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(4) EUROPEAN PARLIAMENT

1997-1998 SESSION

EXTRACT

OF THE MINUTES

OF THE MEETING OF

2 OCTOBER 1997

IN THE CHAIR : Nicole FONTAINE, Vice-President

Public international law, Community law and national constitutional law

A4-0278/97

Resolution on the relationships between international law, Community law and the constitutional law of the Member States

The European Parliament,

- having regard to the symposium on the relationships between Community law, international law and the constitutional law of the Member States, organized by its Committee on Legal Affairs and Citizens' Rights on 21 and 22 June 1995,

- having regard to the draft Treaty of Amsterdam of 19 June 1997([1]),

- having regard to the report of the Committee on Legal Affairs and Citizens' Rights and the opinion of the Committee on Institutional Affairs (A4-0278/97),

A. whereas the European Community is a Community based on the rule of law([2]) and must be based on the clear separation of powers,

B. whereas comprehensive judicial protection of fundamental rights at a high level is an important feature of any Community based on the rule of law,

1. Recalls that the law of the European Union constitutes an autonomous legal system and recalls also the case-law([3]) of the Court of Justice of the European Communities with regard to the supremacy of Community law over national law;

2. Recalls that one of the essential elements of the constitutional law of the Member States of the Union is the separation of powers and that, therefore, any transfer of powers from the Member States to the Union must be accompanied by the assignment of powers to the European Parliament as the direct expression of the will of the peoples who make up the European Union;

3. Recalls that, in view of this autonomy, no domestic provisions of any kind can take precedence over Community law, since this would be to deny its character as Community law and call into question the very legal basis of the Community([4]);

4. Recalls that, according to the case-law of the Court of Justice of the European Communities, the supremacy of Community law means that any national law which conflicts with Community law is inapplicable([5]);

5. Points out that every individual national judge has the duty not to apply any national law which is

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([1]) CONF/4001/97.

([2]) Judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339 et seq., paragraph 23.

([3]) Judgment of 15 July 1964 in Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585 et seq.

([4]) Judgment in Case 6/64 *Costa v E.N.E.L.* referred to above; Judgment of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide- und Futtermittel* [1970] ECR 1107 et seq.

([5]) Judgment of 21 May 1987 in Case 249/85 *Albako v B.A.L.M.* [1987] ECR 2345, paragraph 14; judgment of 7 February 1991 in Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 19.

incompatible with Community law([1]);

6. Emphasizes the great significance of the preliminary ruling procedure pursuant to Article 177 of the EC Treaty for turning the supremacy of Community law over national law into reality, and refers forcefully to the CILFIT judgment([2]), which laid down criteria governing the obligation for national courts to refer cases;

7. Recalls that, in accordance with the Foto-Frost judgment([3]), national courts do not have the power to declare the acts of the Community institutions invalid, and reaffirms the view that jurisdiction concerning the binding nature of Community law rests solely with the Court of Justice and draws attention also to the exclusive competence of the European Court of Justice under Articles 164-188 and 219 of the EC Treaty, to have the final say on the scope of the tasks and powers transferred to the Community institutions;

8. Draws attention to the significance of Article 177(3) of the EC Treaty as a means of ensuring the uniform application of Community law in all Member States; stresses that the supreme national courts must also submit questions of Community law to the Court of Justice of the European Communities and must abide by its preliminary rulings;

9. Is concerned about developments in certain national courts, which are considering the possibility - contrary to Community law - of examining secondary Community law;

10. Observes that it follows from the logic of Community law that the Court of Justice of the European Communities should be the only judicial body with the power to take binding decisions on the interpretation and application of Community law;

11. Welcomes the indirect entrenchment of the supremacy of Community law through paragraph 2 of the Protocol on the application of the principles of subsidiarity and proportionality, which is included in the draft Treaty of Amsterdam, and which is to be annexed to the EC Treaty;

12. Calls, in addition, for the supremacy of Community law to be enshrined directly in the EC Treaty itself;

13. Considers that, in so far as powers which have implications for sovereignty are transferred to the EU institutions, such transfers must presuppose the recognition that the EU assumes sovereign powers which cease to fall within the exclusive ambit of the States, so that national courts cannot review the acts of the Community institutions acting within their proper competencies;

14. Calls for a clear statement of the relationship between international law and European law to be written into the EC Treaty, in terms of the EC being equated with nation states, which means that international law is applicable not directly but only after it has been declared applicable by an internal legal act of the EC or after its substance has been transposed into EC legislation;

15. Calls for the relationship with international law ultimately also to be regulated for the second and third pillars, in other words for the EU as a whole, in the same way as for the first pillar;

16. Calls for an amendment to the EU Treaty to the effect that the European Union is given legal

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([1]) Judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.* [1978] ECR 629 et seq., paragraph 21.

([2]) Judgment of 6 October 1982 in Case 283/81 *CILFIT e Lanificio di Lavardo v Ministerio della Sanitá* [1982] ECR 3415 et seq.

([3]) Judgment of 22 October 1987 in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 et seq., paragraph 15.

personality;

17. Considers that Article L(c) of the EU Treaty, as it is to be inserted by the draft Treaty of Amsterdam, should be regarded as giving the European Court of Justice a mission to ensure and develop comprehensive protection at a high level of fundamental rights in respect of the sphere of activity of the European Community such that the level of protection of human rights by the Court of Justice is at least as high as under any national constitutional jurisdiction and, in so far as the Court has jurisdiction, in respect of the sphere of activity of the European Union;

18. Instructs its President to forward this resolution, together with the explanatory statement of the committee's report, to the Council, the Commission, the parliaments of the Member States, the European Court of Justice and all the courts of last instance in the Member States.

EUROPEAN PARLIAMENT

session documents

ENGLISH EDITION

24 September 1997 A4-0278/97

REPORT

on the relationships between international law, Community law and the constitutional law of the Member States

Committee on Legal Affairs and Citizens' Rights

Rapporteur: Mr Siegbert Alber

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CONTENTS

Page

Procedural page 3

A. MOTION FOR A RESOLUTION 4

B. EXPLANATORY STATEMENT 8

Opinion of the Committee on Institutional Affairs 17

By letter of 28 January 1997 the Committee on Legal Affairs and Citizens' Rights requested authorization to draw up a report on the relationships between international law, Community law and the constitutional law of the Member States.

At the sitting of 14 March 1997 the President of the European Parliament announced that the Conference of Presidents had authorized the committee to report on this subject. He also announced, on 13 June 1997, that the Committee on Institutional Affairs had been asked for its opinion.

The Committee on Legal Affairs and Citizens' Rights had appointed Mr Siegbert Alber rapporteur at its meeting of 21 December 1995.

It considered the draft report at its meetings of 1-3 and 22-24 September 1997 and at the latter meeting it adopted the motion for a resolution by 15 votes to 1.

The following were present for the vote: De Clercq, chairman; Palacio Vallelersundi, Rothley, and Mosiek-Urbahn, vice-chairmen; Alber, rapporteur; Añoveros Trias de Bes, Barzanti, Cot, Crowley, Fabre-Aubrespy, Gebhardt, Lehne, Medina Ortega, Thors, Ullmann and Zimmermann.

The opinion of the Committee on Institutional Affairs is attached.

