Robert Schuman Centre

Ways Out of the Maquis Communautaire

On Simplification and Consolidation and the Need for a Restatement of European Primary Law

CHRISTOPH U. SCHMID

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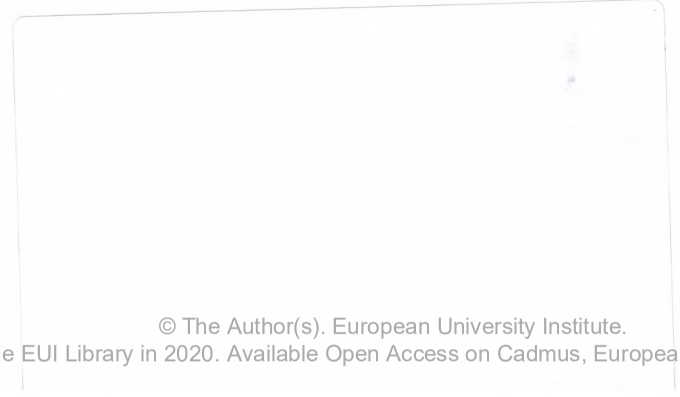

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE

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On Simplification and Consolidation and the Need for a Restatement of European Primary Law

CHRISTOPH U. SCHMID

EUI, Florence and Munich

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I. Introduction[1]

The architecture of European treaty law is rather like that of an American gold-digger town last century: after setting up the three Communities in the founding treaties, new constructions were added on various occasions according to current needs, without adapting them exactly to what existed; structures no longer needed were, as it were, simply left standing as legal ruins in the landscape. Among such poorly coordinated additions were European Political Cooperation, laid down in the 1986 Single European Act, and still more the "roof, temple or pillar construction" of the European Union, created by the Maastricht Treaty. Among things not explicitly regulated, there was in particular whether the Communities are to be absorbed in the Union to such an extent that their actions are to be attributed to it alone, so that it is correspondingly to be assigned legal personality of its own.[2] These uncertainties are also reflected in the names of the bodies: while Art. C (1) ascribes a "unitary institutional framework" to the Union, only the Council appears as "Council of the European Union" - even in Community questions - while the Commission and Court of Justice continue to have the tag " of the European Communities", even where they operate in areas in the Union's province (the CFSP and CJHA)[3]. Finally, the Amsterdam Treaty (AV), too, brought still further complication of primary law by communitarizing further areas of the third pillar while retaining intergovernmental features.[4]

Yet the uncoordinated additions are outnumbered in primary law by the legal ruins mentioned earlier. According to a survey done by Roland Bieber in

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[1] A former German version of this text was published in v. Bogdandy/Ehlermann, "Konsolidierung und Kohärenz des Primärrechts nach Amsterdam", *Europarecht*, Beiheft 2/1998, p. 17. It was first presented at a workshop to evaluate the Amsterdam Treaty held in Frankfurt a. M. in May 1998. I wish to thank Ian Fraser for his help with the translation.

[2] Though the authors of the Maastricht Treaty presumably wished to set up the Union without legal personality, and this finding also represents the prevalent view in the literature in Member States, the Council simply ignored this, for instance when it officially let the Union take over the administration of the city of Mostar (Council Decision 94/308/CFSP of 16 May 1994; *OJ* EC 1994 L 134/1, Art. 1: "Administration of the city of Mostar by the European Union"; see also Council Decision 94/790/CFSP of 12 December 1994, *OJ* EC 1994 L 326, p. 2").

[3] See v. Bogdandy, in EUI Florence, Robert-Schuman-Centre, *A Unified and Simplified Model of the European Communities Treaties and the Treaty on European Union in Just One Treaty*, foreword, pp. 6f

[4] For this see also Müller-Graf, "Justiz und Inneres nach Amsterdam - Die Neuerungen in erster und dritter Säule", *Integration* 1997, 271 (282); Rupprecht, "Justiz und Inneres nach dem Amsterdamer Vertrag", *Integration* 1997, 264 (269); den Boer, "Justice and Home Affairs Cooperation in the Treaty on the European Union: More complexity despite communautarization", *Maastricht Journal of European and Comparative Law* (MJ) 4 (1997), 311, See also the article by Haring in v. Bogdandy/Ehlermann, "Konsolidierung und Kohärenz des Primärrechts nach Amsterdam", *Europarecht*, Beiheft 2/1998.

1995 these now consist, after 20 Treaty amendments and revisions, of over 15 individual texts with well over 1,000 individual provisions, of which almost 400, especially transitional and time-limited measures, have become obsolete. For instance, the prominently placed Articles 13-27 in the EC treaty, on the Customs Union, already became obsolete with the introduction of the Common Tariff in June 1968 and the expiry of the transitional period in late 1969. With its opaquely tangled structure and many obsolete provisions, the *acquis communautaire* has, as Franklin Dehousse recently[5] tellingly put it, turned into the *maquis communautaire*. In this undergrowth of Community law, the important constitutional principles of clarity and openness of legal bases understandably tend to dwindle into mere empty formulas.

More importantly, beyond this 'external' disorder, the actually existing European primary law has come to diverge more and more from the text of the treaties as a result of the ECJ's famous innovative jurisprudence: The judicial doctrines of direct effect, supremacy, pre-emption, *interprétation conforme*, state liability and human rights, to name but the most important ones, have gradually detached the EC treaties from traditional international treaties and rendered them more similar to a national (federal type) constitution - what is called the 'constitutionalisation of the treaties'.[6] Though of utmost importance for the development of the European polity as a whole, this incremental judicial process has remained widely hidden to the citizens. Therefore, the call was increasingly made that not only had the treaties to be simplified and consolidated, but also brought into a more constitution-like shape, in order to contribute to a larger degree of acceptance of Europe by its citizens.

Among these various forms of legal intransparence and disorder, this contribution addresses mainly the development of and the responses to what has been called the 'external' disorder of EC primary law.[7] In particular, the history of the simplification and consolidation efforts will be presented (II), three major academic drafts of alternative treaties analysed (III) and the rather modest outcome of the Amsterdam measures of simplification commented upon (IV). In examining the possibilities of farther-reaching consolidation, this contribution advocates a US type 'Restatement', *i.e.* a non-binding compilation of the whole

[5] F. Dehousse, "Le Traité d'Amsterdam, reflet de la nouvelle Europe", *CDE* 1997, 272, A similar assessment is given by J. V. Louis, "Le traité d'Amsterdam - Une occasion perdue?", *RMUE*, 2/1997, 5 (18), according to whom the AT is a missed opportunity for inter alia a far-reaching improvement in the transparency of the text.

[6] On this notion, see Weiler's classic, "The Transformation of Europe", *Yale L.J.*, 100 (1991), 2403.

[7] This notion is here taken to mean all provisions that have come about by international treaty among the Member States, amendable only by an intergovernmental conference (Art. N TEU).

body of EC primary law (V). Such a legal text is meant to incorporate all valid law regardless of its legislative or judicial origin, in particular the ECJ's famous constitutionalisation doctrines; even a catalogue of human rights as recognised by the ECJ in its jurisprudence could possibly be included. To this limited extent, this contribution goes beyond mere formal simplification and consolidation strategies and broaches the thorny issue of the constitutionalisation of the European treaties.

II. A Brief History of Simplification and Consolidation

Despite the obvious disorder in EC primary law described above, the Communities and the Union took a great deal of time over cleaning up their legal bases. While the need to consolidate primary law had first been put as long ago as 1965 in the preamble to the Merger Treaty, which named legal unification of the three Communities as an objective, after the merger of their authorities, the task of consolidation was taken up in practice only after the setting up of the Union[8]. After the Council, Commission and Court had once again in their reports on the application of the Union treaty in 1995 come out in favour of a comprehensive consolidation of the primary law including its codification, i.e. bringing together the most important texts in a single treaty document, the Corfu European Council set up a reflexion group which started by asking the Council general secretariat for a report of possible alternatives in simplification and consolidation. This mentioned, as conceivable, alternative or cumulative measures: 1) deleting obsolete provisions and adapting the remaining ones; 2) bringing the main treaties together into a single legal document; and 3) partly restructuring the treaties by exporting minor provisions of a technical nature to protocols. To support the requisite work, the European Parliament now gave a first mandate to produce a consolidation draft to the Centre de Droit Comparé et Européen at the University of Lausanne, headed by Roland Bieber. For its part, the Reflexion Group presented a report in December 1995 unrestrictedly recommending the simplification project, while pointing to the reservations by some States regarding farther-reaching codification of primary law[9]. On the basis of these findings the Council Presidency-in-0ffice drew up a mandate, in the conclusions to the Turin European Summit for the 1996 IGC, to try out a simplification and consolidation of primary law - whereby the term consolidation was presumably meant as an umbrella concept for all clean-up measures, reaching from mere simplification

[8] On the history, see Petite, "Le traité d'Amsterdam: ambition et réalisme", *RMUE,* 3/1997, 17; Jacqué, "La simplification et la consolidation des traités", *RTDE,* 1997, 905ff; and for a tabular summary of the outcome, Dodd/Ware/Weston, "The European Communities (Amendment) Bill: Implementing the Amsterdam Treaty", Research Paper n° 97/112, House of Commons Library, 8ff.

[9] See the Report of the Reflection Group of 5.12.1995, cf. *RTDE,* 1996, 165, 68.

(deleting obsolete provisions and adapting the remaining ones accordingly) over further consolidation measures (e.g. restructuring certain parts of the treaties, e.g. putting together similar provision on institutions into one part; exporting less important provisions into protocols) up to complete codification (putting together and restructuring all primary law texts in a single document)[10].

After the Turin summit, the Council general secretariat first itself produced several consolidation proposals for illustrative purposes. In parallel, the European Parliament gave the Robert Schuman Centre at the European University Institute in Florence a further mandate to draw up a new consolidation draft. This task was carried out there by a research group with international membership[11] headed by Claus-Dieter Ehlermann; the Rapporteur was Armin v. Bogdandy. Following this preliminary work, the Dublin European Council clarified the final mandate for the 1996 ITC as being to work out a largely simplified version of the treaties - consolidation no longer came into it. This version was to be more easily readable for the European citizen and have a more comprehensible shape, while not affecting the (legal) *acquis communautaire* or the present structure of primary law, particularly the division into three pillars. This made it definitively clear that the reform was to be confined to technical measures "à droit constant". This also meant rejecting merger of the legal personalities. In parallel with the IGC the work was thenceforth carried on by a separate group of experts, called "les amis de la présidence" (essentially consisting of members of the permanent representations) independently from the preparations for the substantive treaty amendments. The proposals worked out by this group for simplifying the treaties were essentially taken over in the AT[12]. It was not however possible at the IGC to put through any further consolidation[13]. To be sure, declaration n° 42 on the Final Act of the AT says further consolidated versions are to be published by the Council general secretariat, though without legal validity. Finally, in October 1997 a working group of the Centre for European Legal Studies at Cambridge University, headed by Alan Dashwood and Angela Ward, presented a third draft consolidation for the EC treaty, already incorporating the outcome of the AT. Since they contain nearly all discussed simplification and consolidation strategies, the academic consolidation drafts published, namely the Lausanne, Florence and Cambridge drafts, deserve closer attention.

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[10] The terminology is somewhat unclear in Jacqué (Fn. 5), 905ff, who, on the one hand, speaks of a failed "consolidation" (p. 905), but, on the other, later on calls further clean-up efforts, particularly as regards merging the various treaties, "codification" (pp. 910ff).

[11] The group members were Renaud Dehousse, Eduardo Garcia de Enterria, Jean-Victor Louis, Yves Mény, Francis Snyder and Giuseppe Tesauro; with, in an advisory capacity, Lord Jack MacKenzie-Stuart, Max Kohnstamm and Emile Noël, who died shortly before the work was completed; the draft is dedicated to his memory.

[12] See III, point 1-3 below.

[13] See III, 4.

III. The Academic Consolidation Drafts

According to Parliament's instructions, the drafts were in particular, in order to bring greater clarity while retaining the existing state of the law, to:

- improve the linguistic quality and - by rearranging the provisions - also the logical structure of the treaties;
- clean-up the treaties editorially, in particular deleting obsolete provisions;
- distinguish between institutional provisions and the various policies, and finally
- bring together the three Communities and the Union's areas of activity into a single treaty, setting general principles, constitutional provisions and European fundamental rights at the beginning[14].

These instructions, which clearly go considerably beyond the European Council's Decisions mentioned, were carried out very differently in the Lausanne and Florence mandated work and in the Cambridge project. They will now be discussed in the chronological sequence of their appearance.

1. The Lausanne Draft

As already indicated, the Lausanne draft contains a first part[15] of value to all further work, inventorizing the whole of the primary law. In detail, alongside the Community treaties and the Union treaty, including their amendments, the Convention on Certain Common Institutions of the European Communities of 25.3.1957, the Merger Treaty of 8.4.1985, the Act introducing universal direct elections of members of the European Parliament of 20.9.1976, a number of other important acts of constitutional level and the 40 or so protocols to the Community treaties were considered in detail for their continuing legal relevance. 920 Articles were found relevant to presenting the legal basis for the Community, and were selected for the consolidation. 239 of them could be immediately deleted because they occurred two or more times and another 150 because they had in the meantime become obsolete.

