# THE TREATY ON EUROPEAN UNION AND GERMAN CONSTITUTIONAL LAW: THE GERMAN CONSTITUTIONAL COURT'S DECISION OF OCTOBER 12, 1993, ON THE TREATY OF MAASTRICHT

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# I. INTRODUCTION

## *A. The Constitutional Court's Decision: Introductory and Comparative Remarks*

On November 1, 1993, the provisions for a European Union ("EU") set out in the Treaty of Maastricht entered into force.[1]

The Federal Republic of Germany was the last member state of the European Communities[2] to ratify the Treaty of Maastricht. This occurred in mid-October 1993, after the German Constitutional Court had upheld the constitutionality of the Treaty on October 12, 1993. The constitutionality of the Treaty of Maastricht had been the subject of challenges brought forward by several individual parties before the Constitutional Court.

The creation of the European Union,[3] the *single* most significant step forward to European integration, has had a broad impact on the constitutional law of the member states. In several member states of the EC, the national constitutional courts have had to decide the issue of conformity of the Treaty of Maastricht with the national constitutions: besides Germany, this was the case in France[4] and Spain.[5] One of the

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1. The Treaty on European Union (TEU), Feb. 7, 1992, 31 I.L.M. 247 (1992), [1992] 1 C.M.L.R. 719, signed at Maastricht in The Netherlands on February 7, 1992.

2. The European Communities comprise three separate Communities, set up by multilateral treaties between the same signatory states. The first Community to be created was the European Coal and Steel Community (ECSC), which was brought into being by the Treaty of Paris in April, 1951. In March, 1957, two further Communities, the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), were created by treaties signed in Rome. The EEC was renamed the European Community (EC) by the TEU, signed at Maastricht in February, 1992. The three Communities have in common the following supranational institutions: the European Parliament, the European Commission, the Council on Ministries, the European Court of Justice and the Court of Auditors.

3. The European Union, created by the TEU, rests upon three "pillars." The first pillar consists of the three Communities described *supra* in note 2; the second and third pillars consist of the new forms of intergovernmental cooperation between the member states introduced by the TEU, in the areas of justice and home affairs and a common foreign and security policy, respectively. The European Union is, however, distinct from the three Communities comprising its first pillar, though most commentators deny that it has any legal personality. The Union and the Communities have their institutions in common.

4. Judgment of Apr. 9, 1992 (Decision 92-308 DC), 1992 Recueil des décisions du Conseil constitutionnel [Rec. Con. const.] 55, [1993] 3 C.M.L.R. 345. *See also* Judgment of Sept. 2, 1992 (Decision 92-312), 1992 Rec. Con. const. 76. *See* Hélène Cohen, *Ratification processes of the Treaty on European Unity: France*, [18] 3 EUR. L. REV. 233 (1993). *See* Susan Wright, *The Constitutional Implications in France of the Maastricht Treaty*, 9 TUL. EUR. & CIV. L.F. 35 (1994).

5. *See* Francisco Rubio Llorente, *La Constitution española y el Tratado de Maastricht*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 253 (1992).

main issues in these cases was the introduction of the right to vote of citizens of other EC member states and their right to stand for election in municipal elections; both of these are rights were normally reserved to nationals by constitutional law. The courts also considered the constitutionality of the extent to which the European Union and the Communities, which are part of the Union, have had new competencies transferred to them by the Treaty. It is obvious that the establishment of the monetary union, now an activity of the EC, will deprive the member states of their sovereign rights in the area of monetary policy. The French Constitutional Council took this to be a significant limitation of the traditional scope of *souveraineté nationale*, and considered it necessary for the national Parliament to amend the Constitution by adding an explicit authorization for France to become a member of the European Union. In Germany, the Constitutional Court in its recent judgment[6] explicitly considered the domestic constitutional implications of Germany's membership in the European Union, and indicated which particular safeguards would have to be observed for the dynamic process of the European Union's development to conform to national constitutional principles.

### *B. The Constitutional Court's Jurisprudence on EC Law Before the Decision on the Treaty of Maastricht*

Before analyzing the new decision of the German Constitutional Court on the Treaty of Maastricht in the context of German constitutional law, it is useful to take a short look at the position this Court has taken in its jurisprudence on European Community law. The German Constitutional Court has, *on balance*, favoured European integration and accepted almost all the principles developed by the European Court of Justice. As to the tendency of Community Law to encroach on national constitutional law, however, some reservations have been put forward by the Court.

In comparison with the other constitutional courts in Europe, the German Court, followed by the Italian Constitutional Court, has had to decide the largest number of cases. Initially, the Italian Constitutional Court, unlike the German Court, was somewhat reticent to adapt national

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6. Judgment of Oct. 12, 1993 (Brunner v. The European Union Treaty), BVerfG 2d Sen. [Federal Constitutional Court, 2d Chamber] 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155, 1993 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3047, [1994] 1 C.M.L.R. 57.

constitutional thought to European concepts, but this reticence waned in later years.[7] As to the acceptance of legal developments on the Community side, the German Court turned out to be more prepared to defer to the Community than the French Constitutional Court[8] or the Spanish Court.[9]

In an early decision, the German Constitutional Court confirmed the *autonomy* of European Community law, clearly stating that it was neither traditional international law, nor internal state law. Community law was recognized as a separate source of law, resulting from an autonomous legal order.[10]

In later decisions, the Constitutional Court pointed out that, notwithstanding this autonomy, the German *Act of Approval* to the EC Treaties was the very reason for the validity of Community law in Germany.[11] The creation of the European Communities was seen to be based on both an internal and an external event. The external event was the conclusion of the international treaty founding the three Communities; the internal event was Germany's ratification of the treaty based on an Act of the federal Parliament (*Bundestag*).[12] The Act approved the EC Treaties, authorized the German president to perform

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7. *See, e.g.,* Judgment of June 8, 1984 (No. 170, S.p.A. Granital v. Amministrazione finanziaria), Corte cost., 1984 Giurisprudenza costituzionale 1098; an English translation appears in 21 COMMON MKT. L. REV. 756 (1984). See also discussion by R. Bin of Article 11 of the Italian Constitution in VEZIO CRISAFULLI & LIVIO PALADIN, COMMENTARIO BREVE ALLA COSTITUZIONE 69-76 (1990).

8. *See* Jean Boulouis, *Droit interne, droit communautaire, droit international*, 13 JOURNÉES DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE 23 (1991); Étienne Picard*, Droit administratif*, 67 Juris-Classeur Périodique I, No. 3645, at 43-44 (1993); François Hervouët, *Politique jurisprudentielle de la Cour de justice et des juridictions nationales: Réception du droit communautaire par le droit interne des États*, [1992] 5 REVUE DU DROIT PUBLIC 1257; LOUIS FAVOREU & LOÏC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 334-52 (6th ed. 1991).

9. *See* Judgment of February 14, 1991 (No. 28/1991), Tribunal Constitucional, 119 Boletín de Jurisprudencia Constitucional 15, 21 et seq. (1991); *see also* Judgment of December 12, 1991 (No. 236/1991), Tribunal Constitucional, 129 Boletín de Jurisprudencia Constitucional 125, 141 (1992).

10. Judgment of May 29, 1974, BVerfG 2d Sen., 37 BVerfGE 271, 278.

11. I.e., that it was the *Geltungsgrund* of Community law in Germany [Important German legal terms are italicized]. S*ee id*. at 280; Judgment of June 9, 1971, BVerfG 2d Sen., 31 BVerfGE 145, 174; Judgment of Oct. 22, 1986, BVerfG 2d Sen., 73 BVerfGE 339, 374-75, [1987] 3 C.M.L.R. 225, 256-57.

12. *See* Act of Approval of the EEC Treaty, 1957 Bundesgesetzblatt {BGBl] II 766; Act of Approval of the Euratom Treaty, 1957 BGBl II 1014; Act of Approval of the European Coal and Steel Community Treaty, 1952 BGBl II 447.

the formal act of ratification, and at the same time transferred, on the basis of Article 24, Section 1 GG,[13] all competencies mentioned in the EC Treaties to the European Communities. The Act of Approval is an internal law and therefore subject to constitutional review by the German Constitutional Court.

The Constitutional Court also accepted another fundamental quality of European Community law, namely its so-called *direct applicability*. This means that Community law becomes binding law in the member states the moment it enters into force at the Community level. If EC Treaty provisions, or legislation adopted by the Community institutions (so-called derivative law), or provisions of international treaties concluded by the Communities, are worded in a sufficiently clear manner and do not require specific elaboration by further legislation, they must be directly applied by national institutions, authorities and tribunals.[14]

The German Constitutional Court accepted the direct applicability of Community law,[15] including even Community directives under Article 189, Section 3 of the EC Treaty.[16] This was not a simple step. It should be noted that a directive is adopted by the Community

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13. The German Constitution [hereinafter GG] is named the *Grundgesetz*, which literally means Basic Law. *See* translation in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) [All constitutional translations appearing here are from this source]. Article 24 GG states:

> (1) The Federation may by legislation transfer sovereign powers to international organizations.
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> (1a) Where the Länder have the right to exercise governmental powers and discharge governmental functions they may with the consent of the Federal Government transfer sovereign powers to transfrontier institutions in neighbouring regions.
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> (2) With a view to maintaining peace the Federation may become a party to a system of collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.
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> (3) For the purpose of setting international disputes the Federation shall accede to agreements providing for general, comprehensive and obligatory international arbitration.

14. Derivative law in the EC takes two essential forms: directives and regulations. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY (EC TREATY) art.189. Regulations are directly applicable in member states automatically and in their entirety, without any need for member state action, while directives require implementation by the enactment of domestic legislation.

15. Judgment of Oct. 18, 1967, BVerfG 1st Sen., 22 BVerfGE 293, 295; 31 BVerfGE at 173-74.

16. Judgment of Apr. 8, 1987 (*Kloppenburg*), BVerfG 2d Sen., 75 BVerfGE 223.

institutions and its contents may be more or less detailed. While a member state must implement the substance of the directive into internal law within a given time frame, it can freely choose the means and modalities of this introduction: often it is an act of the national Parliament that implements the directive into national law. If the directive is very detailed, the national legislator has virtually no discretionary powers. Community law only requires the national institutions to use effective means in order to guarantee the validity and applicability of Community directives. There are cases in which a directive was not introduced into the legal order of the member state within the time limit provided for in the directive. In such cases, the directive (when detailed enough) becomes directly applicable law in the internal legal order. This means that individuals can directly invoke the directive before national authorities or tribunals.

The direct applicability of a directive is not expressly provided for in the EC Treaty. Nonetheless, the jurisprudence of the European Court of Justice has affirmed the principle of direct effect as an appropriate sanction for a member state's failure to fulfill a Community duty.[17] Community law is therefore effective in the internal legal order, although the member state has not introduced it on its own. The German Constitutional Court adopted the view of the European Court of Justice and confirmed the direct applicability of a directive, though another important national court, the Federal Court of Finance, had taken a completely different position.[18]

Another very important area in the Court's constitutional jurisprudence has been the protection of fundamental rights. In 1974, in a famous case that became known as the *Solange I* decision, the Constitutional Court held that fundamental rights under the German constitution prevailed over Community law in Germany.[19] The reasoning was based on the fact that Community law does not contain a catalogue of specific fundamental rights as the German Constitution does. The Court stated that it would reconsider its view, if the Communities established such a catalogue of rights as part of Community law. Several years later, in the equally famous *Solange II* decision in 1986, the

17. Case 148/78, Pubblico Ministero v. Ratti, 1979 E.C.R. 1629 (European Court of Justice (ECJ)).

18. Judgment of July 16, 1981 (Case V B 51/80, Re Value Added Tax Directives), Bundesfinanzhof [German Federal Fiscal Court], [1982] 1 C.M.L.R. 527.

19. 37 BVerfGE 271.

Constitutional Court again had to concern itself with this question.[20] Although the Communities had not created a catalogue of this type in Community law, the German Constitutional Court was satisfied that the European Court of Justice had developed so-called general principles of Community law in its jurisprudence. In a long line of decisions, the European Court had continuously applied fundamental rights that appeared equivalent to those contained in the German Constitution.[21] The European Court of Justice had derived these general principles from the constitutional orders and constitutional traditions of the member states. Additionally, it had made reference to the European Convention on Human Rights and to other international instruments for the protection of fundamental rights in its jurisprudence. This appeared sufficient to the German Constitutional Court and it therefore stated, in *Solange II*, that Community law no longer needed to be reviewed as to its compliance with German fundamental rights. Adopted regulations and directives, as well as other actions taken by the Community institutions, were to be reviewed only against the standard of Community fundamental rights, i.e. with reference to the general principles of Community law. The court no longer saw a need for review with reference to German fundamental rights. In this context, however, the German Constitutional Court stated that the situation would change if the Community's high level of protection of fundamental rights were to be seriously diminished in the future jurisprudence of the European Court of Justice. Under this, albeit unlikely, scenario, the Constitutional Court would reopen its review.[22]

In *Solange I,* as well as in *Solange II,* the Court declared that German constitutional law did not permit the general principles of the constitutional order to be undermined. These general principles safeguard the protection of fundamental rights, the effective judicial protection of the individual, and such main aspects as the rule of law and federalism.[23]

20. 73 BVerfGE 339, [1987] 3 C.M.L.R. 225.
21. *Id.* at 379-81.
22. *Id.* at 387.
23. *Id.* at 375-76; 37 BVerfGE 271, 279-80.

## II. THE DECISION

### *A. The Starting Point of the German Constitutional Court's Reasoning: Article 38 of the German Constitution*

#### 1) The Procedure Before the Constitutional Court

The Constitutional Court did not review the Treaty of Maastricht as a whole, but only with respect to its compliance with Article 38 GG. The limited scope for review results from the fact the type of action was a constitutional complaint brought by individuals pursuant to Article 93, Section 1, Number 4a GG.[24] Such an action is only admissible where a plaintiff can claim the violation of a fundamental right guaranteed by the Constitution, or of one of the other rights given by articles expressly mentioned in Article 93, Section 1, Number 4a GG. One of these rights may be found in Article 38 GG, which safeguards an individual's right to participate in the election of the federal parliament. Once an action has been found to be admissible by these criteria, the Court's examination will be limited to this claim.

This does not mean that the Court's review was conducted in a very restricted manner. As will be discussed in greater detail below, Article 38 GG has important implications with respect to the democratic structure of the state. The crucial question was whether it was compatible with the principle of democracy, which is considered to be the basis of a modern state, for the German Parliament to have transferred a series of new competencies to the EC/EU. Had Parliament given up too many, maybe even unlimited, powers? Had it allowed Germany to become incorporated into a European state by this?

The Constitutional Court had to address these issues, carrying with it significant constitutional implications for Germany's membership in the European Union.

The plaintiffs before the Constitutional Court also submitted a series of other arguments denying the constitutionality of the Treaty of Maastricht. However, the Court found all these objections to be inadmissible, as they failed to establish either a breach of fundamental

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24. I.e., a *Verfassungsbeschwerde*. According to Article 93, Section 1, Number 4a GG, the Federal Constitutional Court shall rule "on constitutional complaints which may be filed by anybody claiming that one of their basic rights or one of their rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been violated by public authority."

rights, or a breach of any of the other rights cited in Article 93, Section 1, Number 4a GG. Thus, the Court's judgment focused on Article 38 GG.[25]

2) What is the Content of Article 38 GG?

Article 38 of the German Constitution reads as follows:

> (1) The members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people; they shall not be bound by any instructions, only by their conscience.
> (2) Anybody who has reached the age of eighteen is entitled to vote; anybody of majority age is eligible for election.
> (3) Details shall be the subject of a federal law.

In its first section, this article sets out the role of the elected members of the federal Parliament. They are to act as representatives of the people and are not bound by or subject to orders issued by a political party or any group within the electorate. As in all modern constitutions, this excludes the so-called "imperative mandate," in favour of the nonbinding "free mandate" of the elected representatives.[26] By means of this representation, the principle of popular sovereignty, explicitly required by Article 20, Section 2 GG[27] and a fundamental legal fact of modern constitutional orders, is realized through the process of electing

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25. 89 BVerfGE 155, 171-73, 181 et seq.; 1993 NJW 3047, 3048, 3050-58; [1994] 1 C.M.L.R. 57, 76-78, 84-107.

26. H. H. Klein, *Der Bundestag, in* 2 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 341, 374 (Josef Isensee & Paul Kirchhof eds., 1987); P. Badura *in* BONNER KOMMENTAR ZUM GRUNDGESETZ, art.38, marginal notes (mn.) 48 & 65.

27. Article 20 GG states:

> (1) The Federal Republic of Germany shall be a democratic and social federal state.
> (2) All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies.
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
> (4) All Germans have the right to resist anybody attempting to do away with this constitutional order, should no other remedy be possible.

the representatives.[28] The right to vote, i.e. the right to participate in determining the representatives that are to carry out the will of the people in Parliament, is laid down in Article 38 GG, which also spells out in its section 1 how this right to vote may be exercised: the voting process must be secret; everyone who meets the general requirements for voting must have the right to vote; the effect of each vote must be equal; the elector must directly determine the person who will represent the people in the Parliament.[29] The right to vote is one of fundamental importance, made evident by the fact that it is one of the rights protected by the Federal Constitutional Court. The question arose, however: In what way did the creation of the European Union violate a German citizen's right to vote and right to determine the representatives of the people?

3) Democratic Legitimation and Subdelegation of Powers to the European Union

In answer to this question, the Constitutional Court made it clear that implementing the principle of sovereignty of the people, by allowing for the exercise of the right to vote, means that all public functions must be legitimated by the people. The requirement of *democratic legitimation* is not satisfied merely by the act of voting for persons who are to act as representatives, but requires these representatives—and further representatives who are appointed by them, such as government, civil servants deriving their authority from government, judges who are appointed by state institutions—to be able to carry out the will of the people in all areas relevant to the people. This means that all of the state's activities must be submitted to a decision by the people, though entrusted to the representatives. Understood in this way, sovereignty of the people requires, in principle, full powers to undertake any action to be granted to these representatives.[30]

However, the people can authorize their representatives, i.e. Parliament, to subdelegate part of their powers, even essential parts, to external authorities. This subdelegation is legitimated by the people and

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28. E.-W. Böckenförde, *Demokratische Willensbildung, in* 2 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 29 (Josef Isensee & Paul Kirchhof eds., 1987).

29. P. Badura, *in* BONNER KOMMENTAR ZUM GRUNDGESETZ, *supra* note 26, Appendix to art.38, at 45; H. Meyer, *Wahlgrundsätze und Wahlverfahren, in* 2 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 270, s.38, mn. 1 (Josef Isensee & Paul Kirchhof eds., 1987).

30. 89 BVerfGE 155, 171-72, 182-84, 187; 1993 NJW 3047, 3048, 3050-51, 3052; [1994] 1 C.M.L.R. 57, 76-77, 84-86, 88-89.

thus conforms to the principle of sovereignty of the people, if the Constitution permits it. In particular, such an authorization can be found in the new Article 23 GG,[31] which allows Germany to become a member of the European Union. The article, which will be dealt with below in

31. Article 23 GG states:

> (1) With a view to establishing a united Europe the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by law with the consent of the Bundesrat. The establishment of the European Union as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of this Basic Law or make such amendments or supplements possible shall be subject to the provisions of paragraphs (2) and (3) of Article 79.
> (2) The Bundestag and, through the Bundesrat, the Länder shall be involved in matters concerning the European Union. The Federal Government shall inform the Bundestag and the Bundesrat comprehensively and as quickly as possible.
> (3) The Federal Government shall give the Bundestag the opportunity to state its opinion before participating in the legislative process of the European Union. The Federal Government shall take account of the opinion of the Bundestag in the negotiations. Details shall be the subject of a law.
> (4) The Bundesrat shall be involved in the decision-making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the Länder would be internally responsible.
> (5) Where in an area in which the Federation has exclusive legislative jurisdiction the interests of the Länder are affected or where in other respects the Federation has the right to legislate, the Federal Government shall take into account the opinion of the Bundesrat. Where essentially the legislative powers of the Länder, the establishment of their authorities of their administrative procedures are affected, the opinion of the Bundesrat shall be given due consideration in the decision-making process of the Federation; in this connection the responsibility of the Federation for the country as a whole shall be maintained. In matters which may lead to expenditure increases or revenue cuts for the Federation, the approval of the Federal Government shall be necessary.
> (6) Where essentially the exclusive legislative jurisdiction of the Länder is affected the exercise of the rights of the Federal Republic of Germany as a member state of the European Union shall be transferred by the Federation to a representative of the Länder designated by the Bundesrat. Those rights shall be exercised with the participation of and in agreement with the Federal Government; in this connection the responsibility of the Federation for the country as a whole shall be maintained.
> (7) Details regarding paragraphs (4) and (6) shall be subject of a law which shall require the consent of the Bundesrat.

*See also* Rainer Arnold, La loi fondamentale de la RFA et l'Union européene: le nouvel article 23 de la loi fondamentale, 45 REVUE INTERNATIONALE DE DROIT COMPARÉ 673 (1993).

more detail, has been added to the German Constitution as a *lex specialis* to Article 24 GG,[32] which is the traditional instrument permitting the creation of a supranational order. Both provisions are expressions of the people's fundamental will to achieve European integration, reflected in a Constitution as the basic consensus of society.[33] This is also laid down, in general terms, in the preamble to the German Constitution.[34]

The possibility of subdelegating the representative function of Parliament is not restricted to the internal order and to the creation of other branches of the state organization, i.e. the executive and the judiciary. The will of the people may also be carried out by representatives acting *outside* of the state, embodied in supranational authorities, such as the Council of Ministers in Brussels. The link between the German representatives in the Council and the German people is not interrupted—at least in the opinion of the Constitutional Court—by the fact that these representatives can be outvoted by a majority of representatives of the people of other member states.[35] But it has to be stressed that the Council of Ministers as a whole is an institution of the EC/EU and not a subdelegated organ of the people of Germany or those of other member states. The supranational legal order is an autonomous one,[36] and not a mere sum of individual national institutions.

4) Democratic Legitimation and Control by the People

According to the Constitutional Court, democratic legitimation must be conceived of in *two ways*: the people must have instituted *representatives*, directly[37] or indirectly,[38] in order for their function to be based upon the will of the people. In addition, their activities must be subject to the *control by the people*. This means that representatives must be accountable to the people, a mechanism realized by their responsibility to the national Parliament and, as to the supranational level, additionally

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32. *See* text of Article 24 GG, *supra* note 13.

33. U. SCHEUNER, DAS MEHRHEITSPRINZIP IN DER DEMOKRATIE 12, 54 (1973).

34. The Preamble of the German Constitution reads, in relevant part: "Animated by the resolve to serve world peace as an equal part of a united Europe, the German people have adopted, by virtue of their constituent powers, this Basic Law."

35. 89 BVerfGE 155, 182-83; 1993 NJW 3047, 3050-51; [1994] 1 C.M.L.R. 57, 84-85.

36. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 593 (ECJ).

37. By the election of the national Parliament.

38. By allowing Parliament to institute the executive and the judiciary, as well as the representatives in the EC/EU Council.

to the European Parliament, which also contains directly elected representatives of the German people.[39]

5) Democratic Legitimation and the Form of Subdelegation

A further element must be taken into account: in a case of subdelegation of the representative function, the requirement of democratic legitimation is satisfied only where the institution directly elected by the people, such as the national Parliament, decides on this subdelegation and where it can be determined, with a sufficient degree of precision, *what* is being subdelegated. This means that the act by which Parliament transfers competences of the member state to the EC/EU institutions must be *sufficiently clear* and list the areas of competence in which the supranational authorities may act.[40] On the other hand, it is obvious that in wording such a transfer, use will often have to be made of general terms and provisions with rather broad authorizations. This is particularly so in the case of supranational legislation, which, created as a common body of law between several states, cannot operate with sharply delineated competences, but must be based on a wide spread of powers. In this context, while the Constitutional Court stressed the requirement that the transfer had to be clear as to the matters transferred, it stated also that authorization for EC/EU institutions did not have to be as precise as it would have to be for national institutions.[41]

6) Democratic Legitimation and the Requirement of a Permanent Influence of the People on their Representatives in the EC/EU Council

According to the Constitutional Court's conception,[42] democratic legitimation refers to the creation of institutions with representatives exercising the sovereign's power, to their accountability to the people, and to the people's consent to these institutions (sub-)delegating their power within the framework determined by the people in the Constitution. In addition, the people and their representatives in the

39. 89 BVerfGE 155, 182-83, 187; 1993 NJW 3047, 3051-52; [1994] 1 C.M.L.R. 57, 84-85, 88-89.
40. 89 BVerfGE 155, 187-88; 1993 NJW 3047, 3051-53; [1994] 1 C.M.L.R. 57, 88-89.
41. 89 BVerfGE 155, 187; 1993 NJW 3047, 3052; [1994] 1 C.M.L.R. 57, 88-89.
42. 89 BVerfGE 155, 185-87; 1993 NJW 3047, 3051-52; [1994] 1 C.M.L.R. 57, 87-88.

national Parliament must be able to exert a *permanent influence* upon the exercise of power by the authorities in the supranational body.

The electorate itself exercises its influence upon its representatives' decision-making by means of the original process of electing them. In German constitutional law, there is no place for a spontaneous expression of the will of the people by means of a referendum or similar plebiscitarian actions,[43] as provided for in the constitutions of some of the member states of the European Union. It should be noted that even in these states a direct intervention of the people by means of a referendum, (e.g. as in France or in Spain),[44] can only occur with respect to internal state matters, and not with respect to supranational decision-making. The EC/EU Treaties reserve the competence to decide for the member states' representatives in the Council and, to a rather small extent, also for members of European Parliament. As far as Germany is concerned, it is evident that the people's influence on the exercise of internal state powers and external Community powers is formally limited to election day.[45] Public opinion obviously exerts a continuous and substantial controlling function, with regard to the national and the supranational representatives, in nonelection periods as well, so there is in fact some permanent influence of the people upon the latter.[46]

7) The Realization of Democratic Legitimation at the Supranational Level

(a) As a result of what has been said before, and as the Constitutional Court points out,[47] the principle of sovereignty of the people requires indispensably that the type of democratic legitimation described above be realized at the supranational level. Therefore, the aforementioned link existing between decision-making institutions and the people must be maintained in the European Union.

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43. P. Krause, *Verfassungsrechtliche Möglichkeiten unmittelbarer Demokratie, in* 2 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 314, s.39, mn. 13 (Josef Isensee & Paul Kirchhof eds., 1987).

44. *See* Article 11 of the French Constitution and Articles 87 and 92 (concerning the consultative referendum) of the Spanish Constitution.

45. 89 BVerfGE 155, 187; 1993 NJW 3047, 3052; [1994] 1 C.M.L.R. 57, 88-89.

46. *See* Judgment of May 3, 1966, BVerfG 1st Sen., 20 BVerfGE 45, 46, 97.

47. 89 BVerfGE 155, 184-87; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 86-88.

However, the view of the Constitutional Court is not a parochial one. The scheme of democratic legitimation outlined above refers to the situation existing at present, where the people of a member state constitute the primary basis of sovereignty. But this can change, and a state's people may be substituted by the whole of the member states' people or even by a European Union's people.[48] The Constitutional Court accepted a *functional approach* for the solution of the problem. This means that the function of the principle of sovereignty of the people as a *general* constitutional requirement of a modern society may be realized at the supranational level, and that it is not necessary under German constitutional law for the link of legitimation between the people and its representatives in the EC/EU to be permanently preserved as a link exclusively with the *German* people. Generally, there is a need for a democratic basis of decision-making with a binding effect for the people. The requirement of democratic legitimation is satisfied if such a link exists between the institutions of the EC/EU and the people of the member states participating in the Union.

As to its methodology, the Constitutional Court can be seen to adhere to the view established in its *Eurocontrol*[49] and *Solange II*[50] decisions, that it is necessary for the supranational structures to be *functionally* equivalent to the structures existing in the internal constitutional orders. In these decisions, the Court found such structures to conform to German constitutional law, in that the Constitution's own principles[51] reappear at the supranational level, albeit in forms and modalities specific to this level and derived from the supranational order.[52]

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48. 89 BVerfGE 155, 184-88; 1993 NJW 3047, 3051-53; [1994] 1 C.M.L.R. 57, 86-89.

49. Judgment of June 23, 1981 (*Eurocontrol I*), BVerfG 2d Sen., 58 BVerfGE 1.

50. *See supra* note 20.

51. Such as the principle of effective judicial protection against encroachments on liberty and property laid down in Article 19, Section 4 GG, or the protection of fundamental rights, as provided for in Articles 1 through 17 GG. Article 19, Section 4 GG states:

> Where rights are violated by public authority the person affected shall have recourse to law. In so far as no other jurisdiction has been established such recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by the provisions of this paragraph.

52. *See* Rainer Arnold, *La tutela dei diritti fondamentali nella Costituzione tedesca e l'influenza del diritto comunitario: Alcune considerazioni generali*, 2 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 1157 (1992).

(b) The Constitutional Court's view that constitutional conformity is obtained by creating *functional parallels* between the national and the supranational systems is related to the concept of evolution. The process of integration is a dynamic one, and the rules relevant to this process are evolutionary.[53] The more integration and supranationalization occur, the more national constitutional concepts have to be substituted by emerging supranational ones, which must, of course, conform *functionally* to the principal ideas upon which the national concepts are based. This evolutionary process of integration is evidenced by the fact that the provisions of the EC/EU Treaties, which embody competences to act, are construed so as to increase their effectiveness (the principle of *effet utile*), a method of construction which enables the width and depth of these competences to be adapted to the integration process.[54]

A similar process is also deemed to apply to the institutions. The European Parliament appears to be the institution most exposed to evolution. While it did not always have an abundance of competences, the Parliament has obtained an increasingly significant status: for about 15 years it has been directly elected, its legislative functions have been enlarged by the Single European Act in 1987, and it was granted by the Treaty of Maastricht the power of joint decision-making with the Council of Ministers in a number of very important areas.[55]

(c) The substantial increase of the EC/EU's competences brought about by the Treaty of Maastricht and the enhanced participation in decision-making of the European Parliament also mean that the link between the people and the acting institutions is gradually shifting from one with the national legislatures to one with the European Parliament. The principle of democracy, which is the fundamental principle of the German Constitution and to which the link referred to above is essential, will thus increasingly be realized in supranational terms.

At present, it is the Council of Ministers in which legislative power is still concentrated. As a consequence, the functions of the

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53. HANS PETER IPSEN, EUROPÄISCHES GEMEINSCHAFTSRECHT § 1/12 (1972).

54. Case 9/70, Franz Grad v. Finanzamt Traunstein, 1970 E.C.R. 825 (ECJ); TREVOR C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY 203 (2d ed. 1988); T. OPPERMANN, EUROPARECHT, mn. 441 (1991).

55. *See* EC TREATY art.189a; HARTLEY, *supra* note 54, at 23 et seq.; DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 19 et seq., 31 et seq. (3d ed. 1993).

European Parliament are not yet sufficient to legitimate it.[56] Therefore, it is primarily the *national Parliaments* that must be considered the institutions that constitute the necessary link between the people and the individual ministers as members of the Council. In the view of the German Constitutional Court[57] at least, this democratic legitimation is a partial one, the line of legitimation existing between the national member of the Council and the people of the member state by mediation of the national Parliament. Of course, the European Parliament also acquires legitimation by virtue of being directly elected by the people of the member states, but for the time being, this second line of legitimation is an inferior one—which is why the Constitutional Court speaks of an "additional" legitimation by the European Parliament. More precisely, the degree of participation of the European Parliament in European decision-making will determine how powerful its legitimating function will be.

However, the process of shifting the legitimating function from national legislatures to the European Parliament is not a purely legal one. The *social cohesion* of those who participate in the European Parliament's election is of the utmost importance. The principle of sovereignty of the people can only be fully realized when the people have the possibility of interacting politically and socially by freely exchanging ideas, and by co-existing in different social groups.[58] Democracy is necessarily based on such free social and political interaction. It is only by virtue of such interaction that the sovereignty of the people can be entrusted to representatives, as the determination and appointment of representatives must be realized by means of a true democratic process. The will of the people is manifold, and depends on the basic, and possibly very diverse, attitudes of individuals in a society. Representation must reflect this diversity, as the representatives must be able to formulate positions in Parliament which correspond to this manifold will. In this sense, the existence of several parties, each of them articulating the differing social and political views in a pre-parliamentary phase, as well as free communication, are essential for the articulation of the people's

56. HARTLEY, *supra* note 54, at 24.

57. 89 BVerfGE 155, 182-83; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 84-85.

58. 89 BVerfGE 155, 185; 1993 NJW 3047, 3049-50; [1994] 1 C.M.L.R. 57, 87 (with reference to former statements in Judgment of Aug. 17, 1956, BVerfG 1st Sen., 5 BVerfGE 85, 135, 198, 205 and in Judgment of May 14, 1985, BVerfG 1st Sen., 69 BVerfGE 315, 344).

sovereign will.[59] The actions of the representatives must not only be formally legitimated by the people, but must be undertaken in conditions which are democratic in substance. Thus, legitimation by the people does not only have a formal aspect,[60] but also a substantive one.[61]

This process of interaction in society, which is perceived as essential for democracy and thus for the substantial aspect of legitimation, does not yet exist at the European level. The European Union lacks a common political society. Of course, some first steps have been taken in this direction: the new text of the EC Treaty[62] favours the formation of transnational parties;[63] a forum of European public opinion is gradually evolving, as issues concerning the whole of Europe are increasingly discussed, the number of such issues having been considerably increased by the TEU; far-reaching changes[64] are taking place, which affect the interests of individuals in all the member states and which will deepen the consciousness of increased political linkage to one another; there is, above all, the creation of a Union citizenship, which the Constitutional Court has indicated to be of utmost importance in this context.[65]

In the future, when a degree of social cohesion sufficient for democratic interaction has been obtained, the primary democratic legitimation will shift from the national to the European level.[66] Of course, the existence of sufficient social cohesion does not imply the elimination of cultural diversity: it has been recognized that such elimination would be undesirable and contrary to the principles and activities of the EU.[67] However, this does not prevent an evolution towards social and political homogeneity in European matters, i.e. in matters which fall under the competence of the supranational institutions.

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59. 89 BVerfGE 155, 186-87; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 87-88.

60. The requirement of delegation by, and responsibility to, the people.

61. Democracy must not remain a merely formal principle: 89 BVerfGE 155, 185; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 87; the substantive requirement corresponding to the formal requirement in *supra* note 60, is that of delegation and control on a democratic basis.

62. *See* EC TREATY art.138a.

63. Currently there are only transnational parliamentary groups of the members of the European Parliament.

64. Such as the plans for the introduction of a common currency.

65. *See* EC TREATY arts. 8 through 8c and 89 BVerfGE 155, 184; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 86-87.

66. Accepted by the Constitutional Court, 89 BVerfGE 155, 185; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 87.

67. *See* TEU art.F.

(d) *In summary*, two types of democratic legitimation are conceivable: the present flow of legitimation from the people to the national Parliament and from there to the supranational authorities, and in the future, a link between a common political society of all the peoples of the member states, the European Parliament, and the Council of Ministers. Both of these types of democratic legitimation are acceptable under Article 38 GG and satisfy the principles of the sovereignty of the people and the separation of powers, as required by the German Constitution.

8) Democracy and the Transfer of Legislative Competences to the European Union

In the current state of European integration, the national Parliament constitutes the primary medium of democratic legitimation for the supranational authorities as well. Aside from this function, the national Parliament, the institution primarily responsible for the practice of democracy, must have a *substantial range of competences*.[68] The transfer of national competences from the national Parliament to the supranational level is therefore limited by the principle of democracy.

This limit cannot be exceeded, not even on the basis of Article 23 GG. Both Article 24 GG, which is the former constitutional basis for the transfer of competences to the European Communities, and Article 23 GG, which is relevant for the European Union, are limited by Article 79, Section 3 GG.[69] This provision, which is applicable to the case of constitutional reform, excludes several of the basic principles of the constitutional order from revision. The principle of democracy is one of

68. 89 BVerfGE 155, 186; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 87-88.

69. Express reference is made to these provisions by Article 23, Section 1 GG, *see supra* note 31 and Article 24 GG, *see supra* note 13. Article 79 GG states:

> (1) This Basic Law may be amended only by a law expressly modifying or supplementing its text. In respect of international treaties concerning a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or serving the defence of the Federal Republic, it shall be sufficient, in order to make clear that the provisions of this Basic Law and to confine the supplement to such clarification.
>
> (2) Such law must be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.
>
> (3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited.

them. This safeguard against excessive reforms is also applicable to the constitutional process of integration. The transfer of competences to the European Union is bound by these fundamental principles; as a consequence the mechanism installed by the European Union must respect the concept of democracy.

However, it should be emphasized again[70] that the national concept of democracy envisioning the national Parliament as the primary place of action may shift, through a process of evolution, to the supranational concept with the European Parliament as the new battlefield.

### *B. Summary Analysis of the Constitutional Issues Addressed by the Constitutional Court*

The objective of this first part has been to analyze the constitutional starting point chosen by the German Constitutional Court for the fundamental problems arising in connection with the democratic legitimation of EC/EU decision-making. The principal issues[71] can be summarized as follows:

- Democratic legitimation is the authorization of representatives to carry out the will of the people (delegation in a formal sense leading to *formal* legitimation).
- Determination of representatives must be realized by means of a true democratic process (which is the substantial basis of delegation leading to *substantial* legitimation).
- Democratic legitimation may be ensured by delegation of the power to act from the people to the national Parliament, effected by the elections, but also by subdelegation to supranational institutions, effected by Parliament itself (subdelegation in a formal sense).
- This subdelegation itself must be authorized by the people; authorization is granted by the Constitution (in particular by Article 23 GG which permits Germany

70. *See supra* note 66.
71. *See supra* Part II.A, pp. 101-112.

to participate in founding the European Union and to become a member of it).

- The act of subdelegation must be clear and list all the competences delegated to the supranational institution (democratic legitimation of subdelegation is provided only for those matters which are described by the national Parliament representing the people).
- Currently, democratic legitimation of the supranational institutions is derived primarily from the member states' Parliaments; additional, though only ancillary, democratic legitimation is realized through the European Parliament. In the future, a shift of this link of legitimation from national to European Parliament appears possible.
- The national Parliament must retain its competence to act on a sufficiently broad range of matters; otherwise, it would only have formal competence, but no substantial possibility to represent the people (requirement of substantial representation).

## III. DETAILED ANALYSIS OF THE TREATY OF MAASTRICHT'S CONFORMITY TO THE CONSTITUTIONAL REQUIREMENTS

### *A. The Specific Problems under Examination*

On the basis of the constitutional principle of democracy discussed above, the Constitutional Court had to address the following specific problems.

*First*: The first constitutional problem concerned the *legal nature of the European Union*, and the impact of the European Union's legal nature upon the national Parliament as a medium of democratic legitimation. If the European Union is considered a *European State*, it must be determined whether the German Constitution authorizes the national Parliament to subdelegate power to a state.[72] In other words, is it constitutional for the national Parliament, which is granted the power to institute further representatives,[73] also to subdelegate the carrying out of

72. 89 BVerfGE 155, 184; 1993 NJW 3047, 3050; [1994] 1 C.M.L.R. 57, 86-87; *see also* P.M. HUBER, MAASTRICHT-EIN STAATSSTREICH? 27-29, 49 (1993).

73. Such as the government, the judiciary and also the supranational institutions.

the will of the people to a new sovereign state? This is quite doubtful, particularly when considered in light of constitutional provisions such as Article 79 GG,[74] which establishes limits even on constitutional reform, ensuring that the main structural elements of the German Federal Republic, laid down in Article 20 GG,[75] cannot be modified. Entering into a new state would bring about an interruption of the existing line of legitimation which links the people of an existing state (essentially determined in its structure by Article 20 GG) with this state's institutions. This could not be achieved through constitutional reform or, as is in question here, by creating, on the basis of Article 23 GG, an organization such as the European Union.

*Second*: The second constitutional problem pertains to the role of the national Parliament and its link of legitimation to the newly created European Union. According to the principle of democracy, it is necessary for all delegated and subdelegated powers to remain substantially within the reach of the people. This means that the national Parliament as the directly instituted trustee of the people's power cannot be permitted to lose its link to the trustee of the subdelegated power. Thus, the question must be addressed, whether the member state's national Parliament has a significant influence on creating the European Union and on the Union's current activity.[76]

*Third*: As indicated above, the subdelegation of powers by the national Parliament must be clearly enumerated in the instrument of subdelegation. No unlimited or broad transfer of powers to a further fiduciary is constitutionally permissible. Parliament is responsible to the people for transferring sovereign power. Only if the national Parliament is both conscious of what it is transferring to supranational institutions and is able to indicate clearly to the people what it has transferred, is it meeting its obligation towards the people. This is an essential element of democratic legitimation. As a consequence, the competences attributed to the European Union (and to the European Communities) must be clearly described in the Treaty of Maastricht. Any provision of the Treaty that is too broadly drafted or that attributes poorly defined powers to the supranational organs, would contravene this constitutional requirement.

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74. *See* Article 79 GG, *supra* note 69.
75. *See* text of Article 20 GG, *supra* note 27.
76. 89 BVerfGE 155, 184-185; 1993 NJW 3047, 3050; [1994] 1 C.M.L.R. 57, 86-87.

The Court's review therefore had to include the key sections of the TEU containing the transfer of broad competences. Particular scrutiny had to be applied to the provisions in the TEU of a dynamic or evolutionary nature. In this context, the review was of particularly great importance to the development of the Monetary Union and its operation.[77]

*Fourth*: It also had to be examined whether the TEU leaves a substantial range of competences to the German Parliament. The importance of this question has already been outlined above.[78]

*Fifth*: Finally, the question arose whether the principle of democracy, which is at present realized at a twofold level, namely, primarily at the national, and additionally at the supranational, level, includes a constitutional duty to make supranational institutions progressively more democratic.[79] With the social evolution towards a European political society, the task of achieving democratic legitimation must increasingly be accomplished by the institutions of the European Union themselves.

### *B. Is the European Union a Federal State?*

The constitutional relevance of this question has already been outlined. Is the European Union a state? Obviously, its nomenclature of a "union" does not exclude it from having the qualities of a state. Clear criteria for classifying an entity as a state, however, have not yet been developed.

The traditional "theory of the three elements" (i.e. that the three constituent elements of a state are a territory, a people and an organization)[80] does not offer any assistance in this context.

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77. 89 BVerfGE 155, 182-184, 187, 190; 1993 NJW 3047, 3050-53; [1994] 1 C.M.L.R. 57, 88-92.

78. *See supra* Part II.A.8, pp. 112-113.

79. *See* Article 23, Section 1 GG, *supra* note 31, and the Constitutional Court decision, 89 BVerfGE 155, 192; 1993 NJW 3047, 3053; [1994] 1 C.M.L.R. 57, 92, pointing out that such a constitutional duty, arising out of the same article, exists with respect to the realization of subsidiarity.

80. *See* James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93 (1976-77).

1) Is a Common Union People Necessary for a State?

In the argument denying state quality, the Constitutional Court makes particular reference to the lack of a common Union people.[81] Since it is common knowledge that there are states with not one but several, and even many, peoples on their territory, it does not appear right for the Constitutional Court to attach importance to the nonexistence of a European state's people. It is obvious that, even in a European Federal State, there will be no European people, since one of the main differences, a variety of languages, will be maintained. The fact that statehood does not require a single people is shown by the example of Switzerland, where three languages and three cultural traditions exist in one state, and by many other examples as well.

It is important to the Constitutional Court that social interaction be realizable[82] notwithstanding linguistic differences in Europe. As an example, there are the working languages in the European institutions, on the basis of which communication is facilitated. The agreement upon one or more official languages would be sufficient to ensure homogeneity and the required social interaction in a future state. Further, modern communication techniques are transnational in nature and can overcome language barriers. Other factors such as tradition and cultural attitudes do not differ to such a degree that a common basis for homogeneity could not be found. The common origins in Roman civilization, including its legal system, have established a foundation, implicit or explicit, in life and attitudes all over Europe.[83] This could be useful as the basis of a new state community. The social and cultural cohesion of the European peoples appears sufficient to build a common state in the near future.

2) Union Territory and Organization

As to the other two elements required by the theory referred to above, i.e. territory and organization, it cannot be said that these elements are lacking. Of course, there is no common territory in the traditional sense. But the abolition of frontiers in the common internal market[84] and the acceptance of, for instance, the direct validity and

81. 89 BVerfGE 155, 188; 1993 NJW 3047, 3055; [1994] 1 C.M.L.R. 57, 89.

82. *See supra* note 58.

83. *See* Reinhard Zimmermann, *Das römisch-kanonische ius Commune als Grundlage europäischer Rechtseinheit, in* 1 JURISTENZEITUNG 8 (1992).

84. *See* EC TREATY art.7a, para.2.

binding force of Community law and its application in all member states, are criteria that would define a Community territory in a modern sense.

With respect to organization, there exists a very powerful structure for a European state in Brussels, Strasbourg and Luxembourg. The continued parallel existence of member states' governments does not rule out the possibility of the third requirement being met. Indeed, state quality apparently depends more upon the degree to which competences are concentrated at the Union level and the extent to which Union rules with binding force are imposed upon the members. As far as this aspect is concerned, it should be noted that Community law takes direct effect in the member states and has binding force, overruling national legal provisions to the contrary. These characteristics of Community law have been accepted by the national Constitutional Courts,[85] and they are qualities of Union law as well.[86] They must be taken into account in answering the question whether the European Union constitutes a state.

3) The Competence Argument

In the discussion of the European Union's state quality, the competence argument is of particular importance.[87] A state is deemed to have unlimited power to create competences for itself.

It is clear that the European Union has no global competence on any matter, but is bound to the *principle of compétence d'attribution*.[88] This means that the Union can only act on the basis of explicit or implicit competences attributed it by the member states of the EC/EU Treaties. There is neither a global authorization for the Union to act, nor the power to create competences independently of the will of the member states. Therefore, the argument for the state quality of the European Union, suggesting that this quality is derived from the potential power to create competences, which enables the Union to enlarge its present range of competences without limit, must also be denied: neither Article 235 of the EC Treaty,[89] which permits the Council of the EC to act with respect

85. *See supra* notes 7-9.

86. See the treatment of the issue of whether community law takes priority over national constitutional law by the European Court of Justice in Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide, 1970 E.C.R. 1125 (ECJ).

87. *See* 89 BVerfGE 155, 182-83; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 84-85.

88. *See infra* Part III.C.5.a, pp. 41-56.

89. Article 235 EC TREATY states:

to areas necessary for economic integration without an explicit grant of a competence by the EC Treaty, as long as there is unanimity, nor Article F, Section 3 of the TEU,[90] gives the Union a right to dispose unilaterally of the competences which so far remain vested in the member states.

Even as to competences that *have* been attributed to the Union, it is important to consider the new *principle of subsidiarity*,[91] laid down—albeit in somewhat unclear terms—in Article 3b of the EC Treaty.[92]

The principle of subsidiarity asserts that the supranational entity will not necessarily regulate in all of its areas of competence, but refrain from regulation in areas where it is not necessary for the entity itself to become involved. The supranational institutions are only permitted to act where a member state is unable to deal effectively with a matter, because of its transnational nature or because the problem cannot adequately be resolved without legal provisions equally applicable throughout the Communities.

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> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

90. Article F TEU states:

> 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
> 2. The 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.
> 3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

91. *See* A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992); H. Lecheler, DAS SUBSIDIARITÄTSPRINZIP: STRUKTURPRINZIP EINER EUROPÄISCHEN UNION (1993).

92. Article 3b EC TREATY states:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed 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.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Of course, this principle has no effect on matters where the Communities have exclusive competence. The extent to which such competences exist is, however, in question because the EC/EU institutions adhere to a much broader concept than do the member states.[93] This will certainly be one of the principal issues that the European Court of Justice will be called upon to decide. Sensitivity to the member states' need to preserve their traditional role, and to the need to promote the application of subsidiarity, is at present relatively high; it is, therefore, highly probable that the Court of Justice, whose jurisprudence has great influence on the legal positions taken by the member states, will establish effective balancing mechanisms in this area. This would mean that the Court will take the principle of subsidiarity seriously and will not hinder its practical implementation. In our context, a widely applied principle of subsidiarity would constitute an argument against a finding that the European Union has state structure, even though this conclusion may not hold true under all circumstances.

There are other aspects, too, that indicate that there is not yet a European State. First, the authors of the Treaty of Maastricht were not yet willing to transfer the competence regarding *general economic policy* to the Union.[94] This is merely a matter of coordination, which can be advanced by appropriate agreement in the Council of Ministers. However, it is important to note that broad, though specific, areas of economic policy making, such as foreign trade, industrial and regional policy etc., have already been transferred to the supranational institutions.[95]

The second aspect pertains to *foreign policy* and to matters of the *internal order*, such as the police, the justice system, the treatment of refugees etc. In these areas, the Union can only act unanimously, which is more characteristic of an intergovernmental rather than a state mechanism.[96] It appears important, however, that majority rule can be introduced by a unanimous decision for so-called common actions in foreign policy,[97] but it is crucial that the default rule is one requiring

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93. See the opinion of the EC Commission in FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 14, 1992, at 8.

94. *See* Martin Seidel, *Zur Verfassung der Europäischen Gemeinschaft nach Maastricht*, *in* EUROPARECHT 125, 135 (decentralized economic policy), 136-137 (transition to a state) (1992).

95. *See* EC TREATY arts.110-115, 130 or 130a-130e.

96. *See* TEU arts.J & K.

97. *See* TEU art.J.3.

unanimity. If the member states were to agree to introduce the principle of majority rule in the traditional areas of foreign and internal policy, one could well speak of a transition to a state in this context.

4) The Member States as "Masters of the Treaty"

Another consideration, which is often put forward in discussions of the legal nature of the European Union, and used by the Constitutional Court as an argument against state quality, is that the member states have remained "*masters of the Treaty*."[98] This means that it depends on the will of the member states whether to maintain or dissolve the Union's order. It also means that, in the final analysis, the existence and the binding force of the supranational legal order are based upon the political will of the member states. Against this, it should be remembered that the EC Treaty as well as the Treaty of Union were concluded for an unlimited time.[99] It is true that a joint decision by all the member states could repeal the perpetuity clauses of the Treaties;[100] but this is factually inconceivable, and such a repeal is implicitly excluded by the Treaties, which aim at progressively intensive integration and recognize the *de facto* irreversibility of the dynamic process of integration.[101]

As far as the binding force of EC/EU law is concerned, the German Constitutional Court[102] referred to the role of the Act of Approval to the EC and Union Treaties adopted by the German Parliament. As mentioned above, in a series of judgments[103] the Court has concluded from the existence of this Act that EC/EU law is valid in

98. 89 BVerfGE 155, 190; 1993 NJW 3047, 3052, [1994] 1 C.M.L.R. 57, 90-91.

99. As opposed to the Treaty on the European Coal and Steel Community, which was concluded for only fifty years; however, this has turned out to be equivalent to an unlimited period, as permanent renewal is inevitable in light of the irreversible process of economic integration.

100. It should be stressed that an exercise of the common will, and not the will of one or several of the member states, would be required to wind up the instituted order. But this does not negate the state quality of the European Union; in fact, it could be likened to the intention of an existing *state* to give up its existence and incorporate itself into another state (e.g. as was recently done in Germany). Rainer Arnold, LA UNIFICACIÓN ALEMANA: ESTUDIOS SOBRE DERECHO ALEMÁN Y EUROPEO (1993). If all the members (Regions, *Länder*, provinces etc.) of a federal state were to agree to do so, the central power could not legitimately refuse.

101. *See* Ulrich Everling, *Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht*, *in* VÖLKERRECHT ALS RECHTSORDNUNG-INTERNATIONALE GERICHTSBARKEIT-MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOSLER 173 (Rudolf Bernhardt et al. eds., 1983).

102. 89 BVerfGE 155, 174-75; 1993 NJW 3047, 3049; [1994] 1 C.M.L.R. 57, 78-79.

103. *See supra* note 11

Germany and directly applicable there. The Court has stated further that, contrary to the position taken by the European Court of Justice, the priority of EC/EU law over German law is also based on this Act. In the Maastricht decision, therefore, the Constitutional Court's reference to the Act of Approval led it to conclude that Germany has maintained "the quality of a sovereign state by own law,"[104] i.e., that, as a result of the Act of Approval, the state quality of Germany has not been affected by its membership in the EC/EU, a position that is accepted by the majority of German legal academics.[105]

This view is not necessarily, however, an argument against the state quality of the European Union. Even in federal state systems, approving the transfer of competences to a central institution by the member states may be regarded as the ultimate legitimation for the binding force of federal law for the member states, for its direct effect, and for its priority over member states' law.

5) The Preservation of the "National Identity" of the Member States

Finally, the Court makes reference to Article F, Section 1 of the TEU, which declares that the Union shall respect the "national identity of its member states."[106] It should be noted that this clause is intended as a safeguard against the discretionary use of powers by EC/EU institutions to overrule the basic elements of the member states' constitutions, and so protect the cultural and social peculiarities of the states, i.e. the characteristic elements of a society. The clause also acts as a safeguard against undue equalization caused by an overly intrusive unification of legal rules, or by Community acts interfering with the essential features of the state. But the need to protect national identity in this sense would exist even if the member states were parts of a federal state, in which members are regarded as having state quality, as is the case in Germany. Thus, Article F, Section 1 of the TEU is only of limited importance in the discussion of the state quality of the European Union.

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104. 89 BVerfGE 155, 190; 1993 NJW 3047, 3052; [1994] 1 C.M.L.R. 57, 90-91.

105. *See* H. Steinberger, *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft*, *in* 50 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 9 (1991).

106. 89 BVerfGE 155, 184; 1993 NJW 3047, 3050; [1994] 1 C.M.L.R. 57, 86-87. *See* TEU art.F.

6) Denial of State Quality with an Option for the Future

It follows from the discussion above that the European Union may not qualify as a state (if it is at all possible to define a state) notwithstanding the fact that it is a highly integrated organization. There appears to be a fluid transition from such an organization to what is commonly called a state. If majority rule were generally applied to decisions involving a common foreign policy,[107] the point of transition would be reached. In the area of foreign affairs in particular, which would make increasing use of majority rule, this transition could be effected. In that case, one could conceivably say: "I awoke and found myself in a European state."

By denying the state quality of the European Union, the German Constitutional Court did not intend to create an obstacle hindering further integration towards a European state. The Court does not rule out the possibility that the term "European Union" may legally be conceived of as a vehicle to further integration, leading to a common state or to another organized entity.[108] The Constitutional Court was limited to examining the legal case at hand and did not intend to hinder future evolution towards a European state. This would have to be an outright political process, depending on the will of the people and not one subject to directives from a court.

The Court might have had to decide whether the formation of a state was covered by the procedures governing constitutional reform, or whether it was also necessary to ask the people. In the Maastricht decision, there was no need for the Court to comment on this, as it denied the state quality of the European Union *a priori*. In the future, the question will certainly arise whether a further transfer of competences to the European Union, or even a process of evolution progressing by tacit agreement and in accordance with Union practice, could lead to a European state. When this question arises, it will be difficult to determine clearly the moment at which the consent of the people is required. Since it is improbable that the point of transition to a state could be defined in advance, perhaps the involvement of the people will have to be made possible immediately before the official declaration of a European State, in full awareness that the actual transition had already

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107. But not necessarily those involving internal matters, for which coordination is provided by the TEU.

108. 89 BVerfGE 155, 185; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 87.

been accomplished some time ago. The reverse process could also be used, namely, to obtain the consent of the people in advance to new areas of competence being transferred to the Union level, perhaps before the date of the first revision of the TEU, currently scheduled for 1996. If this were done, the transition to a state resulting from the additional concentration of competences at the Union level would be covered by the anticipated consent.[109]

### *C. The Role of German Parliament and the Constitutionality of the Treaty of Maastricht*

#### 1) Disputed Issues

As has been pointed out, one of the constitutional requirements is that German Parliament must not lose too many of its competences. An excessive transfer of competences would not be covered by Article 38 GG, even when those provisions of the German Constitution that authorize German participation in the pursuit of European integration have been taken into account.

There are *four points* relevant in this context:[110]

*First*, the *formal mode* of creating the European Union and becoming a member of it, as well as modifying the Union's status and enlarging its competences;

*second*, the *scope of participation* of the German Parliament in current decisions made at the Union level;

*third*, the influence of Parliament on German members of the EC/EU institutions; in the federal government, which sends representatives to the Council of Ministers, this influence is exercised through the *creation* of government and by the *control* of it; and

*fourth*, the fact that EC/EU institutions exercise only those competences that have been *specifically transferred* to them, implies that the European Union can act only according to those powers that have actually and consciously been entrusted to it by the national Parliaments.

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109. *See* HUBER, *supra* note 72, at 48-49.

110. With respect to the issues listed *supra* in Part II.B, pp. 22-23, the *first* point corresponds to the third and sixth issues, the *second* point to the seventh issue, the *third* point to the sixth issue, and the *fourth* point to the fifth issue.

2) Constitutional Provisions Concerning the Mode of Creation and Participation in the EU

Regarding the *first point*, Parliament possesses the important power to establish the European Union[111] and to consent to the further development of the Union through an increase in its institutions and competences.

Unlike the new Article 23 GG, Article 24 GG authorized the creation of the European Communities and an enlargement of their powers by an internal Act of Parliament[112] to be adopted by the federal Parliament in the same manner as any other *ordinary* act, i.e. by a simple majority of the votes. Therefore, it is not surprising that the role of the Federal Council (*Bundesrat*), namely, that of cooperating with Parliament in the creation and adoption of federal acts, was the same as that provided for with respect to ordinary laws. The European Union, however, signifies a new stage, in which European integration has now been placed on a more solid constitutional basis: creation and enlargement now require a qualified majority, meaning a two-thirds majority of the members of the federal Parliament, as well as a two-thirds majority of the votes in the Federal Council.[113]

The significance of this change is evident: for a long time now, legal academics have stressed the importance of a transfer of internal competences to the European Communities, and have regarded this as a substantive modification of the Constitution.[114] This position has been unanimously accepted by German academics and jurists, on the ground that a shifting of competences from the internal to the supranational order was a modification established by the German Constitution in those provisions enumerating the competences of the Federation.[115] Notwithstanding this, the old procedure provided for by Article 24 GG differed from the special procedure required in the case of a modification of the Constitution, as set out in Article 79 GG. This difference has now been eliminated by the new version of Article 23, Section 1 GG.

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111. As happened on November 1, 1993.

112. Accompanied by an international treaty. *See* Article 24 GG, *supra* note 13.

113. *See* Article 23, Section 1 GG, *supra* note 31; Article 79, Section 2 GG, *supra* note 69.

114. *See* C. Tomuschat, *Materielle Verfassungsänderung*, *in* BONNER KOMMENTAR ZUM GRUNDGESETZ, art.24, mn. 34.

115. In particular, Articles 73 through 75 GG, listing (inter alia) the Federation's areas of exclusive legislation, the areas of concurrent legislation, and the areas of federal framework legislation.

The new version refers explicitly to Article 79 GG as far as majority requirements are concerned. However, another procedural requirement of Article 79 GG has not been integrated into Article 23 GG: even if the majority requirements are met, a *formal* modification of the German Constitution is only valid if the amendment implementing the modification is placed directly and explicitly into the text of the Constitution.[116] The reason for this is that it should be plain for everyone to see what the actual wording of the Constitution is. This also means that modifications of the Constitution are always general ones, which lead to a modification of the text itself. This procedural requirement seeks to avoid an undermining of the Constitution through exceptions created by particular cases, which could otherwise be effected through Acts of Parliament adopted by a two-thirds majority. Therefore, the Constitution cannot be revised or modified, except in an abstract, general way. The practice of suspending the Constitution in certain cases was not unusual in the Weimar period,[117] and must be considered one of the factors that weakened democracy and the rule of law at that time. Understandably, the post-war Constitution sought to avoid this deficiency by adopting, among others, the procedural requirement referred to above.

It did not appear necessary, for the purpose of shifting competences from the internal order to the European Union, to insist upon this procedural requirement. It would also have been very difficult to distinguish clearly between those areas of competence that have remained with the member states and those which have been completely or partially transferred to the supranational institutions. It is important to note that competences are exclusively allocated to the Union only to a certain extent. The major part of the competences of the Union must be exercised by Union and member states together, utilizing a complex procedure. Therefore, it is possible that member states remain competent in given areas until such time as the Union decides to act in these areas. As a result, it would not have been possible to indicate the transition of competences clearly in the text of the Constitution.

Furthermore, it is important to take into account the newly developed principle of subsidiarity, which reserves the competence to act on a matter to the member states to the degree that they are able to deal appropriately with the matter, while the Union can only act on the same

116. *See* Article 79, Section 1 GG, *supra* note 69.

117. E.R. HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE, vol. VI, 421-27 (1981).

topic if it appears necessary from the Union's point of view. A clearly defined distribution of competences in the numerous areas of competence to which the principle of subsidiarity is applicable, is thus obviously not possible. As a consequence, the requirement of Article 79, Section 1 GG, that the *text* of the German Constitution must be modified, cannot be met in the case of the European Union. It was, therefore, realistic for Article 23 GG not to introduce this requirement for modifications affecting the competence of the European Union.

As a result, the German Parliament is involved, pursuant to Article 23, Section 1 GG, in the fundamental events concerning the institutional life of the European Union. Without the consent of Parliament, neither the creation of the Union would have been possible nor its further development realizable. Therefore, democratic legitimation is not infringed upon in this respect.[118]

Article 23, Section 1 GG also refers to Article 79, Section 3 GG, which enumerates the principles of the German constitutional order which may not be subject to constitutional reform. These consist of the principle of the dignity of human beings, and the principles of the rule of law, democracy, republic, social state and federalism, including the existence of the *Länder* in Germany and their effective participation in the federal legislative process. Through this mechanism, these formative principles embodied in Articles 1[119] and 20 GG are exempted from elimination or substantial modification, even if authorized by a qualified majority. The Constitutional Court does, however, allow limitations upon these principles to be made to a certain degree: while the principle of human dignity is completely out of the reach of constitutional reform, limitations upon the other principles may occur, if they are indispensable and the limitation does not infringe upon the very core of the principle.[120]

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118. 89 BVerfGE 155, 190-91; 1993 NJW 3047, 3052-53; [1994] 1 C.M.L.R. 57, 90-92.

119. Article 1 GG states:

> (1) The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.
>
> (2) The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world.
>
> (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

120. Judgment of Dec. 15, 1970, BVerfG 2d Sen., 30 BVerfGE 1, 29.

It has already been noted that, in the application of Article 24 GG, the limitations laid down by Article 79, Section 3 GG could not be transgressed. Therefore, no transfer of competences could be effected, or action on the part of the Community tolerated, that would lead to a conflict with these principles. The new wording of Article 23 GG adopts this position and therefore makes formal reference to Article 79, Section 3 GG for its area of application.

3) The Participation of the German Parliament in the EC/EU's Decision-Making

The *second point* that the Constitutional Court considered important in evaluating the Treaty of Maastricht's compatibility with the German Constitution concerned the requirement that the German Parliament may not be excluded from the process of decision-making in the Council of Ministers, the institution that is at the heart of the EC/EU system with regard to decision-making powers.[121]

In the Council, representatives of the member states act together pursuant to procedural rules laid down by the Treaties. Therefore, they proceed on the bases of unanimity, or of a simple or a qualified majority, depending upon the matter being decided. From the supranational point of view, the only significant question is what positions these representatives take in the Council: whether, and if so to what extent, their position in the Council is determined by authorities in their home state does not matter under EC/EU law. National constitutional law may provide that the representative of the member state must take into account, or even must follow, a position determined by national institutions. This is what the new Article 23 GG implements, by establishing a complex mechanism for making Parliament's or the Federal Council's[122] positions effective at the EC/EU level.[123] This addresses a long-standing demand of the *Länder*, made to ensure that German federalism can survive in a European Union and that effective instruments are created for this purpose.

The degree of influence of the federal Parliament is not as high as that of the *Länder*. In addition to the federal government's obligation to inform Parliament as soon as possible of all matters concerning the

121. 89 BVerfGE 155, 187-88; 1993 NJW 3047, 3051; [1994] 1 C.M.L.R. 57, 88-89.

122. The Federal Council's position is determined by the majority of the *Länder*.

123. As to this mechanism, see note 31.

European Union, Article 23, Section 3 GG provides that Parliament has the right to state its position concerning such a matter. This position must be *taken into account* by the government, i.e. by the representative in Brussels (a member of the national government) when acting in the Council. But the position adopted by German Parliament is not legally binding upon the representative. He must bear Parliament's position in mind during negotiations in Brussels but needs to conform to it only whenever possible, i.e. if no other position emerges from the arguments of the representatives of the other member states, which is superior when evaluated from a European perspective.

In contrast, the degree of influence exerted by the Federal Council may be greater. In the area of the former competences of the *Federation* itself, the position of the Federal Council is comparable to that of the German Parliament. However, where matters pertaining to the *Länder* are concerned,[124] the position of the Federal Council must be *decisively taken into account*[125] by the representative in Brussels. A specific law defines this: in matters pertaining to such *Länder* competences, if there are divergent views between the federal representative in Brussels and the Federal Council, the latter may confirm its position by a two-thirds majority vote, and thereby create a strict obligation for the representative in Brussels to adhere to this position.

The third, and highest, degree of participation of the *Länder* in Union decision-making is provided for in areas in which the Länder have *exclusive* competence, such as culture, health etc. One of the *Länder* is chosen and its representative assumes the role of leader of the German delegation to the Council of Ministers, instead of a representative of the federal Government.[126] Obviously, this person will attempt to carry out the will of the *Länder* in its purest form, though coordination has to take place in consultation with the federal representative, who is also a member of the delegation. In such cases, the *Länder* will not prevail if important federal interests, especially with respect to matters of foreign and security policy, are threatened.

This mechanism shows that the federal Parliament has some influence upon decision-making in the Council of Ministers, although its

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124. But which are not matters that are within the exclusive competence of the *Länder*. *See* text of Article 23 GG, *supra* note 31.

125. The German term for this is *maßgeblich berücksichtigen*.

126. *See* Article 23, Section 6 GG, *supra* note 31.

resolutions do not have a strictly binding effect on the federal representative in Brussels and certainly could not have this effect due to the principle of separation of powers. However, it must be kept in mind that an absolute majority of the members of the German Parliament could overthrow the Chancellor by means of a motion of censure, which would in turn bring down the whole government, including the representative in Brussels.

Therefore, the German Parliament has a strong indirect influence upon the negotiating position of the federal representative in Brussels, resulting from the threat of a vote of censure and the representative's political responsibility. As a result, the lack of a legal obligation to adhere to the position of the German Parliament is compensated for by creating a factual obligation, a phenomenon which may also be observed with respect to the *third point*.

4) Determination and Control of the EC/EU Representative by the Federal Parliament

The Constitutional Court points out that the federal Parliament also has an indirect influence on the process of selecting the federal representatives to be sent to Brussels. This is part of the so-called creating function of Parliament,[127] which must elect the Chancellor with an absolute majority of its members. The Chancellor then chooses those of his ministers who will act as the federal representatives at the Union's Council sessions, which will depend upon the matter being dealt with in Brussels.

This creating function of Parliament has a positive and a negative aspect. The positive aspect has just been described; the negative aspect arises out of the possibility of overthrowing the Chancellor, and with him the government, as a means of control by Parliament. Of course, the creating and controlling functions of Parliament are exercised by the very majority that forms the government; as a rule, this majority also backs all government actions, including those taken by the representatives in Brussels. In most cases, the majority is composed of a coalition of different parties. Since the electoral system and the constitutional provisions establishing a government are aimed at ensuring the government's stability, it is not very likely that it will be overthrown

127. Klein, *supra* note 26, at 355.

during its term of office, except where the coalition is dissolved; and as this is most detrimental to all members of the coalition, this rarely occurs.[128] The influence of the federal Parliament upon the decision-making process in Brussels is thus exercised *de facto* by the majority in Parliament, much in the same way as parliamentary control in internal matters. If a reference to the influence of the Parliament means the influence of the majority in Parliament, then it may be affirmed that such influence exists, subject, of course, to the reservation that in modern parliamentary systems, the exercise of influence by parties is increasingly concentrated in their leading elites. Parliamentary control by the opposition consists largely of public debates on the activities of ministers in Brussels and of pointing out the government's responsibility for their actions. Control of this type calls upon the public, particularly upon the electorate, and aspires to achieve political change through future elections. Applying this test, it can be said that the functions of creating and controlling the EC/EU representatives of Germany still remain in the hands of the German Parliament.[129]

5) Limited Powers of the EC/EU Transferred by Federal Parliament

This leads to the question whether the provisions in the Treaty of Union are sufficiently clear and precise in their wording to constitute a legally certain basis for the further development of the EC/EU. In other words, it must be determined whether the decision-making power of the EC/EU is based on clearly limited competences, or whether it has been granted a legally or factually unlimited power to act. Under the constitutional requirements of democratic legitimation, as discussed above, the German Parliament may transfer national competences in specific areas, but is not permitted to abandon its role as the medium of democratic legitimation by effecting an *unlimited* shift of power to the EC/EU.[130]

It would also be considered unconstitutional if the EC/EU were to obtain the power to absorb whatever competences it wanted from the member states *by its own will*. It is the role of the national Parliament alone to decide the matters on which the EC/EU can act by expressly

128. *See* WILHELM MÖSSLE, REGIERUNGSFUNKTIONEN DES PARLAMENTS 116-22 (1986).

129. 89 BVerfGE 155, 186-87; 1993 NJW 3047, 3050-51; [1994] 1 C.M.L.R. 57, 87-88.

130. 89 BVerfGE 155, 171-172, 182-184; 1993 NJW 3047, 3048, 3049, 3050-52; [1994] 1 C.M.L.R. 57, 84-85, 88-90.

granting specific competences to it.[131] The power to decide which entity is competent, whether the member state or the EC/EU, is required to remain in the hands of the national Parliament. This is a question, not only of democratic legitimation, but also of the continuing existence of national sovereignty and even of determining the legal nature of the European Union, as indicated below.

(a) The Principle of *Compétence d'Attribution*

Under Community law as well as Union law, the supranational institutions are only permitted to act on the basis of specific legal authorization. These institutions may act only where a competence is attributed to them by the member states (the principle of *compétence d'attribution*[132]). Article 4, Section 1 of the EC Treaty establishes this fundamental principle, which is an expression of the member states' sovereignty. Article E of the TEU repeats this concept and extends it to measures taken under the Treaty of Union itself.[133]

The authorizations in the Treaties refer to substantive matters and often also to certain procedures. The supranational institutions must respect both the form and the substance of the authorization.

As has already been pointed out, the fringes of the substantive authorizations are often large, and the authorizations have furthermore been dynamically interpreted by the European Court of Justice, in order to enable the objectives of the grants of competence to be effectively met (principle of *effet utile*).[134]

The general principles placed at the beginning of the EC Treaty are not specific authorizations that provide a sufficient legal basis for acts by the institutions, but merely describe the objectives to be pursued by the Community. The same is true also of Article B of the TEU. However, these principles are legally binding and not mere political

131. 89 BVerfGE 155, 183-184; 1993 NJW 3047, 3051-52; [1994] 1 C.M.L.R. 57, 89-90. *See* Huber, *supra* note 72, at 29 et seq.

132. Cases 188-190/80, France, Italy and U.K. v. Commission, 1982 E.C.R. 2545 (ECJ); MICHAEL SCHWEITZER & WALDEMAR HUMMER, EUROPARECHT 108 (3d ed. 1990).

133. *See also* 89 BVerfGE 155, 189; 1993 NJW 3047, 3052; [1994] 1 C.M.L.R. 57, 90.

134. *See* HARTLEY, *supra* note 54, at 202-03. *See supra* text accompanying note 54.

declarations, and the authorizations in the Treaties must be interpreted in this light.[135]

When Community institutions adopt a measure,[136] the legal basis pursuant to which it has been adopted must be evident from the measure itself. This must be objectively determinable, and there must be a clear relationship between the measure and its legal basis, because of the rule of law, a fundamental principle in Community as well as Union law. The natural and legal persons concerned, other institutions, and the member states must have the option of bringing an action against this measure before the European Court of Justice, because the rule of law requires the efficiency of judicial protection.[137] If a measure does not conform with its legal basis, it can be declared void by the European Court of Justice pursuant to Article 173 of the EC Treaty.

In practice, the institution sometimes fails to choose the right one of several possible authorizations set out in the EC Treaty. If the procedure chosen differs from the one that should have been chosen, the measure can be annulled. The European Parliament has launched several complaints of violation of its procedural rights of participation in the legislative process before the European Court of Justice. In these cases, if the Council had based its measure on the correct article of the Treaty, Parliament would have been much more involved. Instead of merely being heard, it would have been able to exercise its rights under the so-called cooperation procedure pursuant to Article 189c of the EC Treaty.[138]

The legal problems arising in these cases result from the complexity of the matters governed by the Community Treaties. The problem in such cases is not one of determining which competences the member states have transferred to the Communities, but how to define the authorizations set out in the Treaties and how to include related matters in the grant of competences. The criteria for distinguishing the competences horizontally have not yet been clearly established. Therefore, it is rather

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135. Eberhard Grabitz, *in* 1 KOMMENTAR ZUM EWG-VERTRAG, arts.2 & 3, mn. 1 (Eberhard Grabitz ed., 1992); Case 27/74, Demag v. Finanzamt Duisburg-Süd, 1974 E.C.R. 1037, 1057 (ECJ).

136. Such as a regulation, a directive or a decision pursuant to Article 189 EC TREATY, *supra* note 14.

137. *See* Case 68/86, U.K. v. Council, 1988 E.C.R. 855 (ECJ).

138. Case 302/87, Parliament v. Council (*Comitology*), 1988 E.C.R. 5615 (ECJ); Case 70/88, Parliament v. Council (*Chernobyl*), 1991 E.C.R. 4529 (ECJ).

difficult to decide, for instance, whether a measure is legitimated by the competence for environmental protection (Articles 130r through 130t of the EC Treaty) or by the authorization to harmonize rules in connection with the internal market (Article 100a of the EC Treaty).[139]

There is also much uncertainty concerning the distribution of competences between the EC/EU and member states. A large number of matters do not fall into the exclusive competence of the supranational institutions, but may be subject to complementary regulation by the member states. Neither written law nor case law nor academic doctrine have developed a clear system for the distribution of competences. Several decisions of the European Court of Justice have declared matters such as external commercial policy-making an exclusive area for Community action. Recently, the Commission has listed other areas of exclusive competence, such as all matters connected to fundamental freedoms[140] and certain other areas, which have been contested by the member states.[141] There is an urgent need for the European Court of Justice to provide clarification, as the introduction of the principle of subsidiarity has made this topic increasingly important.

(b) The Constitutional Court's Position on the Competence Question

First of all, the Court held that the principle of *compétence d'attribution* was reaffirmed in the TEU. Secondly, it confirmed that therefore there could not be an unlimited competence, even on the basis of Article F, Section 3 of the TEU; thirdly, it stated that Union and Community competences may not be increased by the supranational bodies themselves, but only by the formal procedure of modifying the Treaties, an event which depends on the will of the member states,[142] and finally, that the most important political process initiated by the TEU, namely the creation of a Monetary Union, is set out in a sufficiently clear manner in the TEU.[143]

It should be stressed that the aspects examined by the Constitutional Court are parts of the question whether the federal

139. Case 300/89, Commission v. Council (*Titanium Dioxide*), 1991 E.C.R. 2867 (ECJ).
140. The free movement of goods, persons, services and capital.
141. *See* FRANKFURTER ALLGEMEINE ZEITUNG, *supra* note 93.
142. 89 BVerfGE 155, 188-99; 1993 NJW 3047, 3052-54; [1994] 1 C.M.L.R. 57, 89-98.
143. 89 BVerfGE 155, 199-207; 1993 NJW 3047, 3055-56; [1994] 1 C.M.L.R. 57, 98-103.

Parliament has willingly given up limited areas of competence, or whether it has provided a "blank cheque" authorization which would be incompatible with Constitutional Law.

As far as the *compétence d'attribution* is concerned, the new text of the EC Treaty, as modified by the Treaty of Union, explicitly refers to this principle in the newly allocated areas of competence that are laid down in Article 3a (concerning the coordination of economic and monetary policy) and in Articles 4a and 4b (the latter dealing with the European system of Central Banks and the European Investment Bank). These provisions repeat what is set out in general terms in Article 4 of the EC Treaty for those specific areas and institutions.[144]

(c) *Compétence d'Attribution* and the Subsidiarity Rule

The *compétence d'attribution* rule is also connected to the subsidiarity mechanism in Article 3b[145] of the EC Treaty. Section 1 of this provision contains a dual test, which is the basis of subsidiarity: the Community will act within the limits of the competences attributed to it by this Treaty, and it will adhere to the scope of the competences enumerated in this Treaty. There is nothing new in this first section—it explicitly repeats what was formerly derived from Article 4 of the EC Treaty, and what had been unanimously accepted by legal academic writers. It appears appropriate for this principle to be articulated again as the basis of the new principle of subsidiarity (laid down in Article 3b, Sections 2 & 3 of the EC Treaty).[146]

Article 3b, Section 3 of the EC Treaty[147] reveals another aspect of the *compétence d'attribution* rule. This section expressly states that no measure of the Community shall exceed, in its degree of regulatory effect, the extent necessary to meet the objectives of the EC Treaty. This means that the Community may not act *ultra vires*, either in substance or in form. Of course, the supranational institutions must have the discretionary power to decide what is necessary in the sense of what is an appropriate regulation of the given matter. The term "necessary" means a competence to be realized in this manner by the competent institution. Consequently, Article 3b, Section 3 of the EC Treaty prohibits the

144. 89 BVerfGE 155, 189-90; 1993 NJW 3047, 3052; [1994] 1 C.M.L.R. 57, 90-91.
145. EC TREATY art.3b, *supra* note 92.
146. *See supra* note 91.
147. 89 BVerfGE 155, 212, 1993 NJW 3047, 3057; [1994] 1 C.M.L.R. 57, 107.

exceeding of the scope of Community competences; in other words, it maintains the principle of *compétence d'attribution*.

Furthermore, the new wording of the EC Treaty consciously recognizes the importance of this principle in the detailed competences as well. The Constitutional Court explicitly and correctly refers to this fact. Here, it is sufficient to point out that the authors of the EC Treaty wanted to restrict EC/EU activities in the newly transferred areas, such as culture, formation, health etc. In these matters, the supranational institutions only have the right to *promote* what the member states do (i.e. to back their activities), and the Treaty provisions explicitly prohibit the Community to take measures to unify the different national laws on these matters.[148] It is evident that these restrictions are rooted in the spirit of subsidiarity and that they are expressions of the principle of *compétence d'attribution*.

This principle thus not only excludes Community actions in areas which have not been integrated, but also reduces the scope of Community measures within integrated areas.

As a result, it has become clear that the principle of *compétence d'attribution* has received a new dimension and has become deeper and more detailed through the transfer of new competences to the EC/EU. Thus, the TEU clearly satisfies the constitutional requirement of a *clear determination*, firstly of the matters to be regulated by the supranational institutions and secondly, of the extent and modalities of their decision-making.[149]

(d) The Scope of Article F, Section 3 of the TEU[150]

Article F, Section 3 of the TEU was also one which fueled fears of unlimited Union powers. This article reads: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

The German Constitutional Court was correct in not interpreting this provision as the grant of a unilateral, absolute power for the Union to act in any area it wanted, even ones that had not been transferred to it. This provision is not intended to grant the European Union a "super"-competence, and does not constitute an exception to the principle of

148. 89 BVerfGE 155, 189; 1993 NJW 3047, 3052; [1994] 1 C.M.L.R. 57, 90.
149. 89 BVerfGE 155, 212; 1993 NJW 3047, 3057, [1994] 1 C.M.L.R. 57, 107.
150. TEU art.F, *supra* note 90.

*compétence d'attribution*; nor is it an instrument intensifying the effects of the existing Article 235 EC which allows EC legislation without specific authorization (see below). The German government emphasized the purely programmatic character of Article F, Section 3, maintaining that it merely expresses the political intention to turn the European Union into an efficient entity by transferring to it all the competences necessary for it to meet its objectives;[151] however, this transfer is to be effected on the basis of this article by the member states of the Union, and not unilaterally by the Union itself. Such a transfer would, therefore, as the Constitutional Court points out, fully comply with the procedures provided for in the national constitutions.

There are other provisions, too, in the TEU, that refer to a future transfer of additional competences to the Union (Article K.9 and Article N, Section 1). These provisions expressly declare the regular procedure, which is followed by the member states according to their constitutions, to be applicable. Thus, modifications of the TEU effecting a transfer of new competences to the Union can only enter into force upon ratification by the member states.[152]

Other arguments against the interpretation of Article F, Section 3 of the TEU as an unlimited authorization of the European Union are discussed in detail by the German Constitutional Court, but will not be analyzed here. In summary, it may be said that this article does not create constitutional problems by detracting from the Union's *compétence d'attribution*.

(e) Monetary Union and *compétence d'attribution*

In political terms, the future Monetary Union is the most important step towards European integration taken by the TEU.[153] National sovereignty will be considerably limited by a common European currency. The principle of *compétence d'attribution* is also important in this context, as the essential details of such a far-reaching step must be clearly foreseeable and determined in advance. [154]

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151. 89 BVerfGE 155, 194-97; 1993 NJW 3047, 3053-54; [1994] 1 C.M.L.R. 57, 93-96.

152. 89 BVerfGE 155, 199; 1993 NJW 3047, 3054; [1994] 1 C.M.L.R. 57, 97-98.

153. *See* H.J. HAHN, DER VERTRAG VON MAASTRICHT ALS VÖLKERRECHTLICHE ÜBEREINKUNFT UND VERFASSUNG 29-35, 57-70 (1992); M. WILLMS, INTERNATIONALE WÄHRUNGSPOLITIK 213-28 (1992).

154. 89 BVerfGE 155, 199-207; 1993 NJW 3047, 3055-56; [1994] 1 C.M.L.R. 57, 98-103.

In fact, the principle of *compétence d'attribution* is well observed in the area, so that no constitutional problems arise with respect to it. The various phases which are to lead to the creation of the Monetary Union have been clearly prescribed and so has its substantive scope. Exact dates exist for the start of the first and second phases, while the beginning of the third phase has been kept flexible, but has been fixed to start on January 1, 1999, at the latest. The criteria for participating in the final stage as a member of the Monetary Union have also been clearly enumerated in the Treaty. Furthermore, the functions of the European Central Bank have been set out in detail, as well as the organs that will exercise these functions and the status of these organs. Therefore, the future institutional structure of the Monetary Union is clearly foreseeable.[155]

The principle of *compétence d'attribution* is of particular importance as a safeguard against non-observance of the so-called convergence criteria[156] laid down in Article 109j of the EC Treaty and the protocol to that article. These criteria will be used to ensure that the Monetary Union that is created will be economically and financially viable, as only those members of the Union that meet these criteria will be permitted to participate in it. By approving the Treaty of Union, the German Parliament has authorized the supranational institutions to prepare and create the Monetary Union, subject to the condition that all the safeguards set out in the Treaty are strictly observed. Thus, the supranational institutions[157] will not be in violation of the principle of *compétence d'attribution* if they take all the steps necessary to evaluate properly whether a member state's economic and financial situation conforms to the convergence criteria. A decision in favour of a member state made by the Council for political reasons, where the member state did not meet the mentioned criteria, would constitute a violation of the EC Treaty and also of the principle of convergence.[158] This does not, of course, rule out the possibility that the Council may exercise its discretion in arriving at a final evaluation.

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155. *See* U. Häde, *Die Europäische Wirtschafts- und Währungsunion, in* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 171 (1992); *see also* Act on the Deutsche Bundesbank of July 26, 1957, 1957 BGBl I 745, and later amendments.

156. *See* R. GEIGER, EG-VERTRAG, art.109j, mn. 17-21 (1993).

157. Of which the Council is one, when it is composed of the heads of the member states' governments, pursuant to Article 109j(3) of the EC Treaty.

158. 89 BVerfGE 155, 200-03; 1993 NJW 3047, 3055; [1994] 1 C.M.L.R. 57, 98-100.

The convergence criteria, as defined in the Treaty and the protocol, cannot be modified, explicitly or implicitly, by a Council decision, not even one arrived at by unanimous vote: this would require the Treaty and the protocol themselves to be modified, which would require the consent of all the member States. On the German side, it would be Parliament that would be competent to approve the modified Treaty, using its internal ratification procedure.[159]

It should be noted that the German Parliament has declared in a resolution that it expects to be consulted in advance by the government with respect to the decision on the entry into the third and final phase, in which the common currency will be created and the European Central Bank established. The German Constitutional Court also stressed this fact,[160] but it is important to point out that even a negative vote of the German Parliament would not, strictly speaking, bind the government to vote negatively in the Council of Ministers; as was shown earlier, while Article 23, Section 3 GG obliges the German representatives in the Council to take Parliament's position into account, the obligatory effect of Parliament's opinion upon the government is not as high as that of the Federal Council as the representative organ of the *Länder*. This follows clearly from the contrast between the wording of Article 23, Section 3 GG (referring to the German Parliament) and that of the following sections (referring to the Federal Council). The same result may be derived from the special acts that have been adopted pursuant to Article 23 GG. This means that the evaluation of the convergence criteria performed by the German government when acting in the Council pursuant to Article 109j of the EC Treaty does not have to be identical to the evaluation made by German Parliament. The constitutional principle of the separation of powers rules out a strictly binding effect for such a resolution of Parliament, as it is neither based on an internal legislative competence, nor provided for in the EC Treaty. The decision whether the convergence criteria have been met is reserved for the Council, a body whose members are members of the national executive. Such a resolution of the German Parliament goes beyond what is generally provided for in Article 23, Section 3 GG. The resolution requires a consenting vote in Parliament for the federal government to participate in

159. 89 BVerfGE 155, 203; 1993 NJW 3047, 3055; [1994] 1 C.M.L.R. 57, 100.

160. 89 BVerfGE 155, 202, 163-64; 1993 NJW 3047, 3055, 3047-48; [1994] 1 C.M.L.R. 57, 99-100, 70-71, and Bundestagsdrucksache [German Parliament Publication] 12/3906.

the Council's decision on the entry into the third phase of Monetary Union, reflecting Parliament's claim that it has its own right to evaluate whether or not the convergence criteria have been met. But all this can only be valid to the extent that it is constitutional within the scope of Article 23, Section 3 GG. Therefore, the supposedly binding effect of such a resolution adopted by the German Parliament in fact reduces to an obligation on the part of the German government seriously to take into account what the German Parliament has voted for.

The Federal Council has adopted a similar resolution.[161] However, this resolution cannot have a higher degree of binding effect than the one established by Article 23, Sections 4-6 GG with respect to relations between the federal government and the Federal Council. While it was suggested above that a strictly binding effect exists when a Federal Council resolution deals with matters pertaining to the competence of the *Länder*, this is not the case with a resolution concerning Monetary Union; this area is presently within the exclusive competence of the federal government, which means that the degree of influence exercised by the Federal Council is low. Thus, the federal government acting in the supranational institutions has no greater obligation to follow the Federal Council's opinion than it does to respect the resolution of the German Parliament.

Furthermore, the federal government has not assumed a strict obligation, in the sense of a formal constitutional consensus, to follow the resolutions of Parliament or the Federal Council. After all, it was only the federal Minister of Finance who stated in Parliament that he would not continue with the opening of the third phase in Brussels without obtaining the consent of the federal Parliament and of the Federal Council. Perhaps this promise can be interpreted in the light of constitutional good faith,[162] but it is more of a self-imposed political and moral obligation than a constitutional duty. A promise of this nature would oblige only the Minister of Finance who contributes, pursuant to Article 109j of the EC Treaty, to making a recommendation which serves as the basis for the final decision of the Council, in a session of the heads of the member States and the governments. Such a recommendation will not be binding, but is, however, an important factor in the final decision.

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161. *See* Bundesratsdrucksache [German Federal Council Publication] 810/92, at 6-7.

162. *Organtreue*, 89 BVerfGE 155, 203; 1993 NJW 3047, 3055; [1994] 1 C.M.L.R. 57, 100.

It is thus clear that nonobservance of the resolutions would not affect the compatibility of the government's actions in Brussels with EC/EU law.

It should also be mentioned that the declarations as to the federal Parliament and the Federal Council are not formal reservations to the Treaty of Union; they were made known to the Treaty partners only after the ratification by Germany.[163] The declarations therefore do not have external effect at the Union level.

Contrary to what the German Constitutional Court stated, therefore, a negative vote by the federal Parliament and/or the Federal Council would not prevent Germany's membership in the Monetary Union if the other countries were to decide by a qualified majority that Germany met the convergence criteria.[164] No member State can unilaterally prevent either the Monetary Union from coming into force or the member states' participation. This shows the great responsibility of each member State in evaluating the convergence criteria.

