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The Legacy of the Maastricht-Urteil  
and the Pluralist Movement

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**JULIO BAQUERO CRUZ**

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## **Abstract**

The Maastricht-Urteil of the German Constitutional Court of October 1993 has left a deep mark on European Union law. Although some may consider it as part of legal history, the decision has never been overruled, and the ideas behind it are very much alive. This paper tries to examine the legacy of that decision. From a practical point of view, the paper focuses on the following issues: the current situation in Germany; the influence on other constitutional or supreme courts and on constitutional reforms in some Member States; the influence on the European Court of Justice and on the Treaty establishing a Constitution for Europe. Regarding theory, three sections of the paper discuss a number of widespread '*idées reçues*' contained in the Maastricht-Urteil on notions such as the State, constituent power (*pouvoir constituant*), and democracy. The next section presents the movement of legal pluralism as an attempt to come to terms with the Maastricht-Urteil and its legacy. It criticises the radical versions of legal pluralism in view of the damage they may cause to essential dimensions of the rule of law. The final section reflects on the real motives behind the Maastricht-Urteil and its legacy, and on possible future developments.

## **Keywords**

European law; German Constitutional Court; rule of law; supremacy; European Court of Justice



## 1. How the True World Became a Fable\*

For those of us who first approached European Community law in the early 90s, the experience was fascinating. We found a law that was in motion and open, the very opposite of what we studied at the university: the civil law, traditional, conservative, crystallised; or constitutional and administrative law, dogmatic, axiomatic, impersonal. We had hardly ever read a judgment before, and were thrilled by *Van Gend en Loos*, *Costa v ENEL*, *Simmenthal*, *ERTA*, *Francovich*.<sup>1</sup> We read with fascination Pescatore's *Law of Integration*<sup>2</sup> and Weiler's 'Transformation of Europe'.<sup>3</sup> With hindsight one could say that that period saw the high watermark of European integration through law. Opinion 1/91 summarised the central elements of Community constitutional law as interpreted by the European Court of Justice.<sup>4</sup> The Maastricht Treaty consolidated many of them, adding important provisions on citizenship, economic and monetary union, foreign policy and justice and home affairs, and putting all together under the umbrella of the European Union.

Everything seemed to be running smoothly, but several spectres hovered over the Europe we were only beginning to discover, and they were soon to become visible. The first one was popular indifference and disaffection, with the close majority of the French referendum and the negative result of the first Danish referendum. The second was constitutional conflict: in 1992 the French and Spanish constitutional courts held that the Maastricht Treaty was incompatible with the respective State Constitutions and that constitutional amendments were required before ratification could proceed;<sup>5</sup> German ratification was suspended in view of a number of complaints lodged before the Federal Constitutional Court.

When the German Court made public its judgment on 12 October 1993, the Maastricht Treaty was declared to be compatible with the German Constitution. Germany was the last Member State to complete ratification and the Treaty could finally enter into force. But to arrive at that conclusion the German Court added various reservations, conditions and limits to German participation in the European Union. Curiously, the French and Spanish decisions finding the Maastricht Treaty unconstitutional appeared to be harmless in comparison with the German decision. They were formalistic and normatively thin. They slighted European Community law more than they threatened it. The respective Constitutions were easily amended, and the Treaty was soon ratified. The constitutional conflict was soft and short-lived. It seemed a well-rehearsed and empty symbolic ritual. In contrast, the German declaration of compatibility was intense and normatively thick. It pointed to intangible elements of the German Constitution, to unresolved contradictions, to permanent limits imposed on the European Union. It threatened with non-compliance. It evoked the possibility of unilateral withdrawal. Reading that decision we realised that there was another perspective on integration, another paradigm that claimed a higher legitimacy than the European one.

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1 Case 26/62, *Van Gend en Loos* [1963] ECR 1; Case 6/64, *Costa v ENEL* [1964] ECR 585; Case 106/77, *Simmenthal* [1978] ECR 629; Cases C-6/90 & C-9/90, *Francovich* [1991] I-5357; Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263.