The report was tabled on 24 September 1997.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

A

MOTION FOR A RESOLUTION

Resolution on the relationships between international law, Community law and the constitutional law of the Member States

The European Parliament,

- having regard to the symposium on the relationships between Community law, international law and the constitutional law of the Member States which was organized by the Committee on Legal Affairs and Citizens' Rights on 21 and 22 June 1995,

- having regard to the draft Treaty of Amsterdam of 19 June 1997([1]),

- having regard to Rule 148 of its Rules of Procedure,

A. whereas the European Community is a Community based on the rule of law([2]) and must be based on clear separation of powers,

B. whereas comprehensive judicial protection of fundamental rights, of a high standard, is an important feature of any Community based on the rule of law,

1. Recalls that the law of the European Union constitutes an autonomous legal system([3]) and recalls also the case-law([4]) of the Court of Justice of the European Communities with regard to the supremacy of Community law over national law;

2. Recalls that one of the essential elements of the constitutional law of the Member States of the Union is the separation of powers and that, therefore, any transfer of powers from the Member States to the Union must be accompanied by the assignment of powers to the European Parliament as the direct expression of the will of the peoples who make up the European Union;

3. Recalls therefore that, in view of this autonomy, no domestic provisions of any kind can take precedence over Community law, since this would be to deny its character as Community law and call into question the very legal basis of the Community([5]);

([1]) Document CONF/4001/97

([2]) Judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339 et seq., paragraph 23

([3]) Judgment of 15 July 1964 in Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585 et seq.

([4]) Judgment of 15 July 1964 in Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585 et seq.

([5]) Judgment of 15 July 1964 in Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585 et seq.; Judgment of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstellè für Getreide- und Futtermittel* [1970] ECR 1107 et seq.

4. Recalls that, according to the case-law of the Court of Justice of the European Communities, the 'supremacy' of Community law means that any national law which conflicts with Community law is inapplicable([1]);

5. Points out that every individual national judge has the duty not to apply any national law which is incompatible with Community law([2]);

6. Emphasizes the great significance of the preliminary ruling procedure pursuant to Article 177 of the EC Treaty for turning the supremacy of Community law over national law into reality, and refers forcefully to the CILFIT judgment([3]), which laid down criteria governing the obligation for national courts to refer cases;

7. Recalls that, in accordance with the Foto-Frost judgment of the ECJ([4]), national courts do not have the power to declare the acts of the Community institutions invalid, and reaffirms the view that jurisdiction concerning the binding nature of Community law rests solely with the ECJ and draws attention also to the exclusive competence of the European Court of Justice under Articles 164-188 and 219 of the EC Treaty, to have the final say on the scope of the tasks and powers conferred upon the Community institutions;

8. Draws attention to the significance of Article 177(3) of the EC Treaty as a means of ensuring the uniform application of Community law in all Member States and stresses that the supreme national courts must also submit questions of European law to the Court of Justice of the European Communities and must abide by preliminary rulings which have been made;

9. Is concerned about developments in certain national courts, which entertain the possibility - contrary to Community law - of examining derived Community law;

10. Observes that it follows from the logic of Community law that the Court of Justice of the European Communities should be the only judicial body which has the power to take binding decisions on the interpretation and application of Community law;

11. Welcomes the indirect entrenchment of the supremacy of Community law through paragraph 2 of the Protocol on the application of the principles of subsidiarity and proportionality, which is included in the draft Treaty of Amsterdam, and which is to be annexed to the EC Treaty;

12. Calls, in addition, for the supremacy of Community law to be enshrined directly in the EC Treaty itself;

([1]) Judgment of 21 May 1987 in Case 249/85 *Albako v B.A.L.M.* [1987] ECR 2345, paragraph 14; judgment of 7 February 1991 in Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 19

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([3]) Judgment of 6 October 1982 in Case 283/81 *CILFIT v Minister of Health* [1982] ECR 3415 et seq.

([4]) Judgment of 22 October 1987 in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199 et seq., paragraph 15

13. Considers that, in so far as powers which have implications for sovereignty are transferred to the EU institutions, such transfers must presuppose the recognition that the EU assumes sovereign powers which cease to fall within the exclusive ambit of the States, so that national courts cannot review the acts of the Community institutions acting within their proper competencies;

14. Calls for a clear statement of the relationship between international law and European law to be written into the EC Treaty, in terms of the EC being equated with nation states, which means that international law is applicable not directly but only after it has been declared applicable by an internal legal act of the EC or after its substance has been transposed into EC legislation;

15. Calls for the relationship with international law ultimately also to be regulated for the second and third pillars, in other words for the EU as a whole, in the same way as for the first pillar;

16. Calls for an amendment to the EU Treaty to the effect that the European Union is given legal personality;

17. Considers that Article L(c) of the EU Treaty, as it is to be inserted by the Treaty of Amsterdam, should be regarded as giving the European Court of Justice a mission to ensure and develop comprehensive protection of fundamental rights, of a high standard, in respect of the sphere of activity of the European Community such that the standard of protection of human rights by the Court of Justice of the European Communities is at least as high as under any national constitutional jurisdiction, in so far as the ECJ has jurisdiction, in respect of the sphere of activity of the European Union;

13. Instructs its President to forward this resolution, together with the explanatory statement section of the committee's report, to the Council, the Commission, the parliaments of the Member States, the European Court of Justice and all the courts of last instance in the Member States.

B

EXPLANATORY STATEMENT

A. INTRODUCTION

1. Reasons for the own-initiative report

Until a few years ago, the relationship between Community law, on the one hand, and national constitutional law, on the other, seemed largely to have been clarified: although the Community Treaties contain no explicit provisions governing the question of hierarchy, the European Court of Justice had consistently upheld, since its 1964 and 1970 judgments in the cases of *Costa v. ENEL*[1] and *Internationale Handelsgesellschaft*[2], the absolute supremacy of both primary and secondary Community law over all provisions of national law - including constitutional law and the fundamental rights guaranteed thereby. While the Member States' national constitutional courts initially concurred with this legal viewpoint to a very large extent[3], recent years have seen the development of resistance, which has been spearheaded by the decidedly nationally-minded judgments, which are only partially supportive of integration, issued by the German Federal Constitutional Court and the Danish Supreme Court[4]. These courts - increasingly followed by lower courts - claim the right to examine at least secondary Community law for its compatibility with national constitutional law. The dangers associated with doing this are considerable: after all, the very roots of the Community and the uniform application of Community law are at risk.

The reason for and purpose of this own-initiative report is to deliver an opinion on these contentious questions from the European Parliament's point of view. However, given the limit of 330 lines laid down under the Rules of Procedure, many issues cannot be addressed, or can only be hinted at. The main starting-point for the discussion is the judgment of the German Federal Constitutional Court of 12 October 1993 (known as the Maastricht judgment, published in the Reports of the Federal Constitutional Court as E 89, 155, II).

2. The judgment of the Federal Constitutional Court - an assessment

2.1 In its Maastricht judgment, the German Federal Constitutional Court examined primary European law which was coming into being (the Maastricht Treaty, which was awaiting ratification at the time) against the yardstick of German constitutional law. The Federal Constitutional Court also claimed the right to rule on the applicability of secondary law in certain cases (inadequate protection of fundamental rights, safeguarding of the limits on transfers of competences).

2.2 First of all, it must be admitted that in many passages the Federal Constitutional Court puts its finger right on the weak points of European integration, for example the vague conferral of competence by Article 235 of the EC Treaty[5], the oft-lamented 'democratic deficit'[6] and the instability risks surrounding the introduction of the euro[7]. The Federal Constitutional Court was right to hold that the crucial thing is that 'the democratic foundations of the Union must be developed in step with integration and a vital democracy must also be maintained in the Member States while integration is under way'[8].