The principle of *compétence d'attribution* is also relevant to the functioning of the Monetary Union. Its predominant aim is to assure price stability.[165] Therefore, the European Central Bank will have to be independent to ward off any influence from national governments, as well as from the supranational institutions, that are sometimes inclined to promote short-term economic growth and are not mindful of the inflationary effects that possibly result.[166] The objective of transferring monetary competences to the Monetary Union institutions is to enable them to pursue the goal of stability seriously. This transfer was not only the legal basis for creating new institutions such as the European Monetary Institute and its successor, the European Central Bank, and not only a transfer of new areas of action, but also a determination of the objectives and means of these institutions. This functional approach to a transfer of competences can also be viewed as the grant of an authorization to supranational institutions limited to the pursuit of a predetermined purpose.[167] Such a transfer constitutes an authorization, and at the same time imposes a duty to act in a certain manner, i.e. the

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163. See the letter by the German Minister of Finance T. Waigel to the Committee on Europe of German Parliament, reprinted in 89 BVerfGE 155, 164; 1993 NJW 3047, 3048; [1994] 1 C.M.L.R. 57, 71.

164. The second requirement is that the conditions of Article 148 of the EC Treaty are met.

165. EC TREATY art.105, s.1.

166. J. von Hagen, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 7, 1992, at 13.

167. 89 BVerfGE 155, 204-05; 1993 NJW 3047, 3056; [1994] 1 C.M.L.R. 57, 101-02.

duty to guarantee stability. The Constitutional Court refers to this as a mandate to achieve stability.[168]

However, it is not only the principle of *compétence d'attribution*, and the constitutional implications of this principle, that are at issue here, but also specific provisions of the German Constitution which bind the process of European integration to certain qualities defined as essential by Constitutional law. Thus, Article 88 GG, which authorizes the establishment of a national Central Bank in the internal order with competences regarding control over and issuance of the currency,[169] expressly permits a transfer of the functions of this bank to a European Central Bank, but only subject to the condition that the latter be independent and obliged to pursue price stability as its primary objective. Therefore, the transfer of monetary competences is subject to limits, and the Act of Approval to the TEU adopted by the German Parliament had to comply with this constitutional requirement.[170]

The institutional system of the European Monetary Union is certainly in compliance with the Constitution. The actions of the European Monetary institutions will only be compatible with internal Constitutional law if they are related to the objective of price stability. Of course, it is up to the institutions to determine a policy for the achievement of this objective; undoubtedly, national constitutional law cannot be the criterion for specific political measures to ensure price stability at the supranational level. It is only where policies are obviously the cause of lasting instabilities, and lead to serious economic distortions, that a divergence from constitutional law is indicated.

The Constitutional Court appears to go even further, though not stating this in clear words. It finds that adherence to the "concept of the Union Treaty," and as a consequence adherence to the "basis and the object of the German Act of Approval to the Treaty," requires not only that the objective of stability be seriously pursued by the European Monetary institutions, but also that this objective be accomplished in

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168. *Vereinbarter Stabilisierungsauftrag*, i.e., a mandate to maintain stability, laid down in the TEU, 89 BVerfGE 155, 205; 1993 NJW 3047, 3056; [1994] 1 C.M.L.R. 57, 102.

169. *See* J. SIEBELT, DER JURISTISCHE VERHALTENSSPIELRAUM DER ZENTRALBANK: VORRECHTLICHES GESAMTBILD UND VERFASSUNGSAUFTRAG AN DEN GESETZGEBER (1988).

170. 89 BVerfGE 155, 204-05; 1993 NJW 3047, 3056; [1994] 1 C.M.L.R. 57, 101-02. *See* Act of Approval of the Maastricht Treaty, 1992 BGBl II 1253.

fact.[171] This statement has two aspects. In the opinion of the Constitutional Court, constitutionality requires not only a willingness to undertake all efforts necessary for the achievement of stability, but also that such efforts be successful, i.e., lead to stability. The second aspect is evidence of the reasoning that if economic stability is at the basis of Germany's consent to the TEU, at least as far as the Monetary Union is concerned, a failure in achieving this objective could constitute a reason to invoke the *clausula rebus sic stantibus* and withdraw from the Monetary Union. The Constitutional Court does not explicitly point to this implication, but the wording of the Court's reasoning suggests it.[172] There are many reasons not to accept such a far-reaching implication, however; while they cannot be detailed here, it should be noted that the very nature of the TEU is not to permit unilateral withdrawal, but to urge the member states to initiate, in common, the necessary steps for increasing stability.

6) The Residual Powers of Parliament

(a) Only a few words shall be added to the previous comments on the residual powers of the national Parliament in the European Union. One should remember that democracy would be seriously endangered if, on the one hand, the national Parliament, currently the primary medium of popular sovereignty, lost nearly all its powers to the European Union,[173] and on the other hand, the European Parliament had not yet gained an adequate level of competences. In such a case, the concentration of powers in an executive institution, namely the Council, would not meet this constitutional requirement, even though the Council had been installed and furnished with competences by the national Parliament.

First of all, only competences enumerated in the Treaty of Union and in the Community Treaties have been shifted away from the national Parliament. The principle of *compétence d'attribution* also has a protective effect in favour of the national Parliament. This prevents the interpretation of laws, and the filling of regulatory gaps by the judiciary,

171. Act of Approval of the Maastricht Treaty, *supra* note 170; 89 BVerfGE 155, 204-05; 1993 NJW 3047, 3056; [1994] 1 C.M.L.R. 57, 101-02.

172. 89 BVerfGE 155, 205; 1993 NJW 3047, 3056; [1994] 1 C.M.L.R. 57, 102.

173. 89 BVerfGE 155, 207-12; 1993 NJW 3047, 3056-57; [1994] 1 C.M.L.R. 57, 103-07.

from being transformed into the creation of new law.[174] Of course, filling in the gaps has creative aspects, and in several important cases, the judges on the European Court have discovered, entrenched in Community institutional law, extensive mechanisms that were not an explicit part of the Treaties but were recognized as inherent in the existing provisions. For instance, the construct of direct applicability of a directive that has not been implemented on time by a member State, was a creative step of this kind, that was even accepted by the German Constitutional Court,[175] though contested by others. It has not always been easy to determine where the competence of the judge ends, and modification of the Treaty begins; however, the supranational institutions cannot be denied continued adherence to the *effet utile* principle, which is required for interpretation in the context of dynamic processes such as that of European integration, or to the traditional interpretive doctrine of implied powers, or to the application of Article 235 of the EC Treaty.[176]

While these are certainly exceptions to the principle of *compétence d'attribution*, they are based on the idea that all objectives listed in Articles 2 through 3a of the Treaty must be met to achieve the Common Market, and the other general purposes of the Treaties, such as the internal market,[177] the Monetary Union[178] etc. The achievement of the objectives enumerated in the Treaty requires concrete competences, which the authors of the Treaty intended to create. Where they did not do so, for instance because the need for action may not have been foreseeable by them, Article 235 of the EC Treaty allows for immediate action, though only on the basis of a unanimous decision of the Council. This avoids impeding the dynamic integration process, which would be the case if the institutions had to wait until express competences were added to the Treaty.[179] The institutions must therefore be aware of the

174. 89 BVerfGE 155, 209; 1993 NJW 3047, 3057; [1994] 1 C.M.L.R. 57, 105.

175. *See Kloppenburg*, 75 BVerfGE 223, 240.

176. This article was expressly inserted into the Treaty to authorize acts even without an express competence, as long as they are undertaken in order to accomplish the objectives related to the Common Market as described in Articles 2 and 3 of the Treaty. EC TREATY art.235, *supra* note 89.

177. *See* EC TREATY art.7a; the notion of the internal market is very similar to that of the Common Market.

178. *See* EC TREATY art.3a.

179. HARTLEY, *supra* note 54, at 104; Eberhard Grabitz, *in* 2 KOMMENTAR ZUM EWG-VERTRAG, art.235, mn. 1. (Eberhard Grabitz ed., 1992).

article's purpose, so that they do not trespass on the sovereignty of the member States.[180]

As a result, the principle of *compétence d'attribution* may be seen to have a strong protective effect in favour of the national Parliament, and to constitute an instrument for the safeguarding of national democracy according to the Constitutional Court.

(b) As has already been pointed out, a series of new matters has been transferred to the EC/EU, such that one can no longer speak of a substantial weight of legislative power remaining to national Parliaments. However, it should be remembered that broad areas of competences are not transferred exclusively to the supranational level, but are, in part, exercised by both the supranational entities and the member states. It is the aforementioned principle of subsidiarity[181] that acts as a guardian of the member States' right to cooperate in legislating in these areas. And the reach of this principle extends even further, because it establishes the legislative (and executive) priority in all the areas of non-exclusive competence of the Community. Of course, the actualization of the principle of subsidiarity will depend upon the practice that develops and, ultimately, upon the jurisprudence of the European Court of Justice.[182]

From a constitutional standpoint, the German representatives in the supranational institutions are obliged to give effect to subsidiarity. On the one hand, this results from the principle of democracy, as analyzed above in detail, and on the other, from the special provision of Article 23, Section 1 GG, which authorizes Germany to become a member of the European Union only on condition that the principle of subsidiarity is effectively practised.[183] The German Constitution does not itself define this notion, but implicitly refers to Article 3b of the EC Treaty. This means that the national Constitution accepts the Community interpretation, so long as it takes the main reason for this principle into account: to safeguard the identity of the member States, as expressed in Article F, Section 1 of the TEU, and to maintain an adequate equilibrium with respect to the relative weights of the supranational bodies and the member states.

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180. HARTLEY, *supra* note 54, at 80-81.

181. *See supra* notes 91 & 92; *see also* 89 BVerfGE 155, 210-12; 1993 NJW 3047, 3057; [1994] 1 C.M.L.R. 57, 105-07.

182. *See* Carl Otto Lenz, *Kommentar: Der Vertrag von Maastricht nach dem Urteil des Bundesverfassungsgerichts*, 1993 NJW 3038.

183. 89 BVerfGE 155, 211-12; 1993 NJW 3047, 3057; [1994] 1 C.M.L.R. 57, 106-07.

Additionally, Article 3b, Section 3 of the EC Treaty, commonly referred to as the principle of proportionality, also turns out to be a safeguard against the erosion of national competences.[184] This has already been dealt with in detail above.

(c) Only a short remark shall be made with respect to the independence of the future European Central Bank, which was referred to above in another context. The question that arises concerning this is: is it compatible with constitutional law that the Bank's members will have no parliamentary responsibility, a fact which perhaps affects the principle of democracy?

The same problem has arisen in Germany, where the national Central Bank[185] enjoys the same independence. In order to pursue its specific purposes, the Central Bank must be exempt from parliamentary control. This is to be accepted, even under the auspices of the principle of democracy, as independence of a central bank is the best and most important guarantee of monetary stability. Therefore, this limitation on the principle of democracy appears to be justified.[186]

Since Article 88 GG explicitly requires the independence of the future European Central Bank, which will assume the functions of the *Bundesbank*,[187] this article constitutes a *lex specialis* to Article 20 GG, which institutes and requires democracy and sovereignty of the people. The structure and functions of a future European Central Bank have been clearly determined, and the matters that will be removed from parliamentary control have been sharply defined. Therefore, the exemption from the two constitutional principles is only of a limited nature.

## IV. CONCLUSION

The decision of the German Constitutional Court opened the way to Germany's membership in the EU. It removed a number of the constitutional obstacles to further European integration. The decision can be classified as moderately progressive. Several of the Court's

184. 89 BVerfGE 155, 212; 1993 NJW 3047, 3057; [1994] 1 C.M.L.R. 57, 107.

185. The German Bundesbank at Frankfurt.

186. 89 BVerfGE 155, 207-09; 1993 NJW 3047, 3056-57; [1994] 1 C.M.L.R. 57, 103-04.

187. And also those of the other central banks in Europe, a great number of which are not independent, but which will have to be made independent before the third phase of the Monetary Union begins.

statements regarding Germany's right to secession from the EC/EU, the entry into the third phase of the Monetary Union, or the Constitutional Court's competence to decide on potentially *ultra vires* EC/EU acts, indicate that the Court has considered them from the point of view of internal law and sometimes appears to neglect the standards of EC law. However, as a whole, the "high-water marks" developed in Community law were accepted throughout. The Court did not signal an end to a possible further development towards a European state, for which the consent of the people would obviously be indispensable. For the future, it appears realistic to expect the member states to transfer even more powers to the supranational level to strengthen the effectiveness of the EC/EU, while seeing the subsidiarity mechanism with its equilibrating effect continuously refined by jurisprudence and practice. It is unlikely that the EC/EU will assume the name of "state" within the next few years, but it will factually come close to a state by being vested with an increasing range of powers. The creation of a common European society will have to be promoted at the political level, while maintaining the intrinsically valuable diversity of cultures and languages in Europe.