2 Sijthoff, Leiden, 1974.

3 *Yale Law Journal*, 1991, p. 2403.

4 Opinion 1/91 [1991] ECR I-6079.

5 See the decisions in A. Oppenheimer (ed.), *The Relationship Between European Community Law and National Law: The Cases*, Cambridge University Press, Cambridge, vol. 1, 1994, pp. 385, 399 and 712.



A philosopher once wrote: ‘The true world has become a fable’ . That’s how we felt at that time. We thought that Community law had become a fable, that perhaps it had always been one. We were baffled.

More than a decade has passed and we may now be able to read the Maastricht-Urteil with more detachment. Some may even have the impression that it has become part of legal history, but the truth is that the decision has never been overruled, that it has left a deep mark on European Union law, that the ideas behind it are very much alive. This paper explores its controversial legacy in constitutional practice and theory. It also interprets the movement of legal pluralism as an attempt to come to terms with the decision and its legacy, criticising the damage that radical pluralism may cause to essential dimensions of the rule of law.

But let us first recall the main holdings of the Maastricht-Urteil.

## 2. The Maastricht-Urteil<sup>6</sup> and Its Place in the Case Law of the German Constitutional Court

The first part of the decision focused on admissibility. The German Court found that the complaint was admissible only insofar as it related to Article 38 of the German Constitution, on the constitutional right to participate in the elections of the Bundestag. According to the Court, the German law ratifying the Maastricht Treaty could directly and actually violate that right, which excluded the possibility ‘of reducing the content of the legitimation of state power and the influence on its exercise provided by the electoral process by transferring powers to such an extent that there is a breach of the democratic principle in so far as it is declared intangible by Article 79(3) in conjunction with Article 20 (1) and (2)’.<sup>7</sup> This was the device through which the German Court came to review the instrument of ratification and the whole Maastricht Treaty. The rest of the complaint was declared inadmissible, since it related to fundamental rights guaranteed by the German Constitution for which Community law provided a generally equivalent protection. The German Court declared that it would exercise its review of secondary Community legislation in that field in cooperation with the European Court of Justice, restricting itself ‘to a general guarantee of the constitutional standards that cannot be dispensed with’.<sup>8</sup>

The second part of the decision expounded the minimum intangible content of Article 38 of the German Constitution and assessed the Maastricht Treaty vis-à-vis that standard. The German Court accepted in principle that democracy in the European Union could be *sui generis* and did not have to follow the models of democracy which are usually adopted in nation-States. A minimum of legitimacy was needed, but the specific form through which it would be achieved was not important. Thus, legislation by the executives meeting in the Council and majority voting was accepted, even if this meant that German citizens would lose some of their influence. In any case, this was said to be limited by ‘the constitutional principles and basic interests of the Member States’,<sup>9</sup> in an implicit reference to a questionable interpretation of the Luxembourg compromise.<sup>10</sup> In addition, the Court held that the European Parliament only provides ‘complementary’ legitimacy for the Union, in view of the fact that a European public sphere, an essential condition for a meaningful European democracy, does not exist yet, even if it may develop in future. In this respect, European citizenship was said to constitute ‘a

6 BVerfG, 89, 155 (1993). English translation in *Common Market Law Reports*, 1994, p. 57.

7 *Common Market Law Reports*, 1994, at p. 77.

8 *Ibid.*, at p. 79. This was a somewhat modified restatement of the *Solange II* judgment of 1986 (BVerfG 73, 339; English translation in A. Oppenheimer, cited in note 5, p. 462).

9 *Ibid.*, p. 86.

10 The Luxembourg compromise did not establish a formal veto power over decisions subject to majority voting affecting the very important interests of a Member State, neither did it lead to a consistent legal practice in that sense. See my ‘The Luxembourg Compromise from a Legal Perspective: Constitutional Convention, Legal History or Political Myth?’, in J.-M. Palayret, H. Wallace and P. Winand (eds.), *Visions, Votes and Vetoes: The Empty Chair Crisis and the Luxembourg Compromise Forty Years On*, P.I.E.-Peter Lang, Brussels, 2006, p. 251.

legally binding expression of the degree of a *de facto* community already in existence', even if 'it does not have a tightness comparable to the common nationality of a single state'.<sup>11</sup> Until such factual preconditions of democracy develop, legitimacy rests mainly with the Parliaments of the Member States. They must preserve sufficient functions 'to give legal expression to what binds the people together (to a greater or lesser extent of homogeneity) spiritually, socially and politically'. The conclusion is that 'functions and powers of substantial importance must remain for the German Bundestag'.<sup>12</sup> The German State must not be withered away (the so-called *Entstaatlichung*).

The theme of democracy was immediately linked to that of competences: the Treaty must be precise enough in its objectives, competences, rights and obligations, or else the Union may end up exercising powers which are not conferred. If the Maastricht Treaty were to be implemented in a way which is not covered by that Treaty, the German Court added in what would become the *ritornello* of the decision, 'the resultant legislative instruments would not be legally binding within the sphere of German sovereignty'. And it declared itself competent to carry out that kind of review.<sup>13</sup>

The part of the decision devoted to competences began with a series of basic assumptions: Germany is one of the 'Masters of the Treaties' and may withdraw from the Union unilaterally at any time by a contrary act. Community law is not autonomous: its validity and application in Germany depend upon the act of accession (the 'order to give legal application' or *Rechtsanwendungsbefehl*) and ultimately upon the German Constitution, not upon the autonomous force of the Treaty. Thus, Germany remains a sovereign State and the Union has no *Kompetenz-Kompetenz*, that is, no competence to determine its own competences. Its powers are enumerated and limited, and if the Treaty were interpreted 'in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession' (that is, with the interpretation thereof given by the German Court), 'the resultant legislative instruments would not be legally binding within the sphere of German sovereignty'.<sup>14</sup> The Court then discussed two themes which are less interesting for my present purposes: the constitutionality of Article F(3) of the Maastricht Treaty and of the provisions on monetary union. The first point was not very important. Concerning the second issue, the German Court declared that the new Treaty rules on monetary policy were constitutional, in spite of the exclusion of democratic participation, because they were designed to promote price stability. This part of the judgment is relevant for the economic constitutional model of Germany and the Union, a theme that will not be explored in this paper.<sup>15</sup>

The Court then added a strong note, which was a clear message to the European Court of Justice:

Whereas a dynamic expansion of the existing Treaties has *so far* been supported on the basis of an open-handed treatment of Article 235 of the EEC Treaty as a 'competence to round-off the Treaty' as a whole, and on the basis of considerations relating to the 'implied powers' of the Communities, and of Treaty interpretation as allowing maximum exploitation of Community powers ('*effet utile*') [...], *in future* it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.<sup>16</sup>

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11 *Common Market Law Reports*, 1994, p. 86.

12 *Ibid.*, p. 88.

13 *Ibid.*, p. 89.

14 *Ibid.*

15 On this issue, see Ch. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', *European Law Review*, 2005, p. 461, at p. 475.

16 *Common Market Law Reports*, 1994, p. 105.

In its conclusion, the German Court underlined that '[a]ny further development of the European Union [could not] escape from the conceptual framework set out above'. In a more conciliatory note, it added that '[w]hat is decisive, therefore, from the viewpoint both of the Treaties and of constitutional law, is that the democratic bases of the Union will be built up in step with the integration process, and a living democracy will also be maintained in the Member States as integration progresses'.<sup>17</sup>

Before moving to the analysis of the legacy of the Maastricht-Urteil, it is important to say something about its place in the European case law of the German Constitutional Court, which had previously reached a delicate balance with *Solange II*.<sup>18</sup>

First, with regard to fundamental rights, the Maastricht decision repeated the position of *Solange II* that was codified in Article 23 of the German Constitution in the reform that paved the way to the Maastricht Treaty: the German Court will not intervene as long as European Community law generally provides for an equivalent protection. At the same time something seemed to have been changed. Before the Maastricht decision only acts of German authorities, such as measures implementing Directives, could be challenged. After that decision, it seemed that acts of the Community itself could also be challenged directly before the German Constitutional Court.<sup>19</sup>

Second, for the first time the theme of competences was expressly linked to the democratic deficit: the judgment revolves around democracy as a fundamental right, through a substantive, expansive and unprecedented interpretation of Article 38 of the German Constitution, which becomes a yardstick for European integration regardless of Article 23, the specific provision on the Union. The more balanced if ambivalent approach of *Kloppenburg* to competence issues seemed to be abandoned. In *Kloppenburg*, the German Court highlighted that the European Court of Justice has 'the power of final decision on the interpretation of the Treaty and the validity and interpretation of the acts of secondary Community law', to the exclusion of 'any concurrent jurisdiction of the German courts',<sup>20</sup> accepting that the European Court could develop Community law and 'interpret and amplify existing powers of the Community in the light of and in harmony with the objectives of the Treaty'.<sup>21</sup> At the same time the German Court recalled that '[t]he jurisdiction granted by Article 177 [now 234] is not unlimited. The limits imposed on it by the Constitution are ultimately subject to the jurisdiction of the Federal Constitutional Court'.<sup>22</sup> It had also assessed whether the contested interpretation of the Treaty by the European Court had kept 'within the bound of the sovereign rights assigned to [the Community]', concluding that it had, and annulling the judgment of the Bundesfinanzhof, according to which the European Court had overstepped those limits.<sup>23</sup> All in all it, however, *Kloppenburg* did not seem to create a straitjacket for the Luxembourg Court and for the legal development of the Community.

According to the Maastricht-Urteil, in contrast, the interpretation of Community powers should cease to be expansive and become restrictive; *ultra vires* Community acts are said to be inapplicable 'in Germany', without specifying the institutions that may decide whether those acts are indeed *ultra vires*;<sup>24</sup> nothing is said about the powers of the Luxembourg Court concerning the interpretation of the

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17 Ibid., p. 108.

18 Cited in note 8.

19 See J. Kokott, 'Report on Germany', in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Courts & National Courts: Doctrine and Jurisprudence*, Hart, Oxford, 1998, p. 77, at p. 81.

20 See the *Kloppenburg* judgment, BVerfG, 75, 223 (1987); English translation in A. Oppenheimer, cited in note 5, p. 497, at pp. 508-509.

21 Ibid., p. 516.

22 Ibid., p. 509.

23 Ibid., pp. 515-516.

24 Some interpreted the decision to mean that any German court and any political or administrative organ in Germany could carry out that review (for example, Ch. Tomuschat, 'Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts', *Europäische Grundrechte-Zeitschrift*, 1993, p. 489, at p. 494); J. Kokott, 'Deutschland im

Treaty. A new category seemed to be added to the review of respect for fundamental rights: competence issues. It has been argued that these are fundamentally different from fundamental rights issues, because they go ‘beyond the bipolar relationship between the German constitutional order and the European legal order’, extending to ‘the validity and/or application of European law in all other Member States’.<sup>25</sup> It seems to me, nonetheless, that the difference is not so clear, for two reasons. First, competence issues will generally be raised through constitutional complaints based on Article 38 of the German Constitution, which is a fundamental right. Second, a finding of the German Constitutional Court against a Community act considered to be *ultra vires* would only apply in Germany. It does not mean that courts in other Member States will reach the same conclusion. They may follow it, to be sure, but that can also happen with regard to other fundamental rights. Structurally, issues of competence are similar to issues of fundamental rights, inasmuch as they contest particular interpretations and decisions of the European Court of Justice. The difference may be less significant and lie elsewhere: with regard to most fundamental rights, the German Court considers that the protection afforded at the European level is equivalent to that of the German system; with regard to the right to democratic participation, however, the European situation is not seen as comparable to that obtaining in Germany, and that seems to justify a more active review of Community competences.

In sum, the Maastricht decision changed the German constitutional case law, but there was a degree of uncertainty about the extent of the change. Some may have thought that there was only a change of emphasis, but it was more likely that there was a substantive departure in the interpretation of the German Constitution with regard to European integration.<sup>26</sup>

### 3. Lower German Courts and Subsequent Case Law of the German Constitutional Court

Many years have passed since 1993, and some may think that the Maastricht decision is now part of legal history. Before reaching such a conclusion, however, we need to examine the current state of the law, first of all in Germany.

Concerning lower German courts, after certain initial enthusiasms in which, mainly in connection with litigation on the organisation of the market of bananas, a number of German courts threatened to declare Community acts *ultra vires* pursuant to the Maastricht decision<sup>27</sup> or even declared that the European Court of Justice had exceeded its limits in a specific case,<sup>28</sup> the situation soon became stable. Lower German courts assumed that *ultra vires* review of Community acts would only be carried out by the Constitutional Court.

(Contd.) \_\_\_\_\_

Rahmen der Europäischen Union—zum Vertrag vom Maastricht’, *Archiv des öffentlichen Rechts*, 1994, p. 207, at pp. 218-220, argued that only the Constitutional Court could carry out that review in very exceptional circumstances.

- 25 F. Mayer, ‘The European Constitution and the Courts’, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Hart, Oxford, 2006, p. 281, at p. 298.
- 26 See, in this sense, S. J. Boom, ‘The European Union After the Maastricht Decision: Will Germany Be the ‘Virginia’ of Europe?’, *American Journal of Comparative Law*, 1995, p. 177, at pp. 217-219.
- 27 Decision of 9 January 1996 of the Bundesfinanzhof, *Europäische Zeitschrift für Wirtschaftsrecht*, 1996, p. 126; J. Kokott, ‘Report on Germany’, cited in note 19, p. 117, refers to other decisions of lower German courts. On the bananas litigation and the immediate consequences of the Maastricht-Urteil, see U. Everling, ‘Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts’, *Common Market Law Review*, 1996, p. 401; N. Reich, ‘Judge-Made ‘Europe à la carte’: Some Remarks on Recent Conflicts Between European and German Constitutional Law Provoked by the Bananas Litigation’, *European Journal of International Law*, 1996, p. 103; R. Voss, ‘Das ‘Maastricht’-Urteil und die Folgen’, *Recht der Internationalen Wirtschaft*, 1996, p. 394; F. C. Mayer, *Kompetenzüberschreitung und Letztentscheidung*, Beck, Munich, 2000, pp. 120-131.
- 28 Judgment of the Finanzgericht Rheinland-Pfalz of 7 November 1994, *Europäische Zeitschrift für Wirtschaftsrecht*, 1995, p. 588.

Regarding the subsequent case law of the German Constitutional Court, three decisions are of particular significance.<sup>29</sup> The first one is the order declaring inadmissible a constitutional reference related to the common organisation of the banana market and putting an end to the ‘banana litigation’. The German Court repeated the holding in *Solange II* to the effect that the case law of the Luxembourg Court already provides an effective protection and that it would only intervene if the general level of protection went below that of the German Constitution. It affirmed that the Maastricht decision had not changed that position.<sup>30</sup> This could be interpreted to mean that review of European law on the part of the German Constitutional Court would not be take place in practice,<sup>31</sup> with regard to fundamental rights but also with regard to competences issues, which after all can only be raised through a fundamental rights complaint based on Article 38 of the German Constitution.<sup>32</sup>

The second important decision was rendered on 9 January 2001.<sup>33</sup> The German Constitutional Court declared that the refusal by a German court to refer a case to the European Court of Justice pursuant to Article 234 EC is a violation of the right to a lawful judge enshrined in the German Constitution. This latter decision consolidates the standing case law of the German Court, which already recognised that principle, and gives a further sign of deference.

‘All bark and no bite’! That was the reaction of one commentator to the first of these decisions,<sup>34</sup> and the feeling of more observers, but perhaps the German Court had already indirectly bitten or had thought to have done so, through its alleged influence on the European Court of Justice and on other national courts, themes that will be explored below. Besides, these two examples do not really mean that the Maastricht-Urteil had lost its currency in German constitutional law: there has been no formal overruling and the decision remains in the arsenal of German Constitutional Court, as is shown by the 2005 judgment on the European arrest warrant.<sup>35</sup>

In that judgment, the German Constitutional Court declared unconstitutional the German provisions implementing the Framework Decision on the European arrest warrant,<sup>36</sup> but only insofar as the German legislator had exercised its discretion within the margins left by the European Union. The German Court thus tried to avoid ruling on the validity of the Framework Decision. This exercise in judicial minimalism may be deceptive, however: the judgment is based on dubious interpretations of the substance and scope of the Framework Decision, and of the margins left to the German legislator.

The grounds for declaring the German law unconstitutional were two: first, the violation of the principle of proportionality insofar as one of the optional grounds for non-execution of the arrest warrant foreseen in the Framework Decision had not been included in the German law; second, a violation of the right to effective judicial protection insofar as there was no judicial appeal against the final decisions taken by German administrative authorities. With regard to proportionality, the

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29 For other decisions in which the German Constitutional Court was deferential and avoided direct conflicts with the European Court of Justice, not carrying out the kind of review that it had announced in the Maastricht-Urteil, see F. C. Mayer, cited in note 27, pp. 122-130. In addition, a constitutional complaint against the German law ratifying the Amsterdam Treaty and closely based on the Maastricht-Urteil was declared inadmissible by that Court on 1 April 1998, for lack of fundamental constitutional importance (case 2 BvR 464/98). Curiously enough, Paul Kirchhof was one of the three judges in the chamber, and the decision was unanimous.

30 Order of 7 June 2000, BVerfG, 102, 147; English translation in A. Oppenheimer, cited in note 5, vol. 2, 2003, p. 270.

31 See M. Nettessheim, ‘EU-Recht und nationales Verfassungsrecht’, *FIDE XX Congress London*, BIICL, London, 2002, at p. 146.

32 See my *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Hart, Oxford, 2002, p. 61.

33 Order of 9 January 2001, *Europäische Zeitschrift für Wirtschaftsrecht*, 2001, p. 225.

34 Ch. U. Schmid, ‘All Bark and No Bite: Notes on the Federal Constitutional Court’s ‘Banana Decision’’, *European Law Journal*, 2001, p. 95.

35 BVerfGE, 2 BvR 2236/04, judgment of 18 July 2005 (German and English texts at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)).

36 OJ L 190, of 18 July 2002, p. 1.

unconstitutionality of the German law could have been avoided through the doctrine of consistent interpretation, applied by the European Court of Justice in the context of the third pillar in the *Pupino* judgment, rendered a month before.<sup>37</sup> It was indeed possible to interpret German law in conformity with the Framework Decision. Even though the German legislator had not expressly included one of the grounds for non-execution of the arrest warrant enshrined in the Framework Decision, it seems that it was implicit in another provision of the German law, which did not prevent, in any event, the use of the principle of proportionality when deciding whether to apply these optional grounds for non-execution.<sup>38</sup> With regard to the absence of an appeal against decisions executing an arrest warrant, the distortion is even greater. The German legislator implementing the Framework Decision had divided the procedure into a judicial stage on admissibility and an ministerial stage on the granting of the surrender, thus preserving part of the old extradition system. This is why the Constitutional Court requires a judicial appeal against the final administrative decision. But the holding of unconstitutionality was unnecessary, for the German double-track system is first of all incompatible with the Framework Decision,<sup>39</sup> according to which the decision on surrender has to be taken by one judicial body, exclusively on legal grounds. That decision, besides, is final and there is no appeal against it.

This should have pre-empted the German constitutional issues because simpler solutions, more loyal to the legal order of the Union, were available. But the German Constitutional Court saw the case through the exclusive prism of the German Constitution, misinterpreting the Framework Decision. By refusing to abide by its obligation to request a preliminary ruling from the European Court of Justice, as proposed by the German government,<sup>40</sup> the German Court has created confusion and endangered the integrity of European Union law. In addition, the judgment of the German Court puts Germany in breach of European Union law until it adopts a new law implementing the Framework Decision on the European arrest warrant. In this state of affairs, it is dubious whether the German legislator can respect the judgment of the Constitutional Court and implement properly the Framework Decision at the same time.

Finally, for no particular reason the German Court took advantage of the occasion to repeat the principles of the Maastricht-Urteil concerning the withering away of the State, and to threaten that German organs would have to deny implementation of the Framework Decision if the basis for mutual confidence among the Member States ceased to exist. The Court also interpreted restrictively the new constitutional provision (Article 16(2)) that had been introduced expressly to allow for Germans to be extradited, which recalls the restrictive interpretation of Article 23 of the German Constitution in the Maastricht decision. This shows that the Maastricht-Urteil is very much alive in the German Constitutional Court.

A constitutional complaint is currently pending before that Court concerning the Treaty establishing a Constitution for Europe.<sup>41</sup> The complainant, a member of the Bundestag, argues that the

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37 Case C-105/03, *Pupino*, judgment of 16 June 2005, not yet reported.

38 In his dissent, judge Gerhardt argued that implementation of Article 4(7) of the Framework Decision was 'not required' because the relevant exception was already covered by another provision of the implementing law. He recalled that the Committee on legal affairs of the Bundestag had expressed the same view in a preparatory report. See also Ch. Tomuschat, 'Inconsistencies—The German Federal Constitutional Court on the European Arrest Warrant', *European Constitutional Law Review*, 2006, p. 209, at p. 222; and the comment by A. Hinarejos Parga, *Common Market Law Review*, 2006, p. 583, at p. 588.

39 See Ch. Tomuschat, cited in note 38, at pp. 223-224.

40 In its submissions, the federal government had argued that the supremacy principle means that European law and German law based on it cannot be reviewed against German fundamental rights (paragraph 35 of the judgment). The government also argued that the Constitutional Court should refer a preliminary question to the Luxembourg Court if it had any doubt about the compatibility of the Framework Directive or the implementing law with European Union fundamental rights.

41 Case 2BvR 839/05; a prior complaint had been declared inadmissible because it was directed against a purely procedural act of the Bundestag: BVerfG, 2 BvE 1/05, of 24 April 2005.

German law ratifying it is in breach of several provisions of the German Constitution, including Article 38 on democratic participation. Closely following the Maastricht-Urteil, he claims that the Constitutional Treaty develops the federal character of the Union, violating intangible structural principles of the Constitution and depriving Germany of its 'existential Statehood'. Until the German Court rules on the complaint, the ratification of the Constitutional Treaty, already approved by the Bundestag and the Bundesrat, has been suspended. The case was going to be decided in the winter 2006/2007, but in view of the negative results of the French and Dutch referenda and of possible new developments, like a different Treaty to be submitted to ratification again, the judge in charge of the case has decided to postpone the decision until the fate of the Constitutional Treaty becomes clearer. Otherwise, he argues, the Constitutional Court would become a participant in the European constitutional process, and that would be incompatible with its position as holder of the power of last decision.<sup>42</sup> What seems beyond doubt, in any event, is that the complaint is considered admissible and that the decision on the Constitutional Treaty—or on whatever replaces it—will be on the merits. If we were to guess the result, this communication and of the judgment on the European arrest warrant indicate that a restatement of the Maastricht-Urteil is much more likely than an overruling.

#### 4. Other National Constitutional Courts and Constitutional Revisions

The Maastricht-Urteil also had cross-border effects. It has been a symbol, a catalyst and an incentive in other Member States.<sup>43</sup> The German Court has acted as a sort of Pied Piper of Hamelin, attracting some national courts with the charming song of the defence of State-based constitutional democracