council has created an advisory committee, the Commission must seek advice from this committee but it is not bound by this advice. If the Council has created a management committee, the Commission is obliged to ask for advice from this committee and must communicate to the Council the measures which it has adopted if these measures are not in accordance with the opinion of the committee.

According to the procedure chosen, the application of the measure can or must be deferred for a certain time, which gives the Council, acting by a qualified majority, the opportunity to take a different decision. If the Council has created a regulatory committee, the Commission can only adopt measures which have been approved by a qualified majority of the committee. If the committee does not obtain the required majority, or does not deliver an opinion, the Commission must submit the measures envisaged to the Council in the form of a proposal. The Council can accept the proposal acting by a qualified majority or alter the proposal acting unanimously. If the Council has not acted within the time limit, the Commission can adopt the proposed measures. This possibility can, however, be excluded by the Council, if it has decided against the Commission's measures by a simple majority. For an exhaustive analysis see K. Bradley, *Comitology and the Law: Through a Glass, Darkly*, COMMON MKT. L. REV., 693-721 (1992); Claus-Dieter Ehlermann, *Compétences d'exécution conférées à la Commission — La nouvelle décision-cadre du Conseil*, REVUE DU MARCHÉ COMMUN, 232-39 (1988). Declaration No. 31 annexed to the Treaty of Amsterdam "calls on the Commission to submit to the Council by the end of 1998 at the latest a proposal to amend the Council decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission." Treaty of Amsterdam, *supra* note 3, O.J. C 340/1, at 137 (1997) (Declaration No. 31 relating to the Council Decision of 13 July 1987).



Nevertheless, it already exhibits some federal features, mainly due to the Community institutions' participation in the decision-making. The common foreign and security policy is no longer crafted during meetings of representatives of the governments of the Member States, but is established according to the rules laid down in Articles J.3 to J.11 of the TEU (Articles J.2 to J.18 of the TEU after the entry into force of the Treaty of Amsterdam) in which the Council and the Commission, as well as the Parliament, play a role.<sup>67</sup> This is not unimportant. As of now, a structure is in place which will develop its own dynamics.

The Treaty of Amsterdam strengthens that structure with the new task entrusted to the Secretary-General of the Council "who shall exercise the function of High Representative for the

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67. The center of power in the decision-making process relating to the common foreign and security policy lies with the Council which takes its decisions in the form of a "common position" or "joint action" on the basis of the general guidelines adopted by the European Council. Compare TEU, *supra* note 1, art. J.8(1), O.J. C 224/1, at 96 (1992), [1992] 1 C.M.L.R. at 733 with Consolidated TEU, *supra* note 3, arts. 13-15, O.J. C 340/2, at 156 (1997), 37 I.L.M. at 70-71 (arts. J.3 - J.5 of TEU). The Council is not only supported by Coreper (the Committee of Permanent Representatives), but also by a political committee consisting of political directors, which monitors the international situation in the areas covered by the common foreign and security policy, and contributes to the definition of policies by delivering opinions and supervising the implementation of the decided policy. See TEU, *supra* note 1, art. J.8(5), O.J. C 224/1, at 96 (1992), [1992] 1 C.M.L.R. at 734; Consolidated TEU, *supra* note 3, art. 25, O.J. C 340/2, at 161 (1997), 37 I.L.M. at 73 (art. J.15 of TEU). If the policy takes the form of a common position, the Member States will ensure that their national policies conform with the common position. See TEU, *supra* note 1, art. J.2(2), O.J. C 224/1, at 94 (1992), [1992] 1 C.M.L.R. at 730; Consolidated TEU, *supra* note 3, art. 15, O.J. C 340/2, at 157 (1997), 37 I.L.M. at 71 (art. J.5 of TEU). If the Council decides to undertake a joint action, the Member States are committed as to the positions they may adopt and in the conduct of their activity. See TEU, *supra* note 1, art. J.3(4), O.J. C 224/1, at 95 (1992), [1992] 1 C.M.L.R. at 731; Consolidated TEU, *supra* note 3, art. 14(3), O.J. C 340/2, at 157 (1997), 37 I.L.M. at 71 (art. J.4(3) of TEU). These acts will remain instruments of international law. The European Parliament may make recommendations to the Council and must be kept regularly informed by the presidency and the Commission of the development of the Union's foreign and security policy. It must also be consulted on the main aspects and the fundamental choices in this policy field where its positions are duly taken into account. The European Parliament can ask the Council to respond to its questions, but it cannot sanction the Council, given the restricted means of supervision at its disposal. See TEU, *supra* note 1, art. J.7, O.J. C 224/1, at 96 (1992), [1992] 1 C.M.L.R. at 733; Consolidated TEU, *supra* note 3, art. 21, O.J. C 340/2, at 160 (1997), 37 I.L.M. at 72 (art. J.11 of TEU). Within the framework of the budgetary process, the Parliament could, however, object to some administrative or policy expenditures. See TEU, *supra* note 1, art. J.11(2), O.J. C 224/1, at 96 (1992), [1992] 1 C.M.L.R. at 734; Consolidated TEU, *supra* note 3, art. 28, O.J. C 340/2, at 162 (1997), 37 I.L.M. at 73 (art. J.18(2) (3) and (4) of TEU).

common foreign and security policy."<sup>68</sup> In that capacity, he shall assist the Presidency. This ensures continuity given the fact that the Presidency itself rotates among the Member States for periods of six months each.

The Secretary-General of the Council is that institution's highest ranking official who holds long-term office. Besides assisting the Presidency, the Secretary-General of the Council, High Representative for the common foreign and security policy, shall assist the Council itself in matters coming within the scope of the common foreign and security policy,<sup>69</sup> "in particular through contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties."<sup>70</sup>

Furthermore, the Commission can submit to the Council proposals relating to the common foreign and security policy.<sup>71</sup> The Council may request the Commission to submit to it any appropriate proposals to ensure the implementation of a joint action.<sup>72</sup> Thus, the right of initiative to deal with an aspect of the common foreign and security policy no longer lies exclusively with the Member States. This marks the beginnings of Union autonomy in this field. Although the practical implementation of the common foreign and security policy remains uncertain in many ways, the Treaty nevertheless reveals a federal interest on the part of the Member States to increase their influence on international politics by acting as a unit and being recognized as such. The representation of the Union by the Presidency, assisted by the more permanent Secretary-General of the Council, High Representative for the common foreign and security policy, as well as — if need be — by the next Member State to hold

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68. Consolidated TEU, *supra* note 3, art. 18, O.J. C 340/2, at 159 (1997), 37 I.L.M. at 72 (art. J.8(3) of TEU)

69. Treaty of Amsterdam, *supra* note 3, O.J. C 340/1, at 132 (1997) (Declaration No. 6 on the establishment of a policy planning and early warning unit).

70. Consolidated TEU, *supra* note 3, art. 26, O.J. C 340/2, at 161 (1997), 37 I.L.M. at 73 (art. J.16 of TEU).

71. The Commission may submit proposals based on Article J.17 of the TEU (Article 27 of the Consolidated TEU) which states that the Commission shall be fully associated with the work carried out in the common foreign and security policy. *See* TEU, *supra* note 1, art. J.17, O.J. C 224/1 (1992); Consolidated TEU, *supra* note 3, art. 27, O.J. C 340/2, at 161 (1997), 37 I.L.M. at 73.

72. Consolidated TEU, *supra* note 3, art. 14, O.J. C 340/2, at 157 (1997), 37 I.L.M. at 70 (art. J.4(4) of TEU).

the Presidency,<sup>73</sup> and the co-operation of the diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences<sup>74</sup> must be emphasized in this context.

## ii. Third Pillar

A more nuanced picture exists in relation to police and judicial co-operation in criminal matters, the third pillar of the Union. The Council may, acting unanimously on the initiative of any Member State or of the Commission: (a) adopt common positions defining the approach of the Union to a particular matter; (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States;<sup>75</sup> (c) adopt decisions for any other purpose consistent with the objectives of [the third pillar], excluding any approximation of the laws and regulations of the Member States;<sup>76</sup> or (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional re-

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73. Compare TEU, *supra* note 1, art. J.5, O.J. C 224/1, at 95 (1992), [1992] 1 C.M.L.R. at 732-33, with Consolidated TEU, *supra* note 3, art. 18, O.J. C 340/2, at 159 (1997), 37 I.L.M. at 72 (art. J.8 of TEU). It should be added that the Commission is also "fully associated" with the task of representing the Union in matters coming within the common foreign and security policy and of implementing decisions relating to those matters (including the expression of the position of the Union in international organizations and international conferences). See Consolidated TEU, *supra* note 3, art. 18, O.J. C 340/2, at 159 (1997), 37 I.L.M. at 72 (art. J.8(4) of TEU).

74. Compare TEU, *supra* note 1, art. J.6, O.J. C 224/1, at 96 (1992), [1992] 1 C.M.L.R. at 733, with Consolidated TEU, *supra* note 3, art. 20, O.J. C 340/2, at 159 (1997), 37 I.L.M. at 73 (art. J.10 of TEU).

75. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect. There is an obvious analogy with directives within the meaning of Article 189 of the EC Treaty, but the authors of the Treaty of Amsterdam have made clear their intent that the case law of the Court of Justice relating to the "direct effect" of directives being invoked against national authorities before they are actually transposed into national law but after expiry of the time-limit set to that effect, should not be applied by analogy to third-pillar framework decisions. See EC Treaty, *supra* note 7, art. 189, [1992] 1 C.M.L.R. at 693; Ratti, Case 148/78, [1979] E.C.R. 1629, [1980] 1 C.M.L.R. 96; Foster and Others, Case C-188/89, [1990] E.C.R. I-3313, [1990] 2 C.M.L.R. 833; but see Faccini Dori, Case C-91/92, [1994] E.C.R. I-3325, [1995] 1 C.M.L.R. 665.

76. These decisions shall be binding and shall not entail direct effect. The direct effect extended by the Court's case law to decisions within the meaning of Article 189 of the EC Treaty is also expressly excluded in this instance. See, e.g. Grad, Case 9/70, [1970] E.C.R. 825, [1971] C.M.L.R. 1. The Council, acting by a qualified majority, shall adopt the measures necessary to implement those decisions at the level of the Union.

quirements.<sup>77</sup>

It thus appears that the requirement of unanimity in the Council still leaves decision-making largely in the hands of the Member States assembled in that institution. But there is some real opening to majority voting as far as implementing measures are concerned apparently without any escape route for those Member States finding themselves in the minority.<sup>78</sup> In addition, the right of initiative of the Commission is expressly stated, while the European Parliament has the right to be consulted before the Council adopts any framework decision, decision, or convention referred to in Article K.6 of the TEU, as well as any implementing measures mentioned in that Treaty provision.<sup>79</sup> Moreover, it seems that there are some possibilities for judicial enforcement of this parliamentary prerogative, as the Court of Justice can receive — through a declaration made to that effect by the Member States — jurisdiction to give preliminary rulings on the validity of framework decisions, decisions, and the measures implementing them.<sup>80</sup> The legality of framework decisions and decisions can also be reviewed by the Court of Justice in actions brought by a Member State or the Commission within two months of the publication of the measure. The grounds of action are the same as those stated in Article 173 of the EC Treaty.<sup>81</sup>

Furthermore, the Court of Justice can receive jurisdiction to give preliminary rulings on the interpretation of the measures mentioned in Article K.6(2)(b)(c) and (d) of the TEU, albeit subject to certain conditions and limitations,<sup>82</sup> which is a very effective way of ensuring the judicial enforcement of compliance by national authorities of their obligations flowing from those

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77. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two-thirds of the Contracting Parties. See Consolidated TEU, *supra* note 3, art. 34, O.J. C 340/2, at 164 (1997), 37 I.L.M. at 74 (art. K.6(2) of TEU).

78. Compare Consolidated TEU, *supra* note 3, art. 23, O.J. C 340/2, at 160 (1997), 37 I.L.M. at 72 (art. J.13 of TEU) (leaving escape route when qualified majority voting exceptionally applies to executive decision-making in matters of common foreign and security policy).

79. See *id.* art. 39 O.J. C 340/2, at 167 (1997), 37 I.L.M. at 76 (art. K.11(1) of TEU).

80. See *id.* art. 35, O.J. C 340/2, at 165 (1997), 37 I.L.M. at 75 (art. K.7(1) of TEU).

81. See *id.* (art.K.7(6) of TEU).

82. See *id.* (art. K.7(1) - (5) of TEU).

measures.<sup>83</sup> In any event, the Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article K.6(2) of the TEU whenever such a dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article K.6(2)(d) of the TEU.<sup>84</sup>

As can be seen, the Treaty of Amsterdam has bestowed upon the third pillar some decisive elements inherent in the federal balance which prevails in the Community pillar, yet has stopped short of simply integrating it into the *acquis communautaire*. Thus, the Community institutions enjoying the greatest autonomy from the Member States, *i.e.* the Commission and the European Parliament, have a real input in the decision-making, which, admittedly, is mainly left in the hands of the Council acting unanimously but with a significant opening to majority voting for implementing measures. Likewise, Member States accept being subject to the jurisdiction of the Court of Justice regarding compliance with the commitments entered into. And it is this jurisdiction which is the decisive feature of Community law which, right from the beginning of European integration, distinguished that body of law from international law in general.

On the other hand, there is an express exclusion of the possibility of granting direct effect to framework decisions and decisions. This would seem to make it impossible for private parties to take the same initiative with regard to the judicial enforcement of "third pillar" EU law as they have done ever since the ruling in *Van Gend & Loos* (1963) in relation to the judicial enforcement of Community law.<sup>85</sup> It remains to be seen, however,

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83. *But see* Emerald Meats Ltd v. Commission, Joined Cases C-106/90, C-317/90 and C-129/91, [1993] E.C.R. I-209, [1994] 1 C.M.L.R. 505. *See also* Christiaan W.A. Timmermans, *Judicial Protection against Member States: Articles 169 and 177 Revisited*, in 2 INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION. ESSAYS IN HONOUR OF HENRY G. SCHERMERS 391-407 (D. Curtin & T. Heukels eds., 1994).

84. *See* TEU, *supra* note 1, art. K.6(2) (d), O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737; Consolidated TEU, *supra* note 3, art. 35, O.J. C 340/2, at 166 (1997), 37 I.L.M. at 75 (art. K.7(7) of TEU).

85. *See* Van Gend & Loos, Case 26/62, [1963] E.C.R. 3, [1962] C.M.L.R. 105 (enabling individuals to use courts to enforce own rights).

whether that apparently more limited legal status of framework decisions and decisions will make any difference in practice, because the preliminary rulings jurisdiction conferred upon the Court of Justice in Article K.7 of the TEU, as it relates to framework decisions and decisions, somehow presupposes that such acts can be invoked by interested private parties as relevant for the outcome of a case pending in a national court, which will then seek a decision of the Court of Justice on the validity or interpretation of these acts. The difference between the direct effect and the invocability of framework decisions and decisions may not really matter in such a context. In any event, direct effect is not excluded for implementing measures and provisions of conventions within the meaning of Article K.6(2)(d) of the TEU. Finally, it should be said that it is difficult to see how the Court of Justice could exercise its jurisdiction under Article K.7 of the TEU in a meaningful way if "third pillar" EU law were not to enjoy supremacy in the domestic legal orders of the Member States.<sup>86</sup>

On the basis of all those elements it may be safely concluded that the federal balance established by the Treaty of Amsterdam inside the third pillar of the Union is a major step forward in consolidating European integration in this field, which takes over some essential aspects of the Community pillar but not all of them.<sup>87</sup>

### B. *The Relevance of Community Law for Individuals and Citizenship of the Union*

The autonomy of the central authority of the Union is — as far as the Community pillar is concerned — further reflected in the fact that Community law may impose obligations on individuals or grant them judicially enforceable rights independently.

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86. That is so especially in view of Article K.7 of the TEU which grants the Court of Justice a kind of jurisdiction specifically aimed at ensuring compliance by Member States with this body of law. See TEU, *supra* note 1, art. K.7(7), O.J. C 224/1, at 98 (1992), [1992] 1 C.M.L.R. at 737.

87. In any case, the increased role for the European Parliament, the Commission, and the Court of Justice in the third pillar, as a result of the Treaty of Amsterdam, makes it considerably harder to draw a distinction between the supranationalism inherent in the Community pillar and the intergovernmentalism traditionally said to lie at the basis of the third pillar. See B. Meyring, *Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality*, EUR. L. REV., 221 (1997).

from the legislation of the Member States.<sup>88</sup>

Individuals can rely on those provisions of Community law that have "direct effect." This means that these provisions must be clear, precise, and unconditional so that judges can apply them without the necessity of any additional implementation.<sup>89</sup> Moreover, national courts are obliged by virtue of Article 5 of the EC Treaty to disapply any national regulation that breaches Community law.<sup>90</sup>

The direct relationship between individuals and the central authority in the European Union is also strengthened through citizenship of the Union.<sup>91</sup> Pursuant to Article 8(2) of the EC Treaty, citizens of the Union enjoy "the rights conferred by this Treaty and shall be subject to the duties imposed thereby."<sup>92</sup> These rights concern, *inter alia*, the right to move and reside freely within the territory of the Member States, the right to vote and to stand as a candidate at the municipal elections in the Member States, and the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which the citizen resides under the same conditions as nationals of that State.<sup>93</sup> The fact that in order to be recognized as a citizen of the Union, individuals must be nationals of a Member State, reveals that the Member States still determine the circle of beneficiaries of citizenship of the Union notwithstanding the autonomy of the Union.<sup>94</sup> The federal balance established between the Union and the Member States allows the Member States to retain the power to determine to whom their nationality will be given, but at the same time obliges them to recognize

88. Van Gend & Loos, Case 26/62, [1963] E.C.R. 3, 23, [1962] C.M.L.R. 105, 117-18.

89. Thus, for instance, students rely on provisions of Community law having direct effect to combat the unequal treatment of citizens of another Member State with regard to university tuition and the financing of studies. See *Casagrande v. Landeshauptstadt München*, Case 9/74, [1974] E.C.R. 773, [1974] 2 C.M.L.R. 423; *Gravier v. City of Liège*, Case 293/83, [1985] E.C.R. 593, [1985] 3 C.M.L.R. 1; *Blaizot v. University of Liège*, Case 24/86, [1988] E.C.R. 379, [1989] 1 C.M.L.R. 57; *Lair v. University of Hannover*, Case 39/86, [1988] E.C.R. 3161, [1989] 3 C.M.L.R. 545.

90. *Albako v. BALM*, Case 249/85, [1987] E.C.R. 2345, 2360, ¶ 17.

91. See EC Treaty, *supra* note 7, art. 8(1), [1992] 1 C.M.L.R. at 593.

92. *Id.* art. 8(1), [1992] 1 C.M.L.R. at 593.

93. David O'Keeffe, *Union Citizenship*, in LEGAL ISSUES OF THE MAASTRICHT TREATY 92 (D. O'Keeffe & P. Twomey eds., 1993); Carlos Closa, *Citizenship of the Union and Nationality of Member States*, COMMON MKT. L. REV., 487, 509-14 (1995).

94. *Micheletti e.a.*, Case C-369/90, [1992] E.C.R. I-4239, I-4262, ¶ 10.

the rights which nationals of other Member States derive from Community law.<sup>95</sup>

The genesis of citizenship of the Union mirrors in a striking way the dynamics of integration which characterize the Community and the Union. At the outset, when the Community was still the European Economic Community, only individuals who exercised an economic activity could derive rights from Community law enabling them to engage in cross-border activities. Now, market integration has attained such a level, and the powers of the Community have been broadened in such a way, that even non-economically active individuals (or those whose involvement in the performance of economic activities is limited) can derive rights from Community law, for instance, the right to reside in another Member State.<sup>96</sup> A further step was taken when the creation of citizenship of the Union led to the extension of even a limited number of political rights.

## II. THE CONSTITUTIONAL EMBEDDING OF THE DIVISION OF POWERS BETWEEN THE CENTRAL AUTHORITY AND THE COMPONENT ENTITIES

The constitutional embedding of the division of powers between the central authority and the component entities is the second main characteristic of federalism. It guarantees their respective autonomy.<sup>97</sup>

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95. For a critical comment on this situation see Siófra O'Leary, *Nationality Law and Community Citizenship: a Tale of Two Uneasy Bedfellows*, YEARBOOK OF EUROPEAN LAW 1992 353-84 (1993).

96. See Council Directive 90/364/EEC, O.J. L 180/1, at 26 (1990) (discussing right of residence for nationals of Member States in general); Council Directive 90/365/EEC, O.J. L 180/1, at 28 (1990) (discussing right of residence for employees and self-employed persons who have ceased their occupational activity); Council Decision 93/96/EEC, O.J. L 317/1, at 59 (1993) (discussing right of residence for students replacing Directive 90/366/EEC declared void by the Court of Justice in *European Parliament v. Council*, Case C-295/90, [1992] E.C.R. I-4193, [1992] 3 C.M.L.R. 281). The evolution towards "citizenship" also appeared in *Cowan v. Trésor Public*, Case 186/87, [1989] E.C.R. 195, 220-21, ¶¶ 15-17, [1990] 2 C.M.L.R. 613, 631 and *GB-INNO-BM*, Case C-362/88, [1990] E.C.R. I-667, I-686, ¶ 8, [1991] 2 C.M.L.R. 801. As a result of these cases it appears that every person who goes to another Member State is a potential recipient of services or consumer and therefore comes within the sphere of application of Community law. See also Ulrich Everling, *Von der Freizügigkeit der Arbeitnehmer zum Europäischen Bürgerrecht?*, EUROPARECHT, 81-103 (Beiheft 1/1990); Marc Fallon, *Les droits accéssoires à l'exercice des activités économiques de la personne dans la Communauté*, ANNALES DE DROIT DE LOUVAIN 235-53 (1993).

97. See EC Treaty, *supra* note 7, art. 3b, [1992] 1 C.M.L.R. at 590 (stating that



The federal character of government is not determined by the fields of competence that are attributed to the central authority or left to the component entities.<sup>98</sup> Every federal system develops its own specific balance of sovereignty. In general, powers will tend to be allocated in such a way that competence is given to the level of government where they can be most effectively exercised.<sup>99</sup> But historical or political circumstances may also influence the division of powers in one or the other direction.

All of this can give rise to conflicts of powers and normative conflicts. The first type of conflict relates to the delimitation of the respective powers. Normative conflicts, on the other hand, arise from the incompatibility of regulations adopted by the central authority with those adopted by component entities, each of which has been legitimately enacted.

Conflicts of powers are normally resolved by a decision of the highest court of the federation. Thus, the central authority and the component entities retain their autonomy. Normative conflicts will always be decided in favor of the central authority.<sup>100</sup> If the regulations of the component entities were to prevail, the uniformity and effectiveness of the rules laid down by the central authority in areas of its own competence would be endangered, as would the federation itself.

A large number of powers have been conferred upon the Union. In the framework of the Community pillar, the Union has been given the power to create the internal market, to preserve competition, to carry out a common commercial policy towards third countries, to develop a common agricultural policy and a common transport policy, and to establish an economic and monetary union leading to the introduction of a single cur-

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"[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."). For a clear application of this provision, see Opinion 2/94 [1996] E.C.R. I-1763 ¶ 30.

98. This can, however, make the difference between a federal state and another form of government.

99. That is also the idea underlying the principle of subsidiarity which as a political principle is used to attribute competences to the central authority or leave them to the component entities. See Vlad Constantinesco, *La subsidiarité comme principe constitutionnel de l'intégration européenne*, *AUSSENWIRTSCHAFT*, 439-59 (1991); Jean P. Jacqué, *Centralisation et décentralisation dans les projets d'Union européenne*, *AUSSENWIRTSCHAFT*, 469-83 (1991); Koen Lenaerts & Patrick van Ypersele *supra* note 52, at 8-10.

100. See U.S. CONST., art. VI, cl. 2 (Supremacy Clause); GERM. CONST., art. 31.

rency. In addition, the EC Treaty grants powers to the Community in a variety of fields such as social policy, education and vocational training, culture, public health, consumer protection, trans-European networks, industry, research and technological development, environment, and development co-operation. The Treaty of Amsterdam has added aspects of employment policy, customs cooperation as well as visas, asylum, immigration, and other policies related to the free movement of persons to the list of the Community's competences.

The Community must also focus its actions on the strengthening of the economic and social cohesion between the various regions. To this end, structural funds have been established to financially assist less developed regions. The attempt to raise the least favored regions to the same level of development as other parts or regions of the Community reflects a real solidarity between the least favored and the richer Member States. This also implies that the Community form of government is federal, for it pursues a harmonious development of the Community as a whole. The same is true for the dynamics of integration which appear in the steadily broadening powers of the Community, through various amendments of the Treaty and the teleological jurisprudence of the Court of Justice.<sup>101</sup>

The federal character of the Community pillar of the Union is determined not only by the scope but also by the legal nature of its powers. These powers can be divided into exclusive and non-exclusive powers. Powers are said to be exclusive when Member States may no longer exercise them when they have been transferred to the Community. Only the power to define a common commercial policy towards third countries<sup>102</sup> and the power to determine the conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea<sup>103</sup> by virtue of Article 102 of the

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101. See *supra* note 89 (providing case law concerning education); United Kingdom v. Council, Case C-84/94, [1996] E.C.R. I-5755, [1996] 3 C.M.L.R. 671 (relating to legal basis in EC Treaty for Community legislation on organization of working time, aspect of social policy).

102. See EC Treaty, *supra* note 7, art. 113, [1992] 1 C.M.L.R. at 656; Opinion 1/75 [1975] E.C.R. 1355, 1363-364.

103. Kramer, Joined Cases 3-4/76 and 6/76, [1976] E.C.R. 1279, 1310-312, ¶¶ 39-41, [1976] 2 C.M.L.R. 440, 470; Commission v. United Kingdom, Case 804/79, [1981] E.C.R. 1045, 1072-1073, ¶¶ 17-18, [1982] 1 C.M.L.R. 543, 570; Opinion 2/91 [1993] E.C.R. I-1061, I-1077, ¶ 9, [1993] 3 C.M.L.R. 800, 805-06.

1972 Act of accession have been characterized by the Court of Justice as exclusive Community powers. In these fields no power is left to the Member States, even where the Community does not act. The autonomy of the Community, and therefore its federal character, are eminently present in the fields where the power of the Community is exclusive, even if those fields are not very numerous, as no regulation can be adopted in them without the approval of the Community. In reality, however, the exclusive character of Community powers may be significantly compromised. Thus, it was accepted that Member States in the absence of any appropriate action on the part of the Council could, as trustees of the common interest, take the measures necessary to safeguard the biological resources of the sea.<sup>104</sup>

Most of the powers of the Community are, at the outset, not exclusive, so that the Member States may act in matters covered by these powers to achieve the objectives of the Treaty. However, Member States' freedom to act will disappear as soon as the Community actually exercises its powers, thereby making them exclusive. The Community measures will then prevail over national measures insofar as there is any conflict between the two measures. To detect such a conflict, the content and scope of the Community measures must be analyzed, taking into account not only their express provisions, but also aspects which have not been covered by these measures, deliberately or otherwise; after that analysis national measures remain applicable in relation to matters which were really left out of the scope of application of the Community measures.<sup>105</sup>

The supremacy of Community law over national law is yet another indication of the presence of federalism. The Court of Justice has observed that "the law stemming from the Treaty, an

104. *Commission v. United Kingdom*, Case 804/79, [1981] E.C.R. 1045, 1075-1076, ¶ 30, [1982] C.M.L.R. 543, 572-73. For another example of an inroad into the exclusive character of Community powers, in relation to the common commercial policy, see *Bulk Oil v. Sun International*, Case 174/84, [1986] E.C.R. 559, 583-84, 587, ¶¶ 15-19, 33, [1986] 2 C.M.L.R. 732, 756-57, 760.

105. *Hauptzollamt Hamburg v. Bollmann*, Case 40/69, [1970] E.C.R. 69, 79, ¶¶ 4-5, [1970] C.M.L.R. 141; *Amsterdam Bulb v. Produktschap voor Siergewassen*, Case 50/76, [1977] E.C.R. 137, 147-50, ¶¶ 9-30, [1977] 2 C.M.L.R. 218, 246-52; *Van den Hazel*, Case 111/76, [1977] E.C.R. 901, 909-12, ¶¶ 13-27, [1980] 3 C.M.L.R. 12, 23-25; *Commission v. Belgium*, Case 255/86, [1988] E.C.R. 693, 708, ¶¶ 8-11, [1989] 3 C.M.L.R. 91, 101-02; *Commission v. United Kingdom*, Case 60/86, [1988] E.C.R. 3921, 3935, ¶ 11, [1988] 3 C.M.L.R. 437; *Oberkreisdirektor des Kreises Borken and others v. Moormann*, Case 190/87, [1988] E.C.R. 4689, 4720, ¶¶ 11-13, [1990] 1 C.M.L.R. 656.

independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."<sup>106</sup> The supremacy of Community law must be effectively guaranteed. To this end, the Court has laid down a set of rules which aim to guarantee the full effect of Community law in the domestic legal orders of the Member States by requiring their courts to set aside procedural and other rules of national law which obstruct the application of Community law. These jurisprudential rules of Community law have an important impact upon traditional national law.<sup>107</sup> At the same time, they are of a notably federal nature because they create a single judicial space in which Community law will be enforced in the most effective way possible.

### III. THE EXISTENCE OF MECHANISMS TO PROTECT THE IDENTITY OF THE COMPONENT ENTITIES

A further characteristic of federalism is the respect for the autonomy and the identity of the component entities that are protected by means of specific mechanisms. Article F(1) of the TEU notes that the Union "shall respect the national identities of its Member States."<sup>108</sup> As such, in the European Union, several such mechanisms can be found.

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106. *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, 594, [1964] C.M.L.R. 425, 456.

107. *See, e.g., Factortame and others*, Case C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1 (holding that Member State courts derive power to suspend national regulation which is contrary to Community law directly from Community law); *Von Colson en Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430 (holding that sanction which Member States impose following breach of Community law provisions from which individuals derive rights, must ensure effective and efficient judicial protection which has real deterrent effect); *Francovich e.a.*, Joined Cases C-6 en C-9/90, [1991] E.C.R. I-5357 [1993] 2 C.M.L.R. 66; *Brasserie du Pêcheur & Factortame III*, Joined Cases C-46/93 and C-48/93, [1996] E.C.R. I-1029, [1996] 1 C.M.L.R. 889; *Dillenkofer*, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, [1996] E.C.R. I-4845, [1996] C.M.L.R. 469 (holding that Member State is responsible for damage suffered by individuals as consequence of breaches of Community law committed by public authorities of Member State concerned). *Cf Van Schijndel & Van Veen*, Joined Cases C-430/93 and C-431/93, [1995] E.C.R. I-4705, [1996] 1 C.M.L.R. 801; *Kraaijeveld*, Case C-72/95, [1996] E.C.R. I-5403; *see also* C.M.G. Himsworth, *Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited*, EUR. L. REV. 291 (1997).

108. *See* Consolidated TEU, *supra* note 3, art. 6(3), O.J. C 340/2, at 153 (1997), 37 I.L.M. at 69 (art. F(3) of TEU).

The powers of the Member States are protected in specific ways. Thus, the exercise by the Community of its powers is subject to certain restrictions, and some powers of the Member States are explicitly guaranteed.

### A. *Restrictions on Community Power*

#### 1. Principle of Subsidiarity

The principle of subsidiarity laid down in Article 3b of the EC Treaty provides that the exercise of non-exclusive powers of the Community is dependent on the requirement that the objectives of the intended action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. This condition, which relates to the necessity of action by the Community, tends to restrict the extent of such action. It offers the Member States an additional protection because in the field of non-exclusive powers of the Community they will only lose their powers insofar as the Community has chosen to act.<sup>109</sup> In addition, every Community action has to respect the principle of proportionality, which means that an action cannot go further than is necessary to attain its objectives and must be within the ambit of the EC Treaty.<sup>110</sup> Thus, before taking action, the Community not only has to enjoy the substantive power to act, but it also has to justify the necessity and the form of its action.<sup>111</sup>

#### 2. Principle of Mutual Recognition

The principle of mutual recognition of national legislation on which the establishment of the internal market heavily relies<sup>112</sup> also restricts the Community in the exercise of its regula-

109. See *supra* note 52.

110. See EC Treaty, *supra* note 7, art. 3b, ¶ 3 [1992] 1 C.M.L.R. at 590.

111. Lenaerts & van Ypersele, *supra* note 52, at 35-71.

112. See *Rewe v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494 [hereinafter *Cassis de Dijon*] (providing origin of principle of mutual recognition). The principle of mutual recognition prohibits Member States, in the absence of harmonization, from imposing restrictions on the commercialization of products which have been lawfully marketed in another Member State, unless the protection of a "mandatory requirement" renders such restrictions necessary. The Member States are obliged to recognize the regulations of other Member States to a large extent. In the 1980s, a new approach to the harmonization of national legislation was adopted such that only the minimum requirements were harmonized, after which Member States were required to mutually recognize each other's legislation. In

tory power. According to that principle, exhaustive harmonization of national legislation to remove all disparities in the regulatory schemes adopted by the Member States is not necessary. The Member States thus retain the power to enact their own legislation, but they cannot invoke the precise content of that legislation to obstruct interstate commerce within the Community. Mutual recognition of national legislation is an expression of the duty of Community loyalty laid down in Article 5 of the EC Treaty: Member States recognize legislation of the other Member States as equivalent, notwithstanding its different content, especially where that legislation fulfills the requirements of the minimum harmonization achieved by the Community.

This attitude reflects a subtle balance between the interests of the Member States and the interests of the Community. Through the enactment of legislation, Member States may preserve their "national identities,"<sup>113</sup> but they must leave room for similar concerns of the other Member States as well as for the realization of the internal market. Moreover, the Community stays on the safe side of the principle of subsidiarity as it will harmonize national legislation only to the minimal extent necessary to make mutual recognition possible. Or, in other words, the more Member States are ready to play the card of Community loyalty in their reciprocal relations as members of one Community, the more subsidiarity will lead to a lesser degree of regulatory density at Community level.

Under the regime of mutual recognition of national legislation, the free movement principle requires Member States to authorize, in their territory, the marketing of goods and services lawfully introduced into the market of another Member State. Disparities between national legislation, arising out of the divergent ways in which the several Member States define their fundamental local values, do not therefore entail the risk that goods or services, lawfully marketed in the Member State in which they

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the same way, the Commission proposed in its *White Paper on the completion of the internal market* a "new strategy" based on the principle of mutual recognition of national legislation. See Commission of the European Communities, completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 Final (June 1985).

113. See TEU, *supra* note 1, art. F(1), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728; Consolidated TEU, *supra* note 3, art. 6(3), O.J. C 340/2, at 159 (1997), 37 I.L.M. at 69 (art. F of TEU).

originate, cannot be introduced into the market of other Member States whose legislation subjects such goods and services to protective conditions unknown in the Member State of origin. An exception is granted only where a Member State's legislation containing specific marketing conditions for such goods and services — conditions that are indistinctly applicable to domestic and out-of-state goods and services — “may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.”<sup>114</sup>

The list of “mandatory requirements” is by no means exhaustive.<sup>115</sup> It will be lengthened whenever the policy goal is found to serve an aspect of the general interest which — in line with the fundamental values of the Community — is worthy of protection.<sup>116</sup>

A further aspect of the question then is whether the national legislation that hinders free movement is actually “neces-

114. *Cassis de Dijon*, [1979] E.C.R. at 662 ¶ 8. Mutual recognition in the field of services means that the Member State in which the services are provided “must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment.” Webb, Case 279/80, [1981] E.C.R. 3305, 3326, ¶ 21. For a more recent application of the same line of reasoning relating to the issue of the mutual recognition of diplomas and professional qualifications, see *Vlassopoulou v. Ministerium für Justiz*, Case C-340/89, [1991] E.C.R. I-2357, [1993] 2 C.M.L.R. 221 (holding that rather than being allowed to refuse recognition of Greek diploma in law, and subsequent legal experience of Ms. Vlassopoulou in Germany, Member State was obliged to analyze with great care precise extent of professional knowledge acquired by Ms. Vlassopoulou, who wanted to become attorney in Germany). Thus, the German authorities could only impose those additional training requirements which still seemed necessary after the legal training received in the Member State of origin had been duly taken into account. *Compare Gebhard*, Case C-55/94, [1995] E.C.R. I-4165.

115. *Commission v. Denmark*, Case 302/86, [1988] E.C.R. 4607, 4630, ¶ 9, [1989] 1 C.M.L.R. 619, 631 (protection of the environment); *Familiapress v. Bauer Verlag*, Case C 368/95, [1997] E.C.R. I-3689 (maintenance of press diversity).

116. Note the wording of the Court's assessment that the elimination of possible abuse in the provision of manpower “amounts for [Member States] to a legitimate choice of policy pursued in the public interest.” Webb, Case 279/80, [1981] E.C.R. 3305, 3325, ¶ 19, [1982] 1 C.M.L.R. 719, 736. “[T]he provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labor market and the lawful interests of the workforce concerned.” *Id.* It is hard to imagine a more open discussion of policy as the basis for a judicial decision. *See, e.g.*, *Schindler*, Case C-275/92, [1994] E.C.R. I-1039, [1995] 1 C.M.L.R. 4.

sary" to satisfy the mandatory requirement concerned. If there are less restrictive alternatives, less burdensome for the operation of the free movement principle yet equally effective in satisfying the mandatory requirement, the national legislation will be considered incompatible with Community law.<sup>117</sup> This "means-goals" test draws the Court of Justice into the hardest part of balancing conflicting policy values.<sup>118</sup>

The outcome of judicial review of Member State legislation will depend entirely upon the degree of scrutiny applied. In practice, Member States defending their legislation must argue convincingly that the national situation is so specific, and hence different from that prevailing in the other Member States, that the laws of those States must be regarded as insufficient to satisfy the mandatory requirement in question.<sup>119</sup> Mutual recognition, after all, is only required when the legislation of other Member States is equivalent to national legislation.

### 3. Harmonization

A more direct way to protect the regulatory power of the Member States is to recognize a nucleus of powers which are not touched upon by the prohibitions of the EC Treaty, but which can be limited through the acceptance of a Community harmonization measure.<sup>120</sup> The classic example is Article 36 of the EC

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117. See *Commission v. Germany*, Case 178/84, [1987] E.C.R. 1227, [1988] 1 C.M.L.R. 780 [hereinafter *German Beer Case*] (providing application of "less restrictive alternatives" test). This case, the so-called *German Beer Case*, in which a centuries-old law, which mandated that beer brought onto the German market be made only with natural ingredients, was considered to be inconsistent with the free movement principle, because the stated objectives of the law, health and consumer protection, could have been reached, according to the Court, through alternative means which would have been less burdensome for cross-border trade, such as, for instance, an appropriate warning on the label of the bottle.

118. See *German Beer Case*, [1987] E.C.R. at 1275, ¶ 49, [1988] 1 C.M.L.R. at 811 (explaining why ban on additives is not really necessary to protect public health). "Mere reference to the potential risks of the ingestion of additives in general and to the fact that beer is a foodstuff consumed in large quantities does not suffice to justify the imposition of stricter rules in the case of beer." *Id.* The Court also cited "the findings of international scientific research and in particular the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the FAO and the World Health Organization," in support of its conclusion. *Id.* at 1276, ¶ 52.

119. See, e.g., *Commission v. French Republic*, Case 188/84, [1986] E.C.R. 419 (providing example of case where Member State successfully argued need for special national laws relating to technical and safety standards for woodworking machines).

120. See EC Treaty, *supra* note 7, arts. 36, 48(3), 56, 66, [1992] 1 C.M.L.R. at 605, 612, 615-16, 618. In fact, in those matters the Member States do not dispose of a re-



Treaty in the field of the free movement of goods, which shields national legislation having a restrictive effect on commerce from the application of Articles 30 and 34 of the EC Treaty prohibiting quantitative restrictions on imports or exports and all measures having equivalent effect between the Member States,<sup>121</sup> where such legislation protects in a proportional way the interests listed in that article.<sup>122</sup> Only the harmonization of national legislation will remove the obstacle to the free movement of goods.<sup>123</sup> However, when harmonization of national legislation takes place on the basis of Article 100a of the EC Treaty, Member States may deem it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment. In the context of these latter concerns Member States may even, under certain conditions, introduce new provisions after the adoption of a harmonization measure. In all cases they shall notify the Commission of the national provisions as well as

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served power which could not be affected by the Community. See *Simmenthal*, Case 35/76, [1976] E.C.R. 1871, 1885-886, ¶ 14, [1977] 2 C.M.L.R. 1, 15; *Tedeschi*, Case 5/77, [1977] E.C.R. 1555, 1576, ¶ 34, [1978] 1 C.M.L.R. 1, 18; *Commission v. Germany*, Case 153/78, [1979] E.C.R. 2555, 2564, ¶ 5, [1980] 1 C.M.L.R. 198, 207. Therefore, they can no longer justify a measure on the basis of the above-mentioned provisions of the Treaty once a harmonization of national legislation on the basis of Article 100 of the EC Treaty has taken place. See *Ratti*, Case 148/78, [1979] E.C.R. 1629, 1644, ¶ 36 [1980] 1 C.M.L.R. 96, 111. See also EC Treaty, *supra* note 7, art. 100a, [1992] 1 C.M.L.R. at 633-34.

121. In the *Dassonville* case, the Court observed that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." *Dassonville*, Case 8/74, [1974] E.C.R. 837, 851, ¶ 5, [1974] 2 C.M.L.R. 436, 453-54. This definition covers the whole spectrum of legislative and administrative measures which are applied in a non-discriminatory manner to domestic and imported products but nevertheless have an influence on the commercialization of imported products and therefore on the free movement of goods. In a more recent case, *Keck and Mithouard*, Joined Cases C-267 and C-268/91, [1993] E.C.R. I-6097, I-6131, ¶ 14, [1995] 1 C.M.L.R. 101, 124, the Court ruled, however, that national provisions restricting or prohibiting certain selling arrangements are not measures having an equivalent effect "provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States." See also *De Agostini*, Joined Cases C-34/95, C-35/95 and C-36/95, [1997] E.C.R. I-3843, I-3890-3891, ¶¶ 39-41 (providing application of this latter test).

122. For applications of this Treaty provision see, e.g., *Officier van Justitie v. De Peijper*, Case 104/75, [1976] E.C.R. 613, [1976] 2 C.M.L.R. 271; *Brandtsma*, Case C-293/94, [1996] E.C.R. I-3159 [1996] 3 C.M.L.R. 904.

123. See *supra* note 120.

the grounds for maintaining or introducing them.<sup>124</sup>

The Commission shall approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the internal market. When a Member State is authorized to maintain or introduce national provisions derogating from a harmonization measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

### B. *Protection of Member States' Power*

Several areas of competence attributed by the TEU to the Community contain an express protection of the regulatory power of the Member States on certain points. Thus, the action of the Community in the fields of education, vocational training, and youth must fully respect the responsibility of the Member States for the conduct of teaching and the organization of education systems and their cultural and linguistic diversity.<sup>125</sup> Moreover, the Community cannot harmonize the laws and regulations of the Member States in those fields. The same is true in the fields of culture, public health, and employment.<sup>126</sup> Its ac-

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124. See Consolidated EC Treaty, *supra* note 7, art. 95, O.J. C 340/3, at 214 (1997), 37 I.L.M. at 96 (art. 100a(4) to (10) of EC Treaty). On August 2, 1991 Germany notified the Commission that it intended to maintain a stricter prohibition of pentachlorophenol (PCP) than the one adopted in Council Directive 91/713/EEC of March 21, 1991 against which Germany had voted in the Council. See Council Directive No. 91/713/EEC, O.J. L 85/1, at 34 (1991) (amending for ninth time Directive 76/769/EEC on approximation of laws, regulations, and administrative provisions of Member States relating to restrictions on marketing and use of certain dangerous substances and preparations). On December 2, 1992, the Commission decided to confirm the German decision. See O.J. C 334/1, at 8 (1992). At the request of France, the Court annulled the Commission's decision because of a breach of the obligation to reason the decision. See EC Treaty, *supra* note 7, art. 190, [1992] 1 C.M.L.R. at 697; France v. Commission, Case C-41/93, [1994] E.C.R. I-1829, I-1849-1850, ¶¶ 31-37, [1995] 3 C.M.L.R. 733, 748-49. By Decision 94/783/EC of September 14, 1994 on the prohibition of PCP notified by the Federal Republic of Germany, the Commission has confirmed for a second time the exception for Germany. See O.J. L 316/1, at 43 (1994).

125. See EC Treaty, *supra* note 7, art. 126(1), [1992] 1 C.M.L.R. at 660; See EC Treaty, *supra* note 7, art. 127(1), [1992] 1 C.M.L.R. at 661.

126. See EC Treaty, *supra* note 7, arts. 126(4), 127(4), 128(5) 152, [1992] 1 C.M.L.R. at 660-62 (on cultural matters, Council always has to act unanimously); *id.* art. 129(4), [1992] 1 C.M.L.R. at 662-63. The Community retains the power by virtue of Article 57 of the EC Treaty to issue directives for the mutual recognition of diplomas, certificates, and other evidence of formal qualifications. See Koen Lenaerts, *Education in*

tion will be aimed at encouraging co-operation between Member States and, if necessary, supporting and supplementing their action.<sup>127</sup>

The protection of the autonomy and the national identity of the Member States appears not only from the protection of the regulatory power of the Member States but also from specific requirements imposed on the content of Community regulation. By virtue of Article 128(4) of the EC Treaty, the Community always has to take cultural aspects into account when it acts pursuant to other provisions of the Treaty. Such an obligation does not prohibit the Community from acting but requires the Community to take cultural aspects into consideration when balancing the interests of every regulatory action. In this way, the national identities of the Member States and, in some cases, regions of Member States, will have an impact on Community regulation.<sup>128</sup>

The autonomy of the Member States is protected by the aforementioned influence of the Member States on the decision-making process of the Community both at the legislative and the administrative level. The frequent use of the directive as an instrument of regulation is also relevant because this instrument

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*European Community Law After "Maastricht"*, COMMON MKT. L. REV., 7, 35 (1994). See also Consolidated EC Treaty, *supra* note 7, art. 129, O.J. C 340/3, at 236 (1997), 37 I.L.M. at 107 (art. 109r of EC Treaty) (regarding employment policy); *id.* art. 127, O.J. C 340/03, at 235 (1997), 37 I.L.M. at 107 (art. 109p(1) of EC Treaty) (stating that "[t]he Community shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.").

127. See Koen Lenaerts & Piet Van Nuffel, *EUROPEES RECHT IN HOOFDLIJNEN*, Antwerpen/ Apeldoorn, Maklu Uitgevers, 252-57 (1995) (providing more details).

128. The Court of Justice recognizes cultural objectives as mandatory requirements of the general interest in view of which the Member States may impose reasonable restrictions on the free movement of goods, persons, and services. See, e.g., *Groener v. Minister for Education and City of Dublin Vocational Education Committee*, Case C-379/87, [1989] E.C.R. 3967 [1990] 1 C.M.L.R. 401; TV 10, Case C-23/93, [1994] E.C.R. I-4795, I-4832, ¶ 19 [1995] 3 C.M.L.R. 284, 292. *But see* *Piageme v. Peeters*, Case C-369/89, [1991] E.C.R. I-2971, I-2984-2985, ¶¶ 14-16, [1993] 3 C.M.L.R. 725, 733 (use of languages for labeling products); *Meyhui v. Schott Zweisel Glaswerke*, Case C-51/93, [1994] E.C.R. I-3879, I-3987-3989, ¶¶ 18-21. The Court of Justice did not regard the Belgian regulation, which provides that the particulars required on labels must appear at least in the language or the languages of the linguistic region where the foodstuffs are offered for sale, unless a certain description in this language or these languages is necessary for the efficient protection of consumers as being in conformity with the free movement of goods. See Bruno De Witte, *Community Law and National Constitutional Values*, LEGAL ISSUES OF EUROPEAN INTEGRATION 1, 15-18 (1991).

leaves Member States the freedom to choose the most appropriate way to obtain the intended results in their legal order.<sup>129</sup>

As founders of the Union, the Member States enjoy ultimate protection against every attempt to undermine their autonomy. In contrast with other federations where amendments to the constitutional rules can be accepted without the approval of all the component entities,<sup>130</sup> amendments to the Treaties on which the Union is founded require that a conference of the representatives of the governments of the Member States reaches an agreement and that the amendments are approved by all Member States according to their respective constitutional provisions.<sup>131</sup> Therefore, the approval of amendments can fail because of the veto of one of the Member States which thus have at their disposal a powerful means to protect their autonomy and national identity.

#### IV. THE FOUNDATION OF THE CONSTITUTIONAL ORDER ON THE PRINCIPLES OF LIBERTY, DEMOCRACY, RESPECT FOR HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AND THE RULE OF LAW

For federalism to be able to work, a government must be structured in a democratic way and be respectful of fundamental rights and the rule of law.<sup>132</sup> This requirement finds its origin in the very values on which federalism is built, such as co-operation, recognition of diversity (pluralism), solidarity, and limitation of powers. The protection of these values implies that public authority is exercised with due respect for the rule of law, that the composition of the several governments is determined by the cit-

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129. This observation has to be put into perspective because directives are not always correctly used if the Member States press for a detailed regulation at Community level. See Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, *FORDHAM INT'L L.J.* 846, 852-53 (1994).

130. Compare U.S. CONST. art. V, with GERMAN CONST. art. 79 (setting forth that German Constitution can be amended by law approved by two thirds of Members of Bundestag and two thirds of votes cast in Bundesrat). See also O. Pfersmann, *La révision constitutionnelle en Autriche et en Allemagne fédérale — Théorie, pratique, limites*, in *LA RÉVISION DE LA CONSTITUTION*, Aix-en-Provence/Paris, Presses Universitaires d'Aix-Marseille/Economica, 7-67 (1993).

131. TEU, *supra* note 1, art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

132. See Consolidated TEU, *supra* note 3, arts. 6(1), 7, O.J. C 340/2, at 153-54 (1997), 37 I.L.M. at 69 (arts. F(1) and F.1 of TEU); Consolidated EC Treaty, *supra* note 7, art. 309, O.J. C 340/3, at 301 (1997), 37 I.L.M. at 140 (art. 236 of EC Treaty).

izens and that their working methods are supervised by them.<sup>133</sup> Moreover, federalism relies on a variety of governments, all of which have to be legitimized by different groups of citizens. This sometimes complicates the operation of democracy and it certainly may damage the efficiency of decision-making. Thus, the tension between the use of majority voting and the protection of minorities is more intense within the framework of a federal form of government than within a unitary state, in which a minority does not easily coincide with one or another component entity. Specific rules may therefore be needed to alleviate the severity of majority decision-making — almost always by leveling up the required majority or by providing for some kind of escape clauses<sup>134</sup> — to avoid a breakdown.

From a federal perspective, the Community still suffers some democratic deficit, although it has been considerably decreased over the years with the increasing role played by the European Parliament in the enactment of Community legislation. In this respect, the Treaty of Amsterdam constitutes the culmination of a process put into motion some ten years earlier with the Single European Act which, for the first time, extended parliamentary powers in some fields beyond the mere prerogative of the Parliament of expressing an opinion on draft legislation.<sup>135</sup> Indeed, after the entry into force of the Treaty of Amsterdam, the co-decision procedure will function on the basis of an equal input for the Council and the European Parliament and its scope of application will be drastically enlarged.<sup>136</sup> Likewise, the democratic role to be played by the national parliaments in their interaction with members of the Council has been strengthened.<sup>137</sup> There remain a number of cases, however, such as the common agricultural policy (consuming still more than half of

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133. For federalism to be democratic, it is also a sheer practical requirement that *all* constituent authorities which cooperate with one another in an interdependent way be democratic. Thus, it would be hard for the Council consisting "of a representative of each Member State at ministerial level, authorized to commit the government of that Member State" (Article 146 of the EC Treaty) not to lose its democratic legitimacy if the representative of each Member State did not enjoy full democratic legitimacy in the Member State concerned.

134. See Consolidated EC Treaty, *supra* note 7, art. 95(4) - (10), O.J. C 340/3, at 214 (1997), 37 I.L.M. at 96 (art. 100a(4) - (10) of EC Treaty).

135. See EC Treaty, *supra* note 7, art. 189c, [1992] 1 C.M.L.R. at 696-97.

136. See *supra* note 56 and accompanying text.

137. See *supra* note 55 and accompanying text.

the Community budget), where qualified majority voting in the Council is combined with mere consultation of the European Parliament. In that setting democracy remains rather weak, because the European Parliament does not have the power to approve legislation. In addition, the supervision of the members of the Council by the national parliaments is not very efficient, because representatives of a Member State finding themselves in the minority within the Council cannot block a decision of the Council which does not comply with the wishes of their national parliament. Therefore, an increase in the use of qualified majority voting in the Council necessitates, as a matter of principle, an increased input of the European Parliament so as to replace approval by national parliamentary assemblies with approval by the European parliamentary assembly.<sup>138</sup> This will boost not only the democratic legitimacy of the Community but also its federal character.<sup>139</sup>

The lack of parliamentary input at the Community level is also apparent in the budgetary procedure. Because the Community is obliged to have a balanced budget, the power of the European Parliament is limited, notwithstanding the fact that it can — to a certain degree — determine the scope and the destination of the expenditure, for it has no real impact on the revenue side.<sup>140</sup> This lack of influence undermines the principle of “no taxation without representation” because taxes are being levied at the national level to cover expenditure for the conduct of policies determined at a level of government where the people’s representatives play no part in the decision to levy taxes. Therefore, it is not surprising that the Union’s citizens display a lesser interest when it comes to the election of the European Parliament in discussing Union policies because the Parliament is not

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138. See German Solange Beschluß of 29 May 1974, BVerfGE 37, 271 (1974), COMMON MKT. L. REP. 540 (1974). The Bundesverfassungsgericht has since recognized that the increased legislative role for the European Parliament — which, since 1979, is also directly elected — put democracy on the right track at Community level. See BVerfGE 73, 339 (1986), COMMON MKT. L. REP. 225 (1987).

139. See Roquette Frères v. Council, Case 138/79, [1980] E.C.R. 3333, 3360, ¶ 33; Maizena v. Council, Case 139/79, [1980] E.C.R. 3393, 3424, ¶ 34; Commission v. Council, Case C-300/89, [1991] E.C.R. I-2867, I-2900, ¶ 20, [1993] 3 C.M.L.R. 359, 384-85. But see Renaud Dehousse, *Institutional Reform in the European Community. Are there Alternatives to the Majoritarian Avenue?*, EUI WORKING PAPERS, RSC No 95/4 (mentioning difficulties that might arise — according to author — when influence of European Parliament increases).

140. See EC Treaty, *supra* note 7, art. 199(3), [1992] 1 C.M.L.R. at 702.

itself responsible for the tax burden needed to finance those policies.

The Treaties on which the Union is founded do not contain a catalogue of fundamental rights,<sup>141</sup> but some expressions of such rights can be found in a number of Treaty provisions.<sup>142</sup> To some extent, the Treaties can be compared to the text of the U.S. Constitution that emerged from the Philadelphia Convention, before the addition of the first ten amendments.<sup>143</sup> This has not, however, prevented the Court of Justice from ensuring that in the field of protection of fundamental rights "the law is observed."<sup>144</sup> As the Court of Justice said in the *Nold* case:

Fundamental rights form an integral part of the general principles of law, the observance of which [the Court] ensures. In safeguarding these rights the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, inter-

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141. See Koen Lenaerts, *Fundamental Rights to be Included in a Community Catalogue*, EUR. L. REV., 367-90 (1991) (providing analysis of possibility of inserting "Bill of Rights" in Treaties).

142. See, e.g., EC Treaty, *supra* note 7, art. 6, [1992] 1 C.M.L.R. at 591 (no-discrimination on grounds of nationality); Consolidated EC Treaty, *supra* note 7, art. 141, O.J. C 340/3, at 242 (1997), 37 I.L.M. at 110 (art. 119 of EC Treaty) (guaranteeing application of principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including principle of equal pay for equal work or work of equal value). In addition, Article F(2) of the TEU states that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." TEU, *supra* note 1, art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. This provision and the application thereof are to be justiciable in the Court of Justice. See Consolidated TEU, *supra* note 3, art. 46, O.J. C 340/2, at 170 (1997), 37 I.L.M. at 77 (art. L of TEU). See also Consolidated EC Treaty, *supra* note 7, art. 3(2), O.J. C 340/3, at 182 (1997), 37 I.L.M. at 80 (stating that "in all the activities referred to in [Article 3(1)], the Community shall aim to eliminate inequalities, and to promote equality, between men and women.").

143. Cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 4 n.7 (2nd ed. 1988) (stating that "[t]he Constitutional Convention decided against including a Bill of Rights largely in the belief that Congress was in any event delegated none of the powers such a bill would seek to deny."). In the Community, the idea was that it was unthinkable that in a supranational structure of economic powers the fundamental rights of the people, thought of during the 1950s as being solely civil and political rights, could be at risk. See Pierre Pescatore, *Der Schutz der Grundrechte in den Europäischen Gemeinschaften und seine Lücken*, in GRUNDRECHTSSCHUTZ IN EUROPA, EUROPÄISCHE MENSCHENRECHTS-KONVENTION UND EUROPÄISCHE GEMEINSCHAFTEN 64-75 (H. Mosler et al. eds., 1977).

144. EC Treaty, *supra* note 7, art. 164, [1992] 1 C.M.L.R. at 684.

national treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.<sup>145</sup>

Among those treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 is particularly important,<sup>146</sup> as is now expressly stated in Article F(2) of the TEU. For acts of Community institutions to be constitutional, they must be compatible "with the requirements of the protection of fundamental rights in the Community legal order."<sup>147</sup> The Court adds that: "Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements."<sup>148</sup> The constitutionalization of fundamental rights protection in the Community legal order did not, however, lead to a kind of EC version of the fourteenth amendment to the U.S. Constitution, which would have enabled the Court to incorporate selectively the several fundamental rights recognized at the level of the Community into a Community fundamental rights standard to be enforced against the Member States (proceeding on the basis of the principle of supremacy of Community law).<sup>149</sup> The case-law has consistently held that "although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law."<sup>150</sup> The issue then becomes whether or not a national act said to be incompatible with the European Convention on Human Rights

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145. See *Nold*, Case 4/73, [1974] E.C.R. 491, 507, ¶ 13, [1978] 2 C.M.L.R. 183.

146. See *Johnston*, Case 222/84, [1986] E.C.R. 1651, 1682, ¶ 18, [1986] 3 C.M.L.R. 240, 262.

147. See *Wachauf*, Case 5/88, [1989] E.C.R. 2609, 2639, ¶ 19, [1991] 1 C.M.L.R. 328.

148. [1989] E.C.R. 2609, 2639-640, ¶ 19; see also *Klensch*, Joined Cases 201-202/85, [1986] E.C.R. 3477, 3507, ¶ 8, [1988] 1 C.M.L.R. 151, 164.

149. That the Court still refuses to do so flows from recent case law. See *Kremzow v. Austrian State*, Case C-299/95, [1997] E.C.R. I-2629, ¶ 15 [1997] 3 C.M.L.R. 1289; *Annibaldi*, Case 309/96, [1997] E.C.R. (not yet reported).

150. See *Demirel*, Case 12/86, [1987] E.C.R. 3719, 3754, ¶ 28, [1989] 1 C.M.L.R. 421, 439-40; see also *Cinéthèque*, Joined Cases 60-61/84, [1985] E.C.R. 2605, 2627, ¶¶ 25-26, [1986] 1 C.M.L.R. 365, 386.



lies "outside the scope of Community law."<sup>151</sup> And, as it appears, the solution of that issue may depend in part on the compatibility of national legislation with the Community fundamental rights standard upheld by the Court, which makes the reasoning look rather circular. The Court indeed ruled in its *ERT* judgment of June 18, 1991,<sup>152</sup> that when Member States defend their legislation in the face of the free movement principle by reference to one of the exception clauses provided for in the EC Treaty or allowed under the Court's case-law, the legislation to be justified by such a clause must be compatible with the Community fundamental rights standard. If it is not, the reference to the exception clause will fail and the measure will by the same token be prohibited as an infringement of the Community-law free movement principle. If it is compatible with the fundamental rights standard,<sup>153</sup> the reliance on the exception clause can succeed, so that the national legislation will no longer come under the scope of the Community's prohibition of infringements of the free movement principle.<sup>154</sup> Thus, the Court

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151. See Joseph H.H. Weiler, *The European Court at a Crossroads: Community Human Rights and Member State Action*, in *LIBER AMICORUM PIERRE PESCATORE* 821-42 (1987).

152. *ERT v. DEP*, Case C-260/89, [1991] E.C.R. I-2925, [1994] 4 C.M.L.R. 540.

153. [1991] E.C.R. I-2925, I-2964, ¶¶ 42-45.

154. See *Familiapress v. Bauer Verlag*, Case C-368/95, [1997] E.C.R. I-3689, [1997] 3 C.M.L.R. 1329 (providing recent application). In this case, the *Handelsgericht Wien* asked the Court whether Article 30 of the EC Treaty was to be interpreted as precluding application of the Austrian legislation prohibiting an undertaking established in Germany from selling in Austria a periodical produced in Germany, where that periodical contains prize puzzle competitions or games which are lawfully organized in Germany. The Court had no difficulty in finding that because the legislation requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constituted, in principle, a measure having equivalent effect within the meaning of Article 30 of the EC Treaty. See EC Treaty, *supra* note 7, art. 30, ¶ 12, [1992] 1 C.M.L.R. at 602. As both the Austrian Government and the Commission argued that the aim of the national legislation in question was to maintain press diversity, the Court thereupon applied the *Cassis de Dijon* test to verify whether that constituted a mandatory requirement of the general interest proportionately pursued by Austria so that Article 30 of the EC Treaty would no longer apply. On this point the Court ruled that "maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order (see *Commission v. Netherlands*, Case C-353/89, [1991] E.C.R. I-4069, ¶ 30 and *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, C-148/91, [1993] E.C.R. I-487, ¶ 10)." *Familiapress*, [1997] E.C.R. at I-3689, [1997] 3 C.M.L.R. at 1329, ¶ 18.

avoids pronouncing on the compatibility of national laws or acts with the Community fundamental rights standard whenever these laws or acts are foreign to Community law,<sup>155</sup> but the slightest nexus between such laws or acts and Community law, such as the need for their authorization under an exception clause provided for in the Treaty or in the Court's own case-law, is sufficient to justify an inquiry regarding their consistency with the Court's fundamental rights standard.

The reluctance of the Court of Justice to examine whether actions of the Member States which fall outside the substantive scope of Community law comply with the Community fundamental rights standard does not, however, lead to a gap in the judicial protection of fundamental rights. In such cases the

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Maintenance of press diversity was thus added to the list of mandatory requirements of the general interest which may legitimately be pursued by Member States in conformity with Community law because it contributes to safeguarding a fundamental right, namely the freedom of expression. That objective, however, must not be capable of being achieved by measures which are less restrictive of intra-Community trade than the Austrian legislation in question. At that point in its reasoning, the Court was confronted a second time with the fundamental right to freedom of expression, because "a prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression." *Id.* at I-3717, [1997] 3 C.M.L.R. at 1353, ¶ 26. The Court then recalled that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of the free movement of goods, that justification must also be interpreted in the light of the general principles of law and, in particular, fundamental rights. *Id.* at I-3717, [1997] 3 C.M.L.R. at 1353, ¶ 24 (citing ERT, Case C-260/89, [1991] E.C.R. I-2925, ¶ 43, [1994] 4 C.M.L.R. 540, 568). Those fundamental rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at I-3717, [1997] 3 C.M.L.R. at 1353, ¶ 25 (citing ERT, Case C-260/89, [1991] E.C.R. I-2925, ¶ 44, [1994] 4 C.M.L.R. 540, 568). The Court then referred to the judgment of the European Court of Human Rights of 24 November 1993 in *Informations-verein Lentia and Others v. Austria* (A No 276) to support its finding that Article 10 permits derogations from the freedom of expression for the purposes of maintaining press diversity, in so far as they are prescribed by law and are necessary in a democratic society. In conclusion, the Court identified a number of concrete criteria which should enable the referring national court to determine "whether a national prohibition such as that in issue in the main proceedings is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression." *Id.* at I-3717, [1997] 3 C.M.L.R. at 1353, ¶ 27.

155. The European Parliament appears to share this concern. In its Resolution of April 12, 1989, adopting the Declaration of fundamental rights and freedoms, the European Parliament certainly considered that "the identity of the Community makes it essential to give expression to the shared values of the citizens of Europe," but stated in Article 25(1) of the Declaration itself that "this Declaration shall afford protection for every citizen in the field of application of Community law." European Parliament Resolution of April 12, 1989, O.J. C 120/1, at 51-52, 56 (1989).

other supranational legal order in Europe — that is, the legal order established by the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>156</sup> (“ECHR”) within the Council of Europe — may intervene.<sup>157</sup> All EU Member States are Contracting Parties to the ECHR. The control machinery of this convention serves to enforce the fundamental rights of the people against the EU Member States, when they act under their residual — *i.e.* non-Community related — powers. All EU Member States have accepted that individual complaints can be lodged against them. They have also accepted the compulsory jurisdiction of the European Court of Human Rights.<sup>158</sup> This means that outside the scope of application of Community law, EU Member States are not only bound by the ECHR, but are, in addition, equally subject to judicial review of their actions (or inaction) as to their consistency with the fundamental rights protected in the ECHR, a list which is in most respects similar to the U.S. Bill of Rights.<sup>159</sup>

Just like its Luxembourg counterpart has done within the framework of the European Community, the Strasbourg Court of Human Rights has interpreted the ECHR in a most dynamic

156. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. 5 [hereinafter ECHR].

157. The ECHR was signed in Rome on November 4, 1950. The Council of Europe was established on May 5, 1949. Its forty members are, besides the fifteen Member States of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom), Albania, Andorra, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, Moldova, Norway, Poland, Romania, Russia, San Marino, Slovakia, Slovenia, Switzerland, Turkey, and Ukraine.

158. See ECHR, *supra* note 156, art. 48, 213 U.N.T.S. at 246 *as amended* by the Eleventh Protocol of May 11, 1994.

159. The European Court of Human Rights engages in a similar kind of fine-tuning of the fundamental rights protected in the ECHR as does the U.S. Supreme Court in relation to the Bill of Rights. The European Court of Human Rights appears at times to be more exigent than its U.S. counterpart. Thus, in the judgment of February 25, 1982, *Campbell and Cosans*, 48 Eur. Ct. H.R. (ser. A) (1982), Britain was found to have infringed the ECHR for making pupils liable to corporal punishment as a disciplinary measure in public schools. In the later judgment of March 22, 1983, Britain was even required to pay just compensation to the victims involved in the case, 60 Eur. Ct. H.R. (ser. A) (1983). This is to be compared with the U.S. Supreme Court ruling in *Ingraham v. Wright*, 430 U.S. 651 (1977), accepting that corporal punishment of a schoolchild could take place without the guarantee of prior procedural due process of law within the meaning of the Fourteenth Amendment to the U.S. Constitution. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1333, § 15-9 (2nd ed. 1988) (providing critical assessment of U.S. Supreme Court decision in *Ingraham v. Wright*).

way "having regard to the object and purpose of the Convention"<sup>160</sup> and stating that "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which in the words of the preamble, benefit from a 'collective enforcement.'"<sup>161</sup>

### V. THE ENFORCEMENT OF THE CONSTITUTION

From the above-mentioned characteristics of a federal form of government, it appears that an effective government requires a constitution in which the rights and obligations of the central authority and the component entities are laid down and which provides for mechanisms that assure the enforcement of the rules which it contains. Therefore, a federal form of government will always be constitutional. Because such a form of government is characterized by the search for a balance between the central authority and the component entities, the constitution must be sufficiently flexible to allow this form of government to adapt itself to developments in society without undermining the cohesion of the central authority or the national identities of the component entities.<sup>162</sup> A constitutional court will normally guarantee the enforcement of the "constitution" in order to maintain and adjust the balance and to ensure that the federal dynamics are not extinguished by political battles between the component entities and the central authority but find an efficient expression.<sup>163</sup>

The Treaty establishing the European Community has been characterized as the "basic constitutional charter"<sup>164</sup> on which the Community is founded. The Court of Justice held that the Treaty established a new legal order for the benefit of which the

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160. *Golder*, 18 Eur. Ct. H.R. (Ser. A) at 18 § 36 (1975).

161. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (Ser. A) at 90-91 (1978).

162. See D.A.O. Edward, *The Community's Constitution — Rigid or Flexible? The Contemporary Relevance of the Constitutional Thinking of James Bryce*, in 2 INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION. ESSAYS IN HONOUR OF HENRY G. SCHERMERS 57-78 (D. Curtin & T. Heukels eds., 1994) (explaining concept of "flexible constitution").

163. KOEN LENAERTS, LE JUGE ET LA CONSTITUTION AUX ETATS-UNIS D'AMÉRIQUE ET DANS L'ORDRE JURIDIQUE EUROPÉEN, 110-86 (1988) (for United States); see *id.* at 459-566 (for Community legal order).

164. *Les Verts v. European Parliament*, Case 249/83, [1986] E.C.R. 1339, 1365, ¶ 23, [1987] 2 C.M.L.R. 343, 371; Opinion 1/91 [1991] E.C.R. I-6079, I-6102, ¶ 21.

Member States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. Moreover, it underlined that the acts of the Member States as well as the acts of the institutions can be the object of judicial review in order to determine their conformity with the Treaty. The Community is a Community based on the rule of law in which the Court of Justice ensures that the law is observed, in co-operation with the national courts. In this Community based on the rule of law, the Court of Justice must be seen as a constitutional court.<sup>165</sup> The nature of certain cases brought before it, for example, disputes between institutions, or disputes between a Member State and an institution, and preliminary questions on the interpretation and the validity of Community law often involve constitutional issues such as the preservation of the institutional balance, the demarcation of Community and national powers, or the enforcement of fundamental rights.<sup>166</sup>

Day after day, however, the Court of Justice must win the trust of Member States and national supreme courts as the "ultimate judicial umpire of European Community competences,"<sup>167</sup>

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165. A.M. Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, COMMON MKT. L. REV. 127-40 (1974); Ole Due, *A Constitutional Court for the European Communities*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW. ESSAYS FOR THE HON. MR. JUSTICE T.F. O'HIGGINS 4-9 (1992); F.G. Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court?*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY LAW AND NATIONAL LAW. ESSAYS FOR THE HON. MR. JUSTICE T.F. O'HIGGINS 25-32 (1992); Koen Lenaerts, *Some Thoughts about the Interaction between Judges and Politicians*, YEARBOOK OF EUROPEAN LAW 1992 1-34 (1993); J. Mischo, *Un rôle nouveau pour la Cour de justice?*, REVUE DU MARCHÉ COMMUN 681-86 (1990); Pierre Pescatore, *Die Gemeinschaftsverträge als Verfassungsrecht — ein Kapitel Verfassungsgeschichte in der Perspektive des europäischen Gerichtshofs, systematisch geordnet*, in FESTSCHRIFT KUTSCHER 319-38 (1981); G.C. Rodríguez Iglesias, *Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht*, EUROPARECHT 225-45 (1992); Jens Rinze, *The Role of the European Court of Justice as a Federal Constitutional Court*, PUBLIC LAW, 426-43 (1993).

166. The acts of the institutions can be reviewed by the Court of Justice or the Court of First Instance for their conformity with the Treaty through several means. See EC Treaty, *supra* note 7, art. 173, [1992] 1 C.M.L.R. at 687-88 (action for annulment); *id.* art. 175, [1992] 1 C.M.L.R. at 688 (action for failure to act); *id.* art. 215, [1992] 1 C.M.L.R. at 710 (action for damages). The Court of Justice or the Court of First Instance may also review such acts through preliminary questions referred by national judges to the Court on the validity of secondary Community law. Two Treaty articles enable the Court of Justice to review the acts of a Member State. See EC Treaty, *supra* note 7, art. 169, [1992] 1 C.M.L.R. at 686 (action for failure to fulfill its obligations); *id.* art. 177, [1992] 1 C.M.L.R. at 689 (putting forth preliminary rulings on interpretation of Community law).

167. Theodor Schilling et al., *Who, in Law, is the Ultimate Judicial Umpire of European*

as becomes clear from the *Maastricht* judgment of the German Bundesverfassungsgericht of October 12, 1993.<sup>168</sup> The conceptual reason for this is rather straightforward: the Member States — and not the people as such — hold the *Kompetenz-Kompetenz* as makers of the constitution,<sup>169</sup> but in making use of this competence they have conferred upon the Court of Justice, through Article 164 of the EC Treaty, the task of ensuring that, in the interpretation and application of the Treaty, the law is observed. That in turn implies the tasks of “umpiring the federal system”<sup>170</sup> and “drawing lines,”<sup>171</sup> two particularly delicate matters in any variant of federalism. When the Court accomplishes these tasks in line with the rules on interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties,<sup>172</sup> there should be no problem of acceptance of its judicial last word on the precise extent of Community powers as that is exactly the responsibility which the Member States as makers of the constitution have entrusted to it.<sup>173</sup>

### CONCLUSION

The overview of the basic characteristics of the European Union has revealed the presence of several strands of federalism,

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*Community Competences? The Schilling-Weiler/Halterm Debate*, HARVARD JEAN MONNET WORKING PAPERS Series 10/96. See also Theodor Schilling, *The Autonomy of the Community Legal Order — Through the Looking Glass*, HARV. INT'L L.J., 411 (1995).

168. BVerfGE 89, 155 (1993), 1 COMMON MKT. L. REP. 57 (1994).

169. TEU, *supra* note 1, art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

170. Paul A. Freund, *Umpiring the Federal System*, COLUM. L. REV., 561 (1954).

171. The term is borrowed from Louis Henkin, *The Supreme Court 1967 Term — Foreword: On Drawing Lines*, 82 HARV. L. REV., 63 (1968).

172. Vienna Convention on the Law of Treaties of May 23, 1969, in ERIC SUY, CORPUS IURIS GENTIUM - A COLLECTION OF BASIC TEXTS ON MODERN INTERSTATE RELATIONS 99 (2nd ed., 1996). See in particular Article 31(1) of this Convention stating that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The Court of Justice claims to be doing nothing else than this. See, e.g., *Polydor v. Harlequin Record Shops*, Case 270/80, [1982] E.C.R. 329, 348-49, ¶¶ 14-18, [1982] 1 C.M.L.R. 677, 692-93; Opinion 1/91 Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] E.C.R. I-6079, I-6101-6102, ¶¶ 13-21. See also Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J., 656-79 (1997).

173. See Dieter Grimm, *The European Court of Justice and National Courts: the German Constitutional Perspective after the Maastricht Decision*, 3 COLUM. J. EUR. L., 229-42 (1997) (discussing helpful role which preliminary rulings procedure can fulfill in this regard).

especially in the Community pillar of the Union. The mosaic of modes of decision-making which characterizes the present Union follows the historic trails of European integration, which is the result of a gradual development. From this perspective, the establishment of the Union is a step towards the further achievement of integrative federalism because, to a large degree, it strengthens the Community pillar of the Union by broadening its powers to include EMU, citizenship of the Union, a wide range of non-economic powers, and by federalizing the decision-making process through extending majority voting in the Council and providing for an increased input by the European Parliament. Yet, it must be said that several provisions have been added to the EC Treaty which expressly limit the powers of the Community or regulate the exercise of Community powers; in addition, one must not forget the mainly intergovernmental character of the two other pillars of the Union. These features are to be associated rather with the underlying values of devolutionary federalism as they tend to limit or contain the potential scope of European integration.

In view of the federal features inherent in the Community pillar of the Union, the question whether the word federalism should appear in the Treaty is not really important. It is important, however, that the three-pillar structure of the Union grows into a sufficiently coherent unity to remain operational in the future. To that effect the Treaty of Amsterdam goes into the right direction.