The second part of the study[16] brings the remaining 531 provisions together into a draft consolidation. It brings in a new subdivision leaving only important provisions with constitutional content in the consolidated treaty, while technical provisions of a more administrative nature as well as procedural provisions of the ECSC and Euratom treaties incapable of generalization are moved out to

[14] *OJ* n° C151/51, n° 2, P. 14; the official mandate n° IV/92/29 that constituted the basis for the Florence draft was similar.
[15] The European Parliament, Political Series W-16.
[16] European Parliament, Political Series W-17.

newly created protocols. Thus, the new treaty text consists of only 311 provisions, with the remainder in three protocols, on the internal market, on the European Coal and Steel Community and on the European Atomic Energy Community. The advantage of this procedure is to further cut the volume of the treaties, making them more like a constitution as traditionally understood. Drawbacks unavoidably associated with this approach are that at least externally a hierarchy not laid down in the treaties is created, and individual treaty provisions torn apart, hindering a systematic overview[17]. The detailed structure of the Lausanne draft is as follows:

1) principles: here the individual provisions of the main treaties are coordinated and put together;
2) human and civil rights: here the fundamental freedoms, the provisions on Union citizenship and other subjective rights are arranged; but this section contains no actual catalogue of fundamental rights on the model of Member States' constitutions or the ECJ case law;
3) relations with Member States: here all the provisions of the main treaties that govern the interplay of Community and Member States are brought in in a new order;
4) relations to third countries and international organizations: this section was given preference in order to emphasize the Union's positive attitude to international law; it contains in a new numbering all the main treaties' provisions on this area;
5) institutions and procedures: this section contains a general part with institutional, procedural and budget dispositions based on the corresponding provisions of the Community and Union treaties; ECSC and Euratom treaty provisions not largely coinciding with the EC treaty and therefore hard to consolidate, were, as mentioned, put into corresponding protocols;
6) substantive legal principles: this part contains all the Community policies and the Union's areas of operation;
7) general and final provisions: this part brings the corresponding provisions of the Community and Union treaties together; additionally, two new Articles were introduced repealing all the original treaties and making reference to the attached concordance tables.

[17] The Lausanne proposal was, moreover, even extended by an anonymous author with the pseudonym Justus Lipsius ("The 1996 IGC", *European L. Rev.* 20 (1995), 235 (265f) - a high Brussels official - into a true dominance of protocols: the whole substantive law (eg in the EC treaty, Arts. 9-163a) would be put in protocols. Yet it would be at least rather odd if, say, Art. 30 EEC had to be cited as Art. X of the protocol on the Common Market to the Treaty on European Union.

A notable point about the content of the Lausanne Draft is that it combines the Communities and the second and third pillars of the Union into a single legal person, termed "Union". While this change might seem very desirable, in part for reasons of transparency and simplicity, the draft is here departing, on an important and quite controversial point, from the existing legal position. This links up the debate on technical aspects of consolidation with the proposals for amending the content, which would likely diminish the chances of success of the former. On the whole, admittedly, the Lausanne Draft has, with its convincing restructuring of the individual sections, in particular with the formulation of easily graspable general parts, and the far-reaching consolidation of the individual treaty provisions, set criteria especially in technical legal respects that all later drafts have to be measured by.

2. The Florence Draft

The Florence Draft[18] similarly pursues the objective of an integrative overall treaty absorbing all the existing main treaties. By comparison with the Lausanne Draft, however, it is based on a more reticent, minimalist approach. This appears particularly in the endeavour to refrain as far as possible from changing the law as it stands. Thus, the various legal personalities of the Communities are untouched, and nothing is said on the Union's legal capacity. Additionally, the export of provisions to protocols is avoided.

In methodical respects this minimalist approach is also the basis for the procedure in consolidating individual provisions. This was done only where several provisions are either identical, or identical meaning is attributed to them in practice, or finally, existing differences have no practical relevance[19]. By contrast, consolidation of provisions with merely the same regulatory objectives but detailed differences of content was refrained from, even though this would have led to greater harmony and transparency[20].

In detail, the Florence Draft consists in its main variant of 512 articles consolidating the provisions of the main treaties and other important texts of primary law (Single European Act, agreement on common bodies, treaty setting up a Single Council and Single Commission, Act introducing universal direct elections of members of the European Parliament). Alongside this, the Draft also offers an alternative variant, in which, alongside the main text of the Community

[18] EP, Legal Affairs Series W-9; on this see the analyses by *v.* Bogdandy/Ehlermann, *CMLR* 33 (1996), 1107; *EuZW* 1996, 737, and the reviews by Koenig/Pechstein, *NJW* 1997, 996; Harings, *NVwZ* 1997, 979; Kugelmann, *AVR* 35 (1997), 323; della Cananea, *Rivista trimestrale di diritto pubblico* 1997, 617.

[19] See foreword, p. 9.

[20] For instance, Art. 235 EEC and Art. 95(I) ECSC were kept as independent provisions.

plus Union treaty, the ECSC and Euratom treaties continue to exist as separate treaties, though with the procedural provisions capable of consolidation, contained in the main text, deleted. In detail, the Florence Draft has the following basic structure:

1) principles: here the introductory provisions of the two main treaties are re-coordinated and brought together;
2) union citizenship: here the provisions of Art. 8-8e TEC are brought in;
3) institutional provisions: this part is the core of the Draft. Like the Lausanne Draft, it contains a "general part" for the institutions applying to their actions under all three pillars of the Union. This section also deals with the European Council mentioned only in the Union treaty, which is thus also regarded as an institution of the Communities;
4) activities and instruments
   a) The European Communities
   b) The Common Foreign and Security Policy
   c) Cooperation in Justice and Home Affairs

   Here come the various policies of the Communities and Union, along with, in "special parts", those provisions on institutions and procedures that are so different as not to be capable of consolidation;
5) general and final provisions: this part similarly brings the corresponding provisions of the Community and Union treaties together.

With its consistently minimalist approach, the Florence Draft has to be regarded as a more realistic possibility for consolidating all the treaties in a single text. From the legal technical point of view, it probably makes a best job of optimizing the two conflicting objectives of on the one hand giving primary law a largely unitary structure while on the other leaving the specific features of Community and Union as far as possible untouched and thus maintaining the law as it stands.

It is worth noting, though, that Jean-Paul Jacqué, Director in the Council General Secretariat, recently criticized the integrative approach in the Florence draft[21] for dropping certain features of standing law, against the Dublin Mandate: in particular, the general provisions were made common, and the European Council was elected into an institution. Additionally, merging all the treaties is seen as giving a poorly readable overall text, because it is relatively long. Yet this criticism cannot convince. On the one hand, the price for the alternative in the General Secretariat's consolidation draft[22], namely retaining the separation of Union and Community treaties, is relatively high: a unitary, transparent overall concept of primary law which would be easier to convey to the citizen is

[21] Jacqué (Fn. 5), 910.
[22] See IV below.

hardly realizable in this way. On the other, the formulation of general overreaching principles and pinning the European Council down as an institution of the Communities, too, ought not to have any practical consequences. Finally, the accusation of being too long only concerns the first variant. In variant 2 - the one without the substantive provisions of the ECSC and Euratom treaties - the Florence Draft contains more or less the same number of articles as the Lausanne one, or the General Secretariat's own.

3. The Cambridge Draft

The Lausanne and Florence Drafts were recently joined by a further consolidation draft from Cambridge University's Centre for European Legal Studies which has the merit of taking the substantive amendments of the AT into account[23]. This Draft unfortunately confines itself to the EC treaty[24], but makes the interesting attempt, on the model of the US Restatement[25], alongside a restructuring of the individual treaty provisions, also to formulate the ECJ's fundamental case law abstractly in the language of statute. The individual provisions are accompanied by a commentary explaining the individual passages and giving the core decisions and legal literature (unfortunately nearly exclusively English language contributions) used in footnotes. Substantively, even controversial questions are frequently decided here: hypothetical lines of development of the case law that seem likely to the authors are included. A lot of space in this compilation is also taken up by the Union's constitutional bases, along with the doctrines developed by the ECJ on the interaction between Community law and national law. As an example, the Restatement's provisions on direct effect and on primacy systematically and convincingly follow Article 5 EEC, and are as follows in the version of Article I.1.6 (2) and (3) of the Cambridge Draft:

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[23] Published in *European L. Rev.* 22 (1997), 393.

[24] The reason given, that it is too early for an overall consolidation as long as the coverage of each of the three pillars is provisional (Foreword, *European L. Rev.* 22 (1997), 398), is not at all convincing. For not only is the whole of Community law, as we know, constantly changing; additionally, the methods employed in the Maastricht and Amsterdam treaties for including new matters - first incorporation in the Union's operational areas, later, if appropriate, communitarization - might be becoming lastingly established as a constitutional principle that by definition has a dynamic nature. That being the case it seems completely unrealistic to wait for a definitive extent of the three pillars.

[25] While the preface to the Draft explicitly mentions "Restatement" (*European L. Rev.* 22 (1997), 397), it does not *ipsissimis verbis* name the American example.

Article I.1.6
(Article 5, **as amended**)

(1)...
(2) The provisions of this Treaty and of acts of the Community's institutions (hereinafter referred to as "Community provisions") shall, if and in so far as they are capable of being applied without having their content further defined by implementing measures, produce direct effect within the legal orders of the Member States. In particular, any rights arising under Community provisions shall be enforceable in the courts and tribunals of the Member States, by way of adequate remedies available against any party on whom a corresponding duty is imposed.
(3) In the event of confclit between provisions applicable under the lega orders of the Member States (hereinafter referred to as "national provisions") and directly effective Community provisions, the latter shall prevail. To that end, a court or tribunal of a Member State shall refrain, if necessary of its own motion, from applying national provisions in all cases in so far as these conflict with any Community provisions applicable to matters of which the court or tribunal is seized.

Commentary: This Article incoporates the principles which, in their different ways, give substance to the declaration by the Court of Justice that "the Community Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals."[26]

Paragraph (1) reproduces the present Article 5 which expresses the general duty of legal cooperation incumbent on the Member States.

Paragraph (2) is a formulation of the principle of direct effect. The condition that the Community provision in question be capable of judicial application represents a distillation of the case law, backed by the authority of former Judge Pescatore.[27] the second sentence of the paragraph acknowledges that directly effective rights are enforceable only against those on whom the provision relied upon imposes a corresponding duty (the vertical/horizontal distinction). It also makes the point that there is a duty on the Member State concerned to ensure the adequacy of the available national remedies.[28]

Paragraph (3) expresses the principle of the primacy of Community law. The words "in all cases" indicate, without making the point too brutally, that the

[26]Opinion 1/91, EEA Agreement [1991] E.C.R. 6079 at para. 21.
[27]Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law", *European L. Rev.* 8 (1983) 155 at pp. 176 et seq.
[28]Case 222/84, *Johnston* [1986], 1651.

principle applies, irrespective fo the rank of the conflicting national provision in its own hierarchy, and of whether it was enacted before or after the community provision.[29] The second sentence encapsulates the Simmenthal principle, that the duty of ensuring Community primacy falls on the national court seized of the substantive issue in the case.

Even if this version of the doctrine of direct effect and primacy still seems in need of improvement in various details[29], it nonetheless clearly shows some of the advantages of a Restatement: the gain in transparency and the easier comprehensibility of the Community's legal bases. Unfortunately, however, the Cambridge Draft departs from the classic Restatement idea by regarding later adoption as a legally valid treaty text as thoroughly desirable [30]. This is, however, likely instead to prove counterproductive: for alongside probably insuperable political difficulties over adopting such a detailed and therefore necessarily also controversial text, there would also be reservations that the Community legislature was laying fetters contrary to its function on the ECJ case law[31]. The idea of a Restatement should accordingly be pursued in accordance with the classic US conception, without legal bindingness, in improved form and including all the important texts of the primary law[32].

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[29]Case 11/70, *Internationale Handelsgesellschaft*, [1970] E.C.R. 1125; Case 106/77, *Amminstrazione delle Finanze v. Simmenthal*, [1978] E.C.R. 629.

[29] The preconditions for direct effect are not fully described; the leading cases, *van Gend & Loos*, ECJ [1963] 1, and *Costa/Enel* [1964] 1250, are missing; reference to the demarcation between lack of horizontal direct effect and admissible interpretation in conformity with directives might be an idea; also appropriate, finally, would be a reference to the fact that the primacy of Community law over core areas of national constitutional law is not recognized in most Member States (the complete subordination of the MSS under the EU presupposing, in legal theory, a non-existent federal structure of the latter), and that instance courts in various Member States have no right to overthrow constitutional provisions. See on the problem of constitutional conflicts C. Schmid, *From pont d'Avignon to Ponte Vecchio*, WP Law 1998/7, EUI Florence.

[30] See foreword, *European L. Rev.* 22 (1997), 395, under the heading "Aims"

[31] The *legislative* fixation of the ECJ to particular interpretations, questionable from viewpoints of a division of functions within the Community, should meet with a similarly negative response as the notorious "Barber-Protocol" to the Maastricht Treaty. Among many on this, see Everling, "Zur Stellung der Mitgliedstaaten der Europäischen Union als "Herren der Verträge"", in *Festschrift f. Bernhard*, 1995, 1161 (1171f).

[32] See IV. below.

IV. The Simplification of Primary Law in the Amsterdam Treaty

1. Review of the Structure of the Amsterdam Treaty

In its first part (Art 1-4), the AT contains actual changes to the law of Community and Union. These include simplifications of substantive law. Mention should be made in particular, in the context of institutional provisions, of the far-reaching elimination of the cooperation procedure under Art. 189 c EEC (retained only in the area of monetary union) and the tightening of the codecision procedure under 189 b EEC by abolishing the third reading in the European Parliament. The legal technical simplifications of primary interest here are instead regulated by the AT in Arts 6-8. Each of these three Articles is devoted to simplification in one of the three Community treaties; the Union Treaty has not been affected in this respect. Art. 9 AT lays down a further important simplification: the repeal of the Convention of 25.3.1957 on common institutions and the Merger Treaty of 8.4.1965, with the exception of the protocol on privileges and immunities. The essential content of these texts was however incorporated in Art. 9 AT. Art. 10 AT contains a general provision on the basic concept underlying simplification, maintenance of the legal *acquis*. Art. 11 explicitly extends ECJ jurisdiction to part 2 of the AT. Part 3 of the Treaty, consisting of general and final provisions (Art 12-15), contains in Art. 12 an important regulation renumbering the Community and Union treaties and adjusting references. Art. 14 (2), finally, regulates the coming into force of the Treaty on the first day of the second month following deposit of the last ratification document[33].

2. Extent of the Simplification

The simplifications ordered in Part 2 of the AT concern, as indicated, exclusively the three Community treaties and the annexes and protocols attached to them; however, the declarations attached to these treaties remain largely unaffected (because of their lack of legal bindingness) as do the various accession treaties (this essentially affects only transitional, time-limited and other detailed technical arrangements not already taken over into the main treaties). Only these changes, and not the amended versions of the treaties so created as a whole, have to be ratified by the Member States. However, Art. 12 (1) AT bindingly renumbers the provisions of the Union and Community treaties, including the amendments and additions of the first two parts of the AT, according to concordance tables contained in the annex to the treaty: cross-references and references in other Community treaties and other legal instruments and acts are to be adjusted (Art 12 (2-4) AT). This avoids big gaps because of deleted provisions, and makes the added letters for provisions incorporated in the Community treaty

[33] The date aimed at for entry into force is 1.1.1999. See *Agence Europe* Nr. 7073 v. 6/7. 10. 1997, 3.

later superfluous. The new versions of the Union and Community Treaty produced by the change in numbering - which are not supposed to be ratified as such, and, accordingly, will not have binding effect - are attached to the Final Act of the AT for illustrative purposes. The many existing treaty amendments made this re-numbering overdue. The associated difficulties in orientation have accordingly to be put up with as unavoidable[34].

The renumbering retained the existing structure of the treaties as far as possible. All that was deleted from the EC treaty was the section abolishing duties between Member States, and partly the following section setting up the Common Customs Tariff, since most of these provisions had become obsolete. To accommodate the substantive changes, Title IV on "visa, asylum, immigration and other policies affecting free movement of persons" (essentially, provisions transferred from the third pillar), Title VIII on employment and Title X on cooperation in customs matters were added. In the Union treaty, only a title on flexibility, as we know among the most important substantive changes in the AT, was added[35]. In the other two Community treaties the simplification took an easier form: by contrast with the EC treaty, traditional provisions here had from the outset been in separate sections, which could simply be deleted.

3. Content of the Simplification

a) Bases

The conceptual guideline in all simplification measures is, as already indicated, the scrupulous maintenance of the legal *acquis communautaire*. Accordingly, the simplification confines itself essentially to deleting obsolete provisions. Improving the wording of individual provisions going beyond adjustments required by the deletions was in principle deliberately refrained from. The justification was that formulations that at first sight seemed redundant had often been chosen because the content of individual provisions was not equally unambiguous for all parties to the treaties. Equally, vague, ambiguous provisions often conceal a political compromise that ought not to be affected in the course of a purely technical legal clean-up[36].

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[34] Thus Hilf/Pache, "Der Vertrag von Amsterdam" *NJW* 1998, 705 (706); Streinz, "Der Vertrag von Amsterdam", *EuZW* 1998, 137 (139).

[35] For a comprehensive picture see Ehlermann, "Engere Zusammenarbeit nach dem Amsterdamer Vertrag: Ein neues Verfassungsprinzip?", *EuR* 1997, 362; for a criticism Weiler, "Amsterdam, Amsterdam", *European L. J.* 3 (1997), 309 (311f.); see also de Areilza Carvajal/Dastis Quecedo, "Flexibilidad y cooperación reforzadas", *Revista de Derecho Comunitario Europeo* 1997, 7; Constantinesco, "Les clauses de "coopération renforcée" (...)" *RTDE* 1997, 751.

[36] Jacqué (Fn. 5), 905 (908).

In harmony with this approach, Art. 10 of the treaty contains a special "*acquis guarantee clause*", intended to prevent an undesired anti-integration interpretation of individual simplified provisions[37]. In detail, Art. 10 (1) provides that the repeals, deletions and adjustments in the Community treaties as well as the legal effects of these provisions, in particular the effects of the deleted deadlines, and also the legal effects of the accession treaties, remain unaffected.[38] This is intended in particular to ensure that failure to meet an expired deadline can continue to be actionable before the ECJ. Clause 2 extends this protection of the status quo also to legal acts in force enacted on the basis of these provisions; clause 3, finally, mentions in the same context explicitly the Convention on Common Institutions and the Merger Treaty. Maintenance of the legal *acquis* is further stressed once again in a separate declaration on Art. 10 AT in the Final Act[39].

According to its regulatory conception, Art. 10 can be understood as an (intertemporal - hierarchical) conflict provision[40], whereby if the scope of the simplification is unclear the previously valid version of the provision concerned, if appropriate clarified by the ECJ case law, has primacy. It is obvious that the comparison of various versions this makes necessary may lead to considerable problems in applying the law. Additionally, the importance of the interpretive criteria of the new version's wording and of its systematic structure could thus be relativized. In practice, to be sure, such difficulties are scarcely to be expected since first, the simplifications have in any case been done only rather cautiously and second, an anti-integration interpretation could not be reconciled with the umbrella maxim of *effet utile*.

b) Special Questions

In detail, in accordance with the general guidelines for the simplification mentioned, all time-limited, deadline and transitional provisions that had become obsolete were deleted. For symbolic reasons, the deadline in Art. 7a EEC for the completion of the internal market, 31.12.1992[41], was retained, though in view of the deletion of the other deadlines this looks like an oversight[42]. Additionally,

[37] See the explanatory report from the Council General Secretariat, OJ C 353/1, 20.11.1997, 2; similarly Bundesrats-Drucksache 784/97, 17.10.1997, 162; see also *Dodd/Ware/Weston* (Fn. 5), 61f.

[38] This is intended in particular to ensure that failure to meet an expired deadline can continue to be actionable before the ECJ. Clause 2 extends this protection of the status quo also to legal acts in force enacted on the basis of these provisions; clause 3 finally mentions.

[39] Declaration n° 51 to the Final Act.

[40] For a basic treatment of these subtypes of law of conflict see Kegel, Allgemeines Kollisionsrecht, in FS v. Overbeck, 1990, 24.

[41] So Jacqué (Fn. 5), 903 (909).

[42] So too *Streinz* (Fn. 34), 137 (139). A more elegant suggestion here might have been the one

abolition obligations and standstill clauses, for instance on duties or on implementing fundamental freedoms, were, in harmony with the established case law of the ECJ, reformulated as prohibitions. One exceptional farther-reaching consolidation was made in the Act introducing universal direct elections of members of the European Parliament, Arts. 1, 2 and 3 (1) of which were, because of their "constitutional nature", rightly taken over into Art. 138 (old version) TEC. These provisions concern the principles of universal direct election, the five-year term and the number of members per Member State.

A further interesting problem of detail arose with Art. 44 EEC. The system of minimum prices it regulates concerns only the transitional period, which expired on 31.12.69, so that the provision has clearly become obsolete. However, the ECJ derived *inter alia* from this provision the still important principle of Community preference, that is, a preference for trade with other Member States over third states[43]. Here the decision was for deleting the provision, though setting out in a separate declaration attached to the Final Act that the principle mentioned remained unaffected thereby. It would perhaps have been more elegant and comprehensible explicitly to incorporate the principle in the treaty. The same problem arose with the agreement on the transitional provisions under Art. 85 ECSC, obsolete in content, whereas the procedure for concluding international treaties by the ECSC contained in it continues as before to be complied with[44]. In this case, too, the provision was deleted, but the further application of the principle provided for in a separate declaration.

Finally, two obvious errors ought not to remain unmentioned. Thus, an obviously out-of-date passage in Art. 43 I (old version) EEC was retained: "In order to evolve the broad lines of a common agricultural policy, the Commisssion shall, immediately this Treaty enters into force, convene a conference of the Member States with a view to making a comparison of their agricultural policies...." On this, the General Secretariat's explanatory report says quite anecdotally and in lapidary fashion: "the conference mentioned in clause 1 was held in 1958 in Stresa (Italy). It was nonetheless decided to retain this subparagraph"[45] . The report is silent as to the reasons for this decision. Another regrettable blemish is that the Union treaty continues to contain Titles II and III - the provisions

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in the Florence Draft (Fn. 2, German version, p. 156f., translator's note) to retain the date in the treaty but point out that it had expired. The wording might then have been: Art 7a : "The Community shall adopt measures with the aim of progressively establishing the internal market (...) insofar as these have not yet been carried out following the expiry of the set deadline of 31.12.92".

[43] See Jacqué (Fn. 5), 905 (907f).

[44] It provides that negotiations are to be conducted by the Commission acting on a basis of unanimous instructions from the Council, while Member State representatives may take part in the negotiations.

[45] See *OJ* C 353, 20.11.1997, p. 5.

of Arts. G through I old version and 8 through 10 new version - which merely lay down amendments to the three Community treaties and therefore contain no separate meaning within the Union treaty and are correspondingly not printed even in text collections - including even the renumbered Union treaty in the addendum to the Final Act (!). As a supplementary component of the Union treaty, these provisions, while not deleted, could have been rearranged in a less clumsy way[46].

4. The Failed Farther-reaching Consolidation

a) Basic Features of the Drafts by the "amis de la présidence"

As already mentioned at the outset, farther-reaching consolidation in the AT had been planned in the form of a codification of the main treaties in a single document. For this the group of experts called "amis de la présidence", working in parallel with the IGC, had developed various proposals[47] which were reduced to two main alternatives in the course of the conference.

According to the first alternative[48] all the four main treaties were to be consolidated. As with the academic drafts, the constitutionlike provisions were to be put at the start, the three Communities merged and common provisions made for the institutions' actions under the three treaties. The substantive legal provisions of the ECSC and Euratom treaties were, as in the Lausanne draft, to be moved out to protocols. However, a separation of Community treaties and Union treaty into various books was to be retained in order to make sure they were specifically covered, particularly in the light of the ECJ's differing competences[49]. Since however the ECSC treaty in any case runs out in 2002, and in the case of the Euratom treaty the danger of a politically detrimental debate in connection with the new ratification was rated too high, in the later course of the work a second consolidation version was preferred, leaving the Euratom and ECSC treaties entirely untouched but otherwise containing no differences from the first

[46] See *Streinz* (Fn. 34), 139.

[47] Consolidation alternative 1: merger of the simplified Community treaties while retaining the various legal personalities, Doc SN 4230/96; alternative 2: merger of the Community treaties while simultaneously merging the legal personalities, Doc. SN 4463/96; alternative 3: merger of the Community treaties and the Union treaty while simultaneously merging the legal personalities of the Communities, Doc. SN 4464/96; only this alternative was further pursued. For a comparison of these versions with concordance tables, see Doc SN 4692/96. For a review of the work of the "amis de la présidence", see Jacqué (Fn. 5), 903 (910f).

[48] See CONF/4109/97 and CONF/4122/97.

[49] Specifically, CONF/4122/97 provided for the following structure: Book 1: Framework provisions for the EU treaty (Art. A-F TEV old version); Book 2: European Community; Book 3: CFSP; Book 4: CJHA; Book 5: final provisions.

version[50]. The differences between this alternative and the Amsterdam simplification are, however, relatively slight.

b) The Reasons for Failure and Declaration N° 42 on the Final Act

As already mentioned, none of the farther-reaching consolidation drafts from the "amis de la présidence" were adopted at the IGC. Jean-Paul Jacqué made political reasons chiefly responsible for this failure[51]. A new unitary treaty would have had to be ratified again as a whole by Member States. This would lead to a danger of new public debate breaking out about provisions long decided, such as those on monetary union. Though even the treaties' rejection would of course have been able to change nothing of old law from the legal viewpoint, that might understandably have meant political disaster. Moreover, Member States would not have felt it desirable to have the technical changes associated in public debate and in ratification in Member States with the substantive innovations of the Amsterdam Treaty. Instead experience has shown, particularly with the Belgian constitutional reform,[52] that technical revisions are best done in a separate amending procedure where it is clear to the public that no changes of substance are involved. For these reasons Member States by majority refrained from farther-reaching consolidation, though ordering in Declaration n° 42 that the consolidation efforts begun be continued and the results published on the General Secretariat's responsibility, albeit without legal effect[53]. Later, this sort of consolidation version could still be given the consecration of legal validity.

As members of the "amis de la présidence", however, explicitly explained, probably no such intention underlies the declaration mentioned. Instead, it was meant in the first place as a "lightning conductor" to "divert attention" from the failure of the farther-reaching efforts. The Dublin mandate was seen as ultimately preventing merger of the Community and Union treaties; but in order to go to meet the Member States that had made this demand and not leave the drafts already worked out completely unused, it had been agreed to publish them without making them legally binding - and, be it noted, not even under the responsibility of the Council itself but only of its General Secretariat. The impression indeed compels itself that despite Jean-Paul Jacqué's constrasting assertion,

[50] See CONF/4133/97.

[51] Jacqué (Fn. 5), 903 (912f.); also Petite (Fn. 5), 37.

[52] For details on this see Louis, in v. Bogdandy/Ehlermann, "Konsolidierung und Kohärenz des Primärrechts nach Amsterdam", *Europarecht*, Beiheft 2/1998.

[53] It should be stressed in this connection that this declaration was demonstrably, on the basis of its genesis, intended to relate only to the failed further consolidation, not to the new Amsterdam versions of the Community and Union treaty added as addenda to the Final Act. Otherwise there would indeed be a conflict difficult to solve with the renumbering order, effective in international law, in Art. 12 AT, as pointed out by *Streinz* (Fn. 34), 137 (139), and Wouters, "Amsterdam, Parts Two and Three", *MJ* 4 (1997), 328 (330f.).

scarcely any thought seems to have been given to introducing a consolidated version as a legally valid new treaty text soon. Otherwise, the idea would have suggested itself of calling a follow-up revision conference on the Belgian model, or at least laying one down in the Declaration as desirable. It should further be noted that it would scarcely promote the transparency of primary law nor be acceptable in practice were the numbering of the treaties to be changed again immedately. One of the best German experts on the European institutions, Claus-Dieter Ehlermann, takes the view on this[54] that each generation of European lawyers could reasonably be expected to put up with this sort of change only once. For these reasons, it seems likely that the General Secretariat's unofficial consolidation version(s) will be around for a while[55]. A personal enquiry at the Council's General Secretariat, finally, showed that publication of these version(s) would have to await the entry into force of the AT.