The democratic nature of the European Union can be enhanced only by involving the European Parliament more closely in the decision-making process. The adoption of legislation by the Council

of Ministers, which is composed exclusively of representatives of national governments, is contrary to the principle of the distribution of powers and is questionable from a democratic point of view.

2.3 However, some passages of the Maastricht judgment cannot be accepted.

(a) The view that transfers of competences to the European Community has a tendency to render the principle of democracy meaningless[9] - a view which clearly often underpins the remarks of the Federal Constitutional Court - cannot be endorsed.

The Federal Constitutional Courts itself contradicts that view in its judgment (C/I/2/a), where it holds that 'in the Law ratifying accession to a Community of States lies the democratic legitimacy both of the Community of States itself and of its powers to adopt majority decisions which bind the Member States'.

Moreover, Rothley[10] and Fromont[11] are right in this regard: a broad interpretation of the scope of Article 38 of the Basic Law restricts the limits on the power to amend the constitution. The Federal Constitutional Court thereby enhances its own role.

(b) The Federal Constitutional Court makes unusually frequent use of the terms '*Volk*' and '*Staatsvolk*' (the people)[12]. Those terms, which are so important for the Court's line of argument, are not defined. However, it is clear from the context that operating with those terms is meant to perpetuate the existence of the State, or rather of a very specific State. This is particularly clear from the following sentence criticized by Rothley[13]: 'Each of the peoples is the starting-point for a State power relating to itself'[14]. Deliberately painting a black and white picture ('on the one hand, the Federal Republic of Germany, a State democratically legitimized in the most exemplary manner; on the other hand, the undemocratic and inadequately legitimized EC and EU') is meant to gloss over the fact that ultimately every attempt to legitimize - no matter how splendid it may appear in theory - is only a disguise for the exercise of power.

The abstract ex-ante definition of 'people' is clearly impossible and such a definition can only be a source of amusement at ethnology conferences.

(c) The Federal Constitutional Court employs the newly invented term 'Staatenverbund' (association of States) when referring to the EU or the EC[15]. Admittedly, the Court thereby recognizes that the process of European unification is unique and that the community which emerges from that process constitutes 'a first'. Unfortunately, at the same time the Court's line of argument is not in keeping with this uniqueness and with the principle of the further development of the Community (directed towards the creation of 'an ever closer union of the peoples of Europe' (Art. A TEU)); its aim rather is to perpetuate the existence of the nation State in its time-honoured form.

(d) The Federal Constitutional Court reserves the right to examine legal acts of the European institutions and organs even in the future in order to determine 'whether they remain within or go beyond the limits of the sovereign rights conferred on them'[16], and states that German State organs 'would be prevented on constitutional grounds from applying [European legal acts no longer covered by the ratifying legislation] in Germany'[17]. That in effect amounts to national courts examining Community law in the light of national constitutional law, which is incompatible with the principle of the supremacy of Community law. It is also incompatible with the judgment of the European Court of Justice in the *Foto-Frost* case[18], in which the Court held that national courts do not have jurisdiction to declare legal acts of Community institutions invalid.

Paragraphs 5 and 6 of the judgment should also be mentioned in this context. The following passages could be cited as typical examples: 'Were, for example, European institutions and organs to implement or develop the Treaty on European Union in a way which was no longer covered by the Treaty in the form in which it gave rise to the German ratifying law, any legal acts to which it gave rise would not be binding in German sovereign territory. German State organs would be prevented on constitutional grounds from applying those legal acts in Germany' (C/I/3); 'The validity and application of Community law in Germany depend on the obligation to apply the law laid down in the ratifying Law' (C/II/1/a); 'the Treaty sets long-term guidelines making the goal of stability the touchstone of monetary union, which attempt to ensure the achievement of the goal through institutional precautions and ultimately - as *ultima ratio* - should the Community based on stability fail, do not stand in the way of breaking away from the Community' (C/II/2/e).

For the further consequences of the Maastricht judgment in German case-law, see Annex I, which unfortunately has had to remain untranslated for technical reasons.

B. COMMUNITY LAW AS SUPRANATIONAL LAW

1. Dogmatic representation of the relationship between international law, Community law and national constitutional law

(a) Past approaches (drawing on international law)

The past attempts to find a solution often suffered from the fact that they employed basic terms which originated in eras when it was impossible to conceive of organizations with the composition, extent and regulatory density of the present EU. One approach can be summarized as follows:

The starting-point is the uniformity of the legal conception of the world. Hence, the origin of all norms is deemed to be the principle of international law according to which custom and conviction (*consuetudo et opinio iuris*) create international law[19]. This is also how Community law is supposed to have arisen and, according to the traditional approach to international law, how its validity is supposed to take precedence over national law, either by virtue of transposition by a national implementing law (in the system known as 'dualism') or, *ipso iure*, as higher-ranking international law (what is known as 'monism'). This report starts from the assumption of qualified monism. According to the prevailing doctrine of the primacy of the international legal order, one of the norms obtained by custom and conviction constitutes the basis for the validity of the legal orders of individual States[20]. The latter are subordinate to international law by virtue of the context in which they come into being. Another one of the principles obtained from the basic norm 'custom and conviction create international law' is that international treaties (in other words, non-customary sources of law) must be complied with ('*pacta sunt servanda*')[21]. Under another principle of international law, the law of States, which are conceived as the primary subjects of international law, is left essentially untouched by international law[22] and that each of those States is itself competent to regulate the validity and scope of international law *within its domestic sphere of influence* and that States are entitled to develop their domestic sphere of influence[23] inwards.

However, even the starting-point, according to which custom and conviction make international law, is structured in such a way that the role of newly emerging or growing organizations (such as the EU) is systematically hindered; it is primarily the custom of the States (which, for no convincing reason, are designated the *sole* primary subjects of international law) which can create international law.

Thus, from the outset international law is placed at the service of States. This fundamentally predetermines the direction to be taken by further developments. However, there is no legal justification for confining the capacity to create customary law to States. Such a restriction is arbitrary and ideologically motivated; it predetermines essential outcomes of the relationship between the various layers of law.

If, as was said above, the *starting-point* for *all* norms is the custom of certain sociological units (described above as 'States'), then the State cannot exist *as a legal order before* norms are created. That would presuppose another source of normativity and so wreck the uniformity of the legal conception of the world. Thus, there remains only a sociological definition of the structures which, through the interaction of their custom, can generate law. In reality, States have adopted the most diverse forms: States can be small and weak as well as large and powerful; culturally heterogenous and culturally homogenous; multi-lingual and monolingual; centralized and decentralized; and so on.

Where in this plethora of differences can we find a common denominator for a sociologically convincing abstract definition? One is left with the impression that 'State' is simply supposed to mean that which is described as such, and the background to such a course of action is - consciously or unconsciously - that the existence of certain States is meant to be perpetuated.

(b) New approach (drawing on European law)

The approach described above under (a) should be adopted, but with a fundamental adaptation: States should not have exclusive competence for the primary creation of international law; the largest possible sociological associations with a universal sphere of activity (i.e. a sphere of activity with universal vocation) should also have such competence.

That would make institutions such as the EU equal players in the creation of that field of law on which all other law depends: international law. In particular, the principles which have so far only been applied to States could be applied to the EU: the EU would itself be competent for governing the validity of international law within its sphere of influence and be entitled to develop its domestic sphere of influence[24] inwards, including the exclusive right to settle questions regarding the hierarchy between its own law and the law of its Member States. In the current state of European law, these questions are settled by judge-made law.

With this approach, it is worth noting that, during the history of mankind, there must have been similar transitions to the next biggest unit; even the family and the clan, as early phenomena in the history of law, must have handed on their role to the next biggest association: the nation State[25]. We could also mention the example of the nation States whose component parts - let us call them *'Länder'* for sake of simplicity - were in existence even before the nation State itself. Political scientists and international lawyers obviously had no problem in transferring to the next largest unit then.

(c) Entrenching supremacy in the EC Treaty

The approach of entrenching supremacy of Community law is contained in the draft Treaty of Amsterdam (CONF/4001/97 of 19 June 1997, p. 88). Point 2 of the Protocol on the application of the principles of subsidiarity and proportionality states: ' ... it shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law ... '. This protocol will have the status of primary law because it is annexed to the **EC** Treaty and can therefore

be referred to by the Court of Justice when interpreting and upholding the Treaty. The words cited above from the protocol on the subsidiarity principle should be given a warm welcome since they bear witness to the political will of the governments of the Member States to entrench the supremacy of Community law and to solve the problem unequivocally.

However, that solution can be criticized on the ground that it remains silent on the normative status of the entrenchment. Even though the supremacy of European law is established here on the basis of legal theory, or is established in future by being entrenched in the Treaty, it should not be forgotten that acceptance of the principle ultimately remains a question of political and social consensus.

The supremacy of European law is not an end in itself. It is an essential prerequisite for the uniformity of the European legal order. To put it in the words of the European Court of Justice: 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law' (*Internationale Handelsgesellschaft*, paragraph 3); 'The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty ...' (*Costa v. ENEL*, p. 594).

In the history of the supremacy of Community law we can observe a progression from implied consent by the Member States to this hierarchical principle to increasingly explicit consent to that principle. While consent initially took the form of tacit acceptance of the relevant case-law, as new accessions took place submission to the *acquis communautaire* (which includes the judgments of the Court, as 'legal acts of the institutions') was always confirmed by both existing and new Member States in the Acts of Accession (see e.g. Article 2 of the Acts of Accession of Austria, Finland and Sweden). The protocol on subsidiarity in the Treaty of Amsterdam has achieved an admittedly indirect, but nonetheless explicit entrenchment of supremacy. The next step to be aimed for would be a direct, explicit entrenchment in the EC Treaty.

(d) The meaning of supremacy

In the foregoing, we deliberately made imprecise reference to the 'supremacy' of one layer of law over another. This is used to mean the superiority of one norm over another on the basis of its derogative power[26]. That derogative power through which a conflicting norm is or can be neutralized - can come in various strengths. The precise derogative relationship must be inferred from the principles of the legal order in question.

In Community law, according to conventional doctrine on its relationship to every level of national law, the relevant principle is the inapplicability of conflicting domestic law. This form of supremacy - applied consistently - has so far proved adequate. The inapplicability formula has been developed in a number of stages[27]. Firstly, in the *Simmenthal II* judgment (Case 106/77 [1978] ECR 629, paragraphs 17 and 21) the wording of the inapplicability formula was fully developed[28]. The simple inapplicability formula is repeated in the Court's established case-law[29].

2. Acceptance of the supremacy of Community law

(a) Democratic legitimacy

Admittedly, even the Federal Constitutional Court recognizes the process of ever closer integration among the peoples of Europe, and calls for accompanying democratic rights. The court nonetheless

does not venture to allow rights to the European Parliament, as legislator, arguing that it is not yet a fully-fledged parliament because there is as yet no European people that it can represent. Instead, the court, looking backwards, wants the national parliaments to be once again more closely involved in the process of European legislation. However, this negates a fundamental principle of European integration, namely that the essence of the Union resides in the plurality of peoples, i.e. the exact opposite of the creation of a European people. Since the citizens of the Union are directly addressed by European legislation, however, as an electorate they must also have fully-fledged parliamentary representation. This criterion of required representation is more crucial than the State-legitimizing function of what is often only a notional 'people'. In reality, this legitimizing function has also taken effect, in most cases, only after a State has been founded; as far as the founding of the State itself is concerned, it is something of a fiction, because no-one has ever yet set eyes on a certified copy of the '*contrat social*' described by Rousseau. History shows that most nation States have originated in a process of growth, and very few stem from a single founding act. The traditional rules of constitutional law, which apart from their purely national focus are static in nature, are therefore inadequate for dealing with the integration of peoples.

(b) Avoidance of transfers of competence of indeterminate content

The concern about the transfer of national competences with an inadequate constitutional-law basis, presumably felt by the applicants in the judgment of 12 August 1996 of the Danish Supreme Court[30], should be taken seriously. Instruments such as Article 235 of the EC Treaty need to be given a more specific content or broken up into individual, clearer EU legal bases and an equal role for the European Parliament.

(c) Developing a system of fundamental rights which sets limits to the power of the institutions

It is impossible to overlook the importance of a catalogue of fundamental rights, equipped with defensive rights, for the individual. The individual can have confidence in the institutions only when their powers can, if necessary, be reliably limited.

Article L(c) of the TEU, which is to be amended by the Treaty of Amsterdam, wishes to give to the European Court of Justice - with regard to action of the institutions, in so far as the Court has jurisdiction under the EC Treaty and under the EU Treaty - jurisdiction over '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 law' (Article F(2) of the EU Treaty). This act should therefore not be seen merely as confirmation of current ECJ case-law, but as a mandate for judicial development of a high level of legal protection for fundamental rights.

(d) Strengthening the European Parliament

The Treaty of Amsterdam has probably also satisfied the second part of point 3(b) of the Maastricht judgment, which states that it is crucial for the democratic foundations of the Union to be developed in tandem with integration and for a living democracy to be maintained in the Member States even as integration progresses. That Treaty extends the codecision procedure to 24 new areas, and introduces a new version of Article 189b of the EC Treaty, thereby taking a step towards equality for the European Parliament in that procedure. Moreover, under Articles F(1) and Fa of the EU Treaty and Article 236 of the EC Treaty, a Member State's voting rights may be suspended in the event of

a serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, so that that State could no longer participate in the process of European legislation.

3. Further observations regarding the relationship between Community law and international law

3.1 The external relationship

An international agreement concluded by the EC is primarily an act of international law. The relationship between such agreements and other norms of international law is subject to the usual principles of international law[31].

3.2 The internal relationship

Community law can regulate the status of international law in the Community legal order in accordance with its own constitutional arrangements, in precisely the same way as nation States. In this regard, the solutions devised in Community law differ from those employed by States. Community law is basically more 'permeable' to international law. It was rightly the ECJ which developed these solutions in its judge-made law.

Owing to lack of space, only **international law which is regulated in the EC Treaty and which came into being with the participation of the EC** is considered below.

Article 228(7) of the EC Treaty clearly provides that agreements concluded pursuant to Article 228 (i.e. agreements to which the Community is a contracting party) are binding on the institutions of the Community and on Member States[32]. From this it is possible to infer a rank for international law so created, which - within the Community - lies between primary and secondary Community law. This applies in cases in which the ECJ has established that the act of international law and Community law are compatible. If the existence of an incompatibility was not established by the ECJ and the remaining Article 228 procedures were complied with, it must be assumed that the institutions of the Community and the Member States are still bound because obtaining an opinion is not mandatory. Thus, international law which is contrary to Community law could, as a later norm, even revoke of existing treaty law. That fear was nurtured by Opinion 3/94 ([1995] ECR I-4577), in which the ECJ decided that it did not have to comply with a request for an opinion in cases where the international treaty had already been concluded because a negative opinion if any would not have the legal consequences provided for in Article 228(6) (paragraph 13 of the opinion). That result is naturally unsatisfactory and should be rectified should the Treaty be amended.

At the same time, it can be inferred from Opinion 3/94 and from other judgments[33] that the ECJ takes the view that the Community has no 'sovereignty shield'[34] vis-à-vis acts in international law which the Community helps to bring into being. The ECJ makes do, however, in the case of the 1947 GATT Agreement (concluded prior to the EC Treaty, but binding under consistent ECJ judgments[35]), with the interpretation that if individuals[36] or Member States[37] cite provisions of Community law as being in contravention of the GATT, it may only examine Community legal acts for their compatibility with the GATT if they were enacted in implementation of a special undertaking under the GATT or if they refer explicitly to specific provisions of the GATT. This case-law is attributable to the lack of an explicit 'sovereignty shield'. States, by contrast, may certainly have a 'sovereignty shield' from the

point of view of international law. Where they are concerned, it is enough if it is laid down in their constitutional law that international treaties enter into force only after the enactment of legislation declaring the act in international law applicable in domestic law (enactment order[38]) or after the substance of the act in international law has been 'clothed' in the forms of domestic law (transformation[39]). In principle, the same thing should also be called for for the Community, so that it can take its place on the international scene on an equal footing. This requires modification of the Treaty.

Annex I - The consequences of the Maastricht judgment (not translated)

Die Tendenzen des Maastricht-Urteils setzen sich in den folgenden Beschlüssen und Urteilen, durchwegs aus dem Bereich der deutschen "Bananen"-Verfahren, fort:

a) im Beschluß des Bundesverfassungsgerichts vom 25.1.1995 (2 BvR 2689/94, 2 BvR 52/95; abgedruckt in Europarecht Heft 1/2 1995, S. 91)

b) im Beschluß des Bundesverfassungsgerichts vom 26.4.1995, 2 BvR 760/95 (abgedruckt in EuZW Heft 13/1995, S. 412)

c) im Beschluß([1]) des Finanzgerichts Hamburg vom 19.5.1995, IV 119/95 H (Firma T. /Hauptzollamt Hamburg-Jonas, abgedruckt in EuZW Heft 13 1995, S. 413)

d) im Beschluß des Bundesfinanzhofes vom 9.1.1996 (VII B 225/95, abgedruckt in EuZW Heft 4/1996, S. 126)

e) im Beschluß des Verwaltungsgerichts Frankfurt am Main vom 24.10.1996 (1 E 789/95 (V) u. 1 E 2949/93 (V), abgedruckt in EuZW Heft 6/1997, S. 183)([2])

f) im Beschluß vom 30.10.1996 (1 E 78/95 V), durch den das VG Frankfurt eine Vorlage an das Bundesverfassungsgericht veranlaßte.

Dabei machen sich einerseits äußerst bedenkliche Tendenzen bemerkbar, die auf die Überprüfung der Gültigkeit von Gemeinschaftsrechtsakten durch deutsche Gericht hinauslaufen, und andererseits wurden einstweilige Maßnahmen erlassen, die gemeinschaftsrechtswidrige Einfuhr von Bananen genehmigten. Besonders bedenklich ist der unter c) erwähnte Fall, in dem zwar eine mit der Verfahrenszahl C-182/95 beim EuGH anhängige Vorabentscheidungsfrage gestellt wurde, aber zugleich in Aussicht gestellt wurde, daß bei unbefriedigendem Ausgang des Vorabentscheidungsverfahrens die Sache dem Bundesverfassungsgericht vorgelegt werden würde. Das Bundesverfassungsgericht würde solcherart zum "Oberrichter" des Gerichtshofes der Europäischen Gemeinschaften. Diese Tendenzen sind allesamt zurückzuweisen.

Interesse ruft ferner das Bundesverfassungsgerichtsurteil vom 22.3.1995, 2 BvG 1/89 (abgedruckt in EuZW Heft 9 1995, S. 277) hervor, in dem festgestellt wird, daß die Bundesregierung durch die Art, in der sie am 3.10.1989 die Zustimmung zur Fernsehrichtlinie erklärt hatte, den Freistaat Bayern (und die dem Verfahren beigetretenen Länder in ihren Rechten aus Art. 70 I in Verbindung mit 24 I Grundgesetz sowie aus dem Grundsatz des bundesfreundlichen Verhaltens) verletzt hat. Wenn jedoch die Bundesregierung lediglich gemäß einem ihr aus dem EG-Vertrag zustehenden, keinen weiteren Bedingungen unterworfenem Recht einer Richtlinie zugestimmt hat und diesem Recht entgegenstehendes nationales Recht unangewendet zu bleiben hat, so ist nicht nachvollziehbar, wie die Bundesregierung einen Verstoß begangen haben könnte. Das Bundesverfassungsgericht konnte

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([1]) annullierte durch Bundesfinanzhof, Beschluß vom 22.8.1995 (VII B 153, 154, 167, 172/95), siehe Dokument KOM(96)600, S. 462 der deutschen Fassung unter Berufung auf: Recht der internationalen Wirtschaft 1995, S. 871-873;

([2]) Cf. den Kommentar von Albrecht Weber, Die Bananenmarktordnung unter Aufsicht des BVerfG?, EuZW Heft 6/1997, S. 165

also nur unter Außerachtlassung des Prinzips des Vorranges des Europarechts zu seinem Urteil gelangt sein.

Von Interesse ist auch der Beschluß des Bundesverfassungsgerichts vom 31.5.1995, 2 BvR 635/95 (abgedruckt in NJW 1995, Heft 34, S. 2216), der eine Verfassungsbeschwerde gegen das deutsche Zustimmungsgesetz vom 2.9.1994 (BGBl II, 2022) zum Beitrittsvertrag (Österreich, Finnland, Schweden) zum Gegenstand hatte. In der Verfassungsbeschwerde wurde im Lichte des Maßstabes des deutschen Verfassungsgrundsatzes der Gleichheit der Wahl (Art. 28 II 2, 38 I 2 Grundgesetz) die Zusammensetzung des Europäischen Parlaments angegriffen. Obwohl der deutsche Bevölkerungsanteil in der EU bei 22% liege, stelle Deutschland nur 16% der Abgeordneten. Die Verfassungsbeschwerde wurde zwar nicht zur Entscheidung angenommen; dennoch erörtert das Gericht *de facto* die Berechtigung dieser Beschwerde, wenn es ausführt, daß [die gegenwärtige Zusammensetzung] dem Charakter der Europäischen Union als eines Verbandes souveräner Mitgliedstaaten entspreche und [diese] mithin nicht an den Maßstäben gemessen werden könne, die nach dem Grundgesetz für die Wahl eines Parlaments in der Bundesrepublik Deutschland Geltung haben. Weiter führt das Bundesverfassungsgericht aus, daß die Europäische Union kein Staatsvolk habe und daß vom Europäischen Parlament im derzeitigen Stadium der Integration eine lediglich ergänzende demokratische Abstützung der Politik der Europäischen Union ausgehe.

Das einfachste Argument in diesem Zusammenhang, nämlich der Vorrang des Europarechts, wird vom Bundesverfassungsgericht leider nicht verwendet. Es wird *im Ergebnis* doch Europarecht anhand des Maßstabes des nationalen Verfassungsrechtes geprüft.

22 September

OPINION
(Rule 147)

for the Committee on Legal Affairs and Citizens' Rights

on the relationship between international public law, Community law and national constitutional law
(Rapporteur: Mr Alber)

Committee on Institutional Affairs

Draftsman: Mr Wolfgang Ullmann

PROCEDURE

At its meeting of 2 July 1997 the Committee on Institutional Affairs appointed Mr Wolfgang Ullmann draftsman.

It considered the draft opinion at its meeting of 22 September 1997.

At the last meeting it adopted the following conclusions by 16 votes to 2.

The following were pressent for the vote: De Giovanni, chairman; Corbett and Berthu, vice-chairmen; Ullmann (for Aglietta), draftsman; Barton, D'Andrea, Dankert (for Dury), B.Donnelly, Duhamel, Fabre-Aubrespy (for Bonde), Hager (for Vanhecke), Herzog, Lööw (for Spiers), Mendez de Vigo, Schäfer, Spaak, Tsatsos, Valverde (for Salafranca) and Voggenhuber.

EXPLANATORY STATEMENT

1. Mr Alber's draft report builds on the symposium on this subject held by the committee responsible on 21 and 22 June 1995. The background to the question is a development in the case-law of the Federal Republic of Germany which, following on the Federal Constitutional Court's judgment of 12 October 1993 on the Maastricht Treaty, seeks to determine whether individual acts of secondary Community legislation are covered by the German Law ratifying the European Treaties. The practical issue in these cases is the granting of import licences under the organization of the market in bananas; the legal issue is the scope of the basic legal protection of property and the freedom to exercise a profession.

2. This opinion cannot look at the many legal questions raised by the subject-matter of the report: that is the task of the committee responsible. Instead, the powers of the institutions and the institutional aspects of the hierarchy of norms will be examined, taking account of the fact that not all Member States have constitutional courts.

3. The draft report quite rightly focuses on the principle of the supremacy of Community law. This principle means, in particular, that

- courts and state bodies of the Member States may not apply provisions of national law where they conflict with Community law;
- the only criteria which the EU Court of Justice needs to use when deciding on the validity of Community legislation are the Treaties and recognized legal principles of Community law (in other words, national constitutional provisions, in particular basic rights, count as criteria for the Court of Justice only to the extent that they arise as Community basic rights out of the constitutional traditions common to the Member States).

4. Under this interpretation, as developed by the Court of Justice, the principle of the supremacy of Community law is of central importance for the unity and hence the effectiveness of Community law, which is one of the most important factors contributing to integration. However, that fact should not be twisted round to reach the false conclusion that Community law can take precedence over the fundamental constitutional structures of the Member States. On the contrary, respect for these structures is an expression of the European Union's general principle of subsidiarity.

5. The European Union is a Union of the states and peoples of Europe. Respect for the constitutional structures of its Member States, which it regards as equal, is a basic assumption of the EU. As the Commission representative in the case before the German Federal Constitutional Court which led to the Maastricht judgment explained, the Member States, when acting through the Council, avoid taking a qualified-majority decision overriding the vote of a Member State if the state can demonstrate that the decision would require an amendment to its constitution. Even the provision in new Article Fa of the Amsterdam Treaty for imposing sanctions is no exception to this principle, as it permits a decision (which must in any case be unanimous) overriding the vote of the state concerned only if that state has infringed its own constitutional principles.

6. It remains to be seen whether this practice can be reviewed by the European Court of Justice from the point of view of the duty of loyal cooperation. Militating against this is the fact that in order to carry out such a review, the Court of Justice would have to use national constitutional law as a criterion. Decisions taken within the Council could certainly not be reviewed by national courts. The fact that the principle of respect for the constitutional structures of the Member States is ensured by political rather than legal guarantees has not diminished its effectiveness throughout the 40-year history of the EC Treaty.

7. Another question is the extent to which national constitutional courts may review the national ratification law and judge whether its application mandate is effective for Community law. The fact that such a review cannot be ruled out from the outset under the current constitutional construction of the European Union emerges from the fact that the validity of Community law derives from treaties concluded under international law between Member States. These treaties are of a special kind, in that they create supranational institutions and powers. However, the fact that these treaties enter into force following their signature and ratification is in line with the general rules of international law.

8. The argument put forward in the draft report, to the effect that the basis for the validity of Community law might be the social consensus on the legislative powers of the Community institutions, contains some interesting points for future constitutional debate within the European Union. However, at the present stage of the history of European integration, which is characterized by a fairly rapid sequence of intergovernmental conferences, it will be difficult to show that, in the generally accepted view of what constitutes binding practice of the Union, the method of proceeding by means of the conclusion of treaties has been supplanted by original legislative powers belonging

to the Union. This does not mean, however, that the last word has been said on this matter as regards the future constitutional development of the Union.

9. Thus, at the current stage of integration, the special nature of Community law cannot stand in the way of a review of a law of assent by the constitutional court of a Member State where the constitution of the Member State allows a review of such laws by its constitutional court. The key issue is what are the potential consequences of the constitutional review of a ratification Law of a Member State on the basis of the constitution of this Member State, since the Member States have, by establishing the European Court of Justice, expressed the wish that the Court of Justice alone should be competent to interpret EC-related texts, which are the subject of a ratification law, and all acts based thereon. This means that a national constitutional court, acting within its own sphere of competence, can determine whether the national constitution entitles the national legislature to transfer tasks and powers to a supranational body on the scale which the activity of the institutions of the Union (including the Court of Justice) entails. Such a general review would not conflict with the principle of the supremacy of Community law.

10. However, the attempts by some national constitutional courts to review individual provisions of Community law in order to decide whether they are covered by a ratification law amounts to a scarcely-veiled challenge to the supremacy of Community law since it mixes the bodies of Community law and national law in an unacceptable fashion. The question of what the implementation mandate contained in the ratification law authorizes must, in the light of Article 219 of the EC Treaty, ultimately be judged, as far as the sphere of Community law is concerned, by the European Court of Justice([1]). The limits of the power of review enjoyed by national constitutional courts will be determined by whether the national constitution authorizes the national legislature to allow the emergence of a body of law delineated by the European Treaties and fleshed out by the Union institutions.

11. The power of review of national constitutional courts sketched out in this opinion allows complete freedom for further development of European integration so long as it takes place within the framework of the constitutional traditions common to the Member States and leaves the particular constitutional arrangements of individual Member States untouched. In the eventuality - a politically highly unlikely case but one which cannot be excluded with complete certainty as far as legal analysis is concerned - that, viewed as a whole the body of Community law goes beyond this framework, the constitutional courts of the Member States will, as appropriate, make use of the responsibility conferred upon them by their own constitutions.

CONCLUSIONS

12. In the light of the above, the Committee on Institutional Affairs calls on the committee responsible to emphasize the following points in its motion for a resolution:

(a) the importance of the supremacy of Community law as the fundamental principle of the Community legal order;

([1]) This may mean that the national constitutional court has to refer a question on the interpretation of Community law to the Court of Justice. However, it will itself be able to interpret those parts of the Union Treaty for which the Court of Justice is not competent.

(b) the principle deriving from Article N of the Union Treaty that the binding force of Community law in the Member States is established by the ratification laws of the Member States;

(c) the exclusive competence of the European Court of Justice under Articles 164-188 and 219 of the EC Treaty, to have the final say on the scope of the tasks and powers conferred upon the Community institutions;

(d) the continuing responsibility of the constitutional courts of the Member States to examine the way in which and the extent to which their national constitutions empower national legislatures to create a supranational legal order through a ratification law and to participate in this legal order by transferring their own rights of sovereignty as this legal order is fleshed out by acts of the Community institutions.

(e) recalls that European legislation should be, and increasingly is, adopted on the basis of approval both by the Council, representing the Member States, and by the Parliament, representing the electorate directly, thereby conferring dual legitimacy upon such legislation.

ENDNOTES (not translated)

1. EuGH. Urteil vom 15.7.1964, Rs 6/64, Flaminio Costa ./. E.N.E.L., Slg. 1964. S. 1251 ff.

2. EuGH. Urteil vom 17.12.1970, Rs. 11/70, Internationale Handelsgesellschaft mbH. Einfuhr- und Vorratsstelle für Getreide- und Futtermittel. Slg. 1964. S 1125 ff.
Siehe auch EuGH. Urteil vom 13.2.1969. Rs. 14/68. Walt Wilhelm ./. Bundeskartellamt. Slg. 1969. S. 1 ff. EuGH. Urteil vom 9.3.1978, Rs. 106/77, Staatliche Finanzverwaltung ./. S.p.A. Simmenthal . Slg. 1978. S. 629 ff. EuGH. Urteil vom 21.5.1987, Rs. 249.85. Albako Margarinefabrik Maria von der Linde ./. B.A.L.M. Slg 1987. S. 2345 ff.

3. Europäisches Parlament, Generaldirektion Wissenschaft, Arbeitsdokument W-6, "Das Verhältnis zwischen Völkerrecht, Gemeinschaftsrecht und dem Verfassungsrecht der Mitgliedstaaten" (1995), S. 24 ff.

4. Urteil des BVerfG vom 12.10.1993, 2 BvR 2134/92 und 2 BvR 2159/92, BverfGE 89, 155 ff. - Maastricht; Urteil des dänischen Obersten Gerichtshofs vom 12.10.1996, I/272/1994, Hanne Norup Carlsen u.a. ./. Poul Nyrup Rassmussen, EP-Dok. 219.606, S. 10 ff.
Vgl. Auch die in der Mitteilung an die Mitglieder des EP Nr. 9/95, EP-Dok. PE 213.532 zitierten, zumeist im Zusammenhang mit der Ratifikation des Vertrages von Maastricht in den Jahren 1992/1993 ergangenen Urteile, insbesondere High Court of Justice (England), Urteil vom 30.7.1993 und Tribunal Constitucional (Spanien).

5. BverfGE 89, 155, II auf S. 210 (C/II/3/b)

6. BverfGE 89, 155, II auf S. 213 (D)

7. BverfGE 89, 155, II auf S. 204 (C/II/2/e)

8. BverfGE 89, 155, II, auf S. 186 (C/I/2/b/2)

9. BVerfGE 89, 155, II, auf S. 181, 182 (C;C/I/1)

10. Willy Rothley, Europa alla tedesca/Das Bundesverfassungsgericht, das Grundgesetz, die Gemeinschaft; 17. F.I.D.E Kongreß, I, Le droit constitutionnel national et l´intégration européenne, S. 22-43, auf S. 28/29

11. Formont, Europa und nationales Verfassungsrecht nach dem Maastricht-Urteil - Kritische Bemerkungen, JZ 1993, 800 (802)

12. S. 182, 183, 184, 186, 187, 188, 189 des Urteils (C/I - C/II/1)

13. Op. Cit., S. 27

14. S. 186 des Urteils (C/I/2/b/2)

15. Z.B. S. 181, 183, 184, 186, 188, des Urteils (C/I - C/II/1)

16. BverfGE 89, 155, II auf S. 188 (C/I/3)

17. Ibidem

18. EuGH-Urteil vom 22.10.1987, Foto Frost, Rs 314/85, Slg. S. 4199, § 15; schon in ähnliche Richtung gehend EuGH vom 21.5.1987, Albako gegen BALM, Rs 249/85, Slg. S. 2345, §14 " [...]Dieses Ergebnis stünde im Widerspruch zur ständigen Rechtsprechung des Gerichtshofes, nach der die Gültigkeit von Rechtsakten der Gemeinschaft nur nach dem Gemeinschaftsrecht beurteilt werden kann."

19. Vgl die Überlegungen von Hans Kelsen, Reine Rechtslehre, 2. Auflage, Wien, 1960, S. 221 ff (Abschnitt "Die Grundnorm des Völkerrechtes")

20. Kelsen, Reine Rechtslehre², S. 221; noch deutlicher auf Seite 332: "Zwei Normenkomplexe des dynamischen Typus, wie die Völkerrechtsordnung und eine staatliche Rechtsordnung, können ein einheitliches System in der Weise bilden, daß sich die eine Ordnung als der anderen untergeordnet herausstellt, weil die eine eine Norm enthält, die die Erzeugung der Normen der anderen bestimmt und somit diese in jener ihren Geltungsgrund findet."

21. Kelsen, Reine Rechtslehre², S. 223

22. So Verdross/Sima: "Universelles Völkerrecht", 3. Auflage, Berlin 1984, Seite 547. Dies entspricht dem heute vorherrschenden gemäßigten Monismus mit Primat des Völkerrechts. Widersprüche zwischen dem staatlichen Recht und dem Völkerrecht werden nicht durch Nichtigkeit des staatlichen Rechts gelöst, sondern bewirken allenfalls Staatenverantwortlichkeit. Im gleichen Sinne Österreichisches Handbuch des Völkerrechts, 2. Aufl., S. 116 und Kelsen, Reine Rechtslehre, 2. Aufl., S. 331 sowie S. 336/337.

23. Zur Ausgestaltung des Machtbereiches kann Kelsen, op. cit., S. 337, wie folgt zitiert werden: "Das positive Völkerrecht bestimmt, daß Menschen als Regierungen eines Staates anzusehen sind, wenn sie von anderen Regierungen gleicher Art unabhängig und fähig sind, der Zwangsordnung, aufgrund derer sie fungieren, seitens der Menschen, deren Verhalten diese Zwangsordnung regelt, dauernden Gehorsam zu verschaffen, das heißt: wenn diese nur dem Völkerrecht untergeordnete, relativ zentralisierte Zwangsordnung im großen und ganzen wirksam ist, gleichgültig, auf welchem Wege die auf ihrer Grundlage als Regierungsorgan fungierenden Menschen zu ihrer Stellung gekommen sind. Das bedeutet, daß die von einer solchen Zwangsordnung konstituierte Gesellschaft ein Staat, die sie konstituierende Zwangsordnung eine gültige Rechtsordnung im Sinne des Völkerrechts ist." - In der Sache identisch: Kelsen, S. 221

24. Eine der hier verwendeten Formel "Ausgestaltung des Machtbereichs" ähnliche Überlegung verwendet Zuleeg, wenn er auf die - von ihm bejahte - Frage, ob die Gemeinschaft eine Verfassung habe, folgende Definitionskriterien des Begriffs Verfassung gibt: "Wenn die Minimalbedingungen erfüllt sind, hat das fragliche Gebilde eine Verfassung. Der unerläßliche Satz von Vorschiften betrifft die Einsetzung organisatorischer Strukturen, die einer gewissen Stabilität bedürfen. Die Vorschriften bestimmen, durch wen und wie Anordnungen gegeben werden, und ein solches Organisationsstatut ist in den Gründungsvertägen zu finden." Zuleeg, "European Constitution under Constitutional Constraints: The German Scenario", European Law Review, Vol. 22, No. 1, February 1997, p 19-34 auf Seite 21 (Übersetzung aus dem Englischen durch den Berichterstatter).

25. Vergleiche Kelsen, Reine Rechtslehre², S. 338

26. Diese Ausführungen stützen sich auf: Merkl, Adolf: "Prolegomena einer Theorie des rechtlichen Stufenbaus" in Verdross, Alfred [Hg.]: "Gesellschaft Staat und Recht - Untersuchungen zur Reinen Rechtslehre - Festschrift Hans Kelsen zum 50. Geburtstage gewidmet" Wien, Verlag Julius Springer, 1931; Walter, Robert: "Der Aufbau der Rechtsordung", 2. unveränderte Auflage, Wien, Manz, 1974

27. Die ersten Ansätze zu dieser Formel finden sich im schon zitierten Urteil Costa/ENEL, wo von der "Nichteinwendbarkeit" ("inopposabilité") von einseitigen, dem Gemeinschaftsrecht widersprechenden nationalen Maßnahmen die Rede ist. Zu erwähnen sind weiters die Urteile "Milchwerke Wöhrmann" (Rs 7-67, EuGH vom 4.4.1968, Slg. S. 260), "Internationale Handelsgesellschaft", EuGH vom 17.12.1970, Rs 11-70, Slg. S. 1125, "Walt Wilhelm" (EuGH vom 13.2.1969, Rs 14-68, Slg. S. 1, § 6), "Marimex" (EuGH vom 7.3.1972, Rs 84/71, Slg. S. 89, §5), Kommission gegen Frankreich (EuGH vom 4.4.1974, "Code du travail maritime", Rs 167-73, Slg, S. 359, § 35, 41 und §47), bestätigt zuletzt durch EuGH vom 13. März 1997, Rs C-197/96 (Kommission gegen Frankreich), ähnlich die EuGH-Urteile vom 6.5.1980, Rs 102/79 (Kommission /Belgien), § 10-12, und vom 23.5.1985, Rs 29/84 (Kommission/Deutschland), § 23 und 32.

28. [wenn auch in diesem Urteil, was in der späteren Rechtsprechung nicht wiederholt wurde, etwas weitergehend von einer Verhinderung des gültigen Zustandekommens von nachfolgenden, dem Gemeinschaftsrecht widersprechenden Rechtsakten die Rede war]

29. Z.B. in EuGH vom 21.5.1987, Rs 249/85 (Albako gegen BALM), Slg. S. 2345, § 17 oder EuGH vom 7.2.1991, Rs C-184/89 (Nimz) Slg. S. I-297, § 19 (betrifft Tarifverträge); zuletzt EuGH vom 13.3.1997, Rs C-358/95 (Tommaso Morellato/USL no 11 di Pordenone).

30. Urteil des Obersten Gerichtshofs (Dänemark) vom 12. August 1996, I/272/1994 [siehe Mitteilung an die Mitglieder Nr. 39/96, PE 219.606] sowie Urteil vom 30. Juni 1994 der 3. Kammer des Landgerichts Ost (Østre Landsret) Nr. B-1344-

31. Zur Rangordnung der Völkerrechtsquellen siehe Verdross, Völkerrecht, 5. Auflage, Wien 1964, S. 152-155

32. Cf EuGH vom 30.4.1974, Rs 181-73, Haegeman gegen Belgien, Slg. S. 449, § 5; EuGH vom 26.10.1982, Rs 104/81, Hauptzollamt Mainz gegen Kupferberg, Slg. S. 3641, § 13

33. Z.B. EuGH vom 19.3.1996, Rs C-25/94, Slg. S. I-1469 (FAO-Urteil) und
EuGH vom 9.8.1994, Rs C-327/91, Slg. S. I-3641 (Abschluß eines wettbewerbsrechtlichen Abkommens mit den USA)

34. Dieser Begriff wird von Bleckmann, Europarecht, 4. Auflage, Köln/Berlin/Bonn/München, 1985, S. 222, verwendet. Der EuGH geht in seinem Urteil Kupferberg, Rs 104/81, Slg. S. 3641, §17, zwar nur den halben Weg, aber doch immerhin ein gutes Stück in die hier beschriebene Richtung: "Nach den Grundsätzen des Völkerrechts bleibt es den Gemeinschaftsorganen, die für das Aushandeln und den Abschuß eines Abkommens mit einem dritten Land zuständig sind, unbenommen, mit diesem Land zu vereinbaren, welche Wirkungen die Bestimmungen des Abkommens in der internen Rechtsordnung der Vertragsparteien haben sollen."

35. EuGH vom 12.12.1972, Rs 21 und 24/72, International Fruit Company, Slg. S. 1219 ff, §18

36. Urteile vom 22.6.1989, Rs 70/87, Fediol, Slg. S. 1781 ff und vom 7.5.1991, §19, Rs 69/89, Nakajima, Slg. S. I-2069 ff, auf S. 2178; im selben Sinne auch die Schlußfolgerungen des Generalanwalts Elmer vom 24.6.97 zu Rs. C-364/95 und C-365/95 "T.Port", der u.a. zur Frage der Vereinbarkeit der Bananenmarktordnung mit dem GATT Stellung nimmt

37. Urteil vom 5.10.1994, Rs C-280/93, Deutschland gegen Rat, Slg. S. I-4973 ff, § 111

38. Bleckmann, ibid.

39. Bleckmann, ibid.

✓ S47 (12.11.97)

Pn.4575 4581
Pn.4576
Pn.4577
Pn.4578
Pn.4579
Pn.4580
Pn.4581

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4 November 1997

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SEANAD RECEIVED -5 NOV 1997 EIREANN

SEANAD EIREANN 12 NOV 1997 ON ORDER PAPER

Please arrange to have copies of the attached documents laid before both Houses of the Parliament :

1. — Decision on the proposal for a Council Decision concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 on the application of Part XI thereof.
2. — Decision on the proposal for a Council Decision concluding a Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia.
3. — Legislative resolution embodying Parliament's opinion on the proposal for a Council Decision concerning the conclusion of the Cooperation Agreement between the European Community and the Lao People's Democratic Republic.
4. — Legislative resolution embodying Parliament's opinion on the proposal for a Council Decision concerning the conclusion of the Protocol on the extension of the Cooperation Agreement between the European Community and Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand, member countries of the Association of South-East Asian Nations, to Vietnam.
5. — Resolution on the Commission communication on relations between the European Union and Canada.
6. — Resolution on the convergence criteria for Economic and Monetary Union and the funding of the social security systems in the Member States of the European Union.
7. — Resolution on the relationships between international law, Community law and the constitutional law of the Member States.

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Inter-Parliamentary Section

D65 (12.11.97) 4581

1) PN. 4575
2) PN. 4576
3) PN. 4577
4) PN. 4578
5) PN. 4579
6) PN. 4580
7) PN. 4581

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4 November 1997

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DÁIL ÉIREANN 12 NOV 1997 ON ORDER PAPER

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