5. Summary Evaluation

On the whole, it may be said that the AT largely confines itself to "housekeeping" the treaties by deleting obsolete provisions and making therefore necessary adjustments to remaining ones. Genuine consolidation in the sense of a further unification of primary law came only exceptionally, in particular with the incorporation of the provisions on elections to the European Parliament into the EC treaty, as mentioned. It should also be noted in criticism that the urgently needed clarification of the relationship between Union and Communities was further postponed. On the whole, of course, the resulting improvement in the legibility and transparency of primary law attained in the AT is to be welcomed; and alongside this one may also attest a slightly more constitutional look to the cleaned up treaties[56]. Despite this, the otherwise rather thin consolidation outcome, by comparison with the ambitious academic drafts, has to be disappointing. This assessment makes the question of the prospects for further consolidation all the more urgent.

[54] In a talk with the author in April 1998.

[55] It is noteworthy that, according to information from some "amis de la présidence", the States opposed to further consolidation even deliberately pressed for renumbering of the simplified provisions in order thereby to minimize the chances of later consolidation in view of the further renumbering that would then be due. By contrast, some States in favour of consolidation had, following the failure of these efforts, turned for the same reason, though without success, against the renumbering (!).

[56] Thus *Wouters* (Fn. 50), 328 (331)

V. Prospects for Further Non-Legislative Consolidation

1. Preliminary

The failure even of the consolidation drafts from the "amis de la présidence", reticent by comparison with the academic drafts, shows that the AT has brought probably the maximum politically attainable change at present. In particular, a merger of Union and Communities is apparently not in line with Member States' alleged symbolic desire to preserve the Union's control function over the supranational Communities[57]. However, at least a limited consolidation is to be expected in the near future in the light of the expiry of the ECSC treaty in 2002. This is however likely to be confined to the area of the Communities though the maximal solution of merging the two remaining Communities and incorporating the still relevant ECSC provisions in a unitary Community treaty seems because of the then again necessary re-numbering unlikely. Irrespective of this, European Parliament in particular is continuing its efforts at further constitutionalization of the Union system[58].

As a consequence, in view of the currently rather slight chances of any further legislative consolidation, enhanced importance attaches to alternative possibilities of further simplification of primary law. This paper will look further at the proposal adumbrated in the Cambridge Draft for a further-reaching compilation in the form of a Restatement. The basic conception of the US Restatement will be summarized and tested with an eye to its transferability, if necessary with modifications, to European primary law.

2. The Basic Conception of the American Restatement

The production and publication of Restatements by the American Law Institute set up specially for the purpose in 1923 by academics and practitioners is intended to remedy the detrimental position that the US case law had taken on in-

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[57] Thus *Everling*, Ueberlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes, DVBl 1993, 936 (940), explaining that the EU was modelled on old French concept of an "Europe des partries" meant to contain the supranational communities; on the structure of the Union, see also *Curtin*, the Constitutional Structure of the Union: A Europe of bits and pieces, CMLR 30 (1993), 17; *v.* Bogdandy/ Nettesheim, "Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung", *EuR* 1996, 3; see also the contributions by v. Bogdandy, Kadelbach, König, Müller-Graff and Zuleeg in v. Bogdandy/Ehlermann (eds.), "Konsolidierung und Kohärenz des Primärrechts nach Amsterdam", *Europarecht*, Beiheft 2/1998.

[58] A working group at the Robert Schuman Centre, EUI Florence, commissioned by the Parliament, has again analysed further possibilities of constitutionalizing the treaties. See the final report "Quelle Charte constitutionnelle pour l'Union européenne? Strategies et options pour renforcer le caractère constitutionnel des traités", on file with the RSC.

creasingly incalculable dimensions[59]. These uncertainties were increased still further by State competence for the bulk of American law, and particular the whole of private law, and the resulting differences in the law of the various states. As a private initiative by the legal profession, the legally non-binding Restatement was intended to contribute to clarification and systematization, as well as also largely to unification, further development and improvement of the case law by reformulating general principles derived from the case material and summarizing them in a legal text resembling a codification. The Restatement would help lawyers in searching the case material and to a certain extent even relieve the courts from their own evaluation of the precedents. While in first generation Restatements the summarizing of guiding principles was still to the fore, in the second and third generation of Restatements, produced from the 50s onward, the comments and illustrations attached to the principles gained in importance. These contain in particular assessments basic to the formulation of the principles, along with the precedents used (indicated in the footnotes). Additionally, all decisions in which the Restatements are cited were separately published ("Restatement in the Courts"). While, moreover, the first Restatements exclusively concerned areas of State private law, like contract, tort and restitution, later compilations also covered other areas coming under federal legislative competence. To be noted here is in particular the 1987 *Restatement Third on Foreign Relations Law of the United States* containing the international law in force (in the American view) with references to foreign trade law and international procedural law. It is true that the Restatements are rarely adduced by the courts as the sole basis for decision but mostly only as one of several sources of a legal view. Nevertheless, their authority as a so-called secondary source of law is well above that of text books and commentaries. And the gain in systematization and unification reached through them cannot be overlooked. Last but not least, Restatements offer beginners and foreign lawyers in particular a valuable basis for a systematic grasp of American law.

3. Chances for a Restatement of Primary Law and a "European Law Institute"

The advantages of the Restatement in the American case-law system indicated make adopting it in the area of European primary law, which is in vast areas also constituted by case law, worthy of consideration[60]. The fact that Community law

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[59] For more detail see Schindler, "Die Restatements und ihre Bedeutung für das amerikanische Privatrecht", *Zeitschrift für Europäisches Privatrecht* 1998, 275; Gray, "E pluribus unum? A Bicentennial Report of Unification of Law in the United States", *RabelsZ* 50 (1986), 111 (119ff); C. Schmid, *Das Zusammenspiel von Einheitlichen UN-Kaufrecht und nationalen Recht*, 1996, 138ff.

[60] In European private law Restatements have been discussed for some time now as an instrument for non-legislatory unification of law (cf. eg, Remien, "Rechtseinheit ohne Einheitsgesetze?", *RabelsZ* 56 (1992), 300 (312ff) and, most recently, Basedow, "The renascence of

applies uniformly in all Member States and is also monitored by a central European jurisdiction should only facilitate working out such a compilation and make basic divergencies less likely, but not take away its usefulness. For in primary law, too, systematic summarizing and commenting on the lines of the more recent American Restatements could make a major contribution to increasing transparency[61].

Like the American model, the Restatement should try to transform the jurisprudence into specific rules and contain comments and cases for illustrative purposes. In the footnotes, important legal literature in all European languages should be quoted. Thus, a Restatement would be somewhat different from German-style commentaries in that the formulation of general rules should further enhance the rationalisation of problems and the discovery of inconsistencies in the ECJ's jurisprudence. In terms of content, a Restatement might build on the preliminary work in the Cambridge draft, but go farther to accomplish the main intentions of the Lausanne and Florence drafts, too, bringing all the important legal texts together into one treaty. Like these drafts, a Restatement should accordingly contain a section on the Union's constitutional bases (including the ECJ's famous doctrines of autonomy, direct effect, primacy, interpretation in conformity with directives, State liability, etc), a general part on institutions, legal instruments, procedures and judicial review powers. It could also bring about one of the oldest demands from the European Parliament[62], but also of several Member States: an exhaustive catalogue of European fundamental rights that could be put at the start of the text, even before the provisions on Union citizenship, and illustrated by the relevant ECJ decisions. It would be important for getting the Restatement accepted for it to keep strictly to the law as it stands, so that it could be used without reservations in applying the law in the Union's everyday legal reality. Such a compilation could thus give primary law all round a

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uniform law: European contract law and its components", *Legal Studies* 18 (1998), 121). In particular, the socalled 'Principles of European Contract Law' (*Lando/Beale* (eds.) 1995), elaborated in a comparative perspective by national academics and meant to constitute a synthesis of national contract laws, have been qualified as a Restatement of European private law. Finally, it should be noted that, in other central areas of Community law, too, like competition and anti-trust law, a Restatement might do good work.

[61] Though Declaration 42 on the Final Act of the AT, as mentioned, orders the publication of further consolidated versions without legal validity - which may evoke associations with a Restatement - it seems, however, neither realistic nor sensible for such a compilation to be based on this provision and worked out by the General Secretariat. For, first, Declaration n° 42, as we have shown, was adopted in order to publish drafts already elaborated by the General Secretariat. Alongside this, as also mentioned, it would be desirable for an institution with higher authority than the General Secretariat, and to boot not under time pressure, to make the Restatement idea a reality.

[62] See most recently Parliament's resolution on the Treaty of Amsterdam, "*Europe*"/ Documents n° 2060, 3.12.1997, 4, n° 12

look of something more like a constitution - an endeavour that would scarcely have prospects of assent from all Member States as a legally binding text.

The decisive thing for the success of a Restatement is no doubt for it to be produced by a European institution of high authority and published in all Community official languages. A transnational professional institution of European lawyers on the model of the American Law Institute would no doubt be the ideal vehicle. It would also seem conceivable for a Community institution, especially the Parliament, to mandate an academic institution in which all Member States are if possible represented to produce this work. Irrespective of the specific vehicular institution, it would also be important, for a Restatement to work, that it should as far as possible include the Commission and Courts in producing it. For the Restatement's authority would likely depend in practice on whether these institutions consistently use it in their decisions and also cite individual provisions from it. Additionally, in order to be capable of use in everyday legal life, a Restatement would have to be adapted at regular intervals to new law and jurisprudence.

While dangers associated with a Restatement can scarcely be seen in view of its lack of legal validity, its utility could be manifold. It is, first, obvious that a main text giving the Union's constitutional bases, including fundamental and human rights, broad space could present the Union in an incomparably more positive and transparent light and ideally help it to more acceptance by its citizens. To this end, uncommented versions of the Restatement giving only the rules could also be published. Additionally, this sort of compilation of primary law in force could also facilitate an insight into European law for legal beginners. Thus, it could be useful for teaching purposes, too. Further, it could for European accession candidates be a clearer and perhaps also more easily accessible source for acquainting themselves with the legal *acquis communautaire.*

Further advantages might arise for legal science itself. At present, as we know, the academic treatment of European law largely takes a relatively national approach. So while the area is increasingly covered in a growing number of commentaries, journals and textbooks in the various Member States, these do not always employ the foreign literature to a satisfactory extent; and only a few very famous textbooks are translated into other European languages. The whole national secondary literature, moreover, tends to be marked in terms of style, structure and presentation by the various national legal academic traditions[63]. A Restatement produced by outstanding scholars and practitioners from various

[63] For instance, German works frequently focus heavily on dogmatic details and often also contain example cases handled according to traditional syllogistic techniques. By contrast in the Latin legal world, especially in Mediterranean countries, rather rhetorically oriented and lengthy works tend to prevail, partly devoid of discussions of specific cases.

Member States, with commentaries and illustrative cases, could by contrast develop the beginnings of a genuinely European style that could contribute to a "Europeanization of European Legal Science".

Additionally, the European legal profession could through a Restatement gain greater influence over the case law of the European Court. While apparently a large part of the abundant legal literature on European law, particularly pieces written in less accessible languages - among which German has to be counted - are scarcely yet noticed by most judges and officials in the Community, a Restatement would mean a sort of bundling of the authority of scholars and practitioners from the various States. The European courts would as a consequence see themselves confronted with a respected review body of the European legal profession speaking with a single voice, which could thus critically accompany the systematics and consistency of case law and thus place the courts under greater legitimation and justification pressure.

Enhanced influence for a "European Law Institute" or a similar transnational institution would - something that cannot be more than mentioned in the present context - presumably be a thing to welcome from viewpoints of democratic theory as well. At present, the European "multi-level polity", due to the absence of a largely homogeneous European demos, still lacks important requisites of an identity-supported, "input-oriented" democracy. Therefore, apart from drawing on "output-oriented" mechanisms to convey democratic legitimacy, alternative "input-oriented" concepts, which do not depend on a European demos, need to be developed.[64] The most prominent one among these seems to be the concept of deliberative supranationalism, which essentially builds on "external and taming deliberative political processes between institutional actors and societies"[65], in which, ideally, the best solutions emerge because of their higher rational persuasiveness. Thus, a European institution of the legal profession could considerably enhance truly transnational deliberations on the "best interpretation of laws" and the "best law". Such processes might take on outstanding importance also because of the greater importance of this medium in the Union by comparison with Member States because of the lower basic political consensus[66].

Finally, it would be a perhaps not untypical development for the Community if a Restatement could, following a longish period of proving and the continued incorporation of new case law, manage to make its way with Commission

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[64] On the distinction between input- and output-oriented democratic legitimation, see Scharpf, *Problem-solving capacities of multi-level governance*, forthcoming, Chapter I.

[65] Joerges, "European Challenges to Private Law", *European L. J.* 3 (1997), 377 (389).

[66] See Ehlermann, "The European Community, its law and lawyers", *CMLRev.* 29 (1992), 213, 221.

and Court support as an important European constitutional text. Since the start of the Community, important steps in integration have frequently been attained not just through political course-setting by Member States, but also through far-sighted decisions by its lawyers, especially its judges. Ultimately, thus, a Re-statement might even to some extent compensate for the lacking political consensus among Member States in favour of further-reaching consolidation of primary law, and a "European Law Institute" might evolve into an important element of the checks and balances of the European constitutional system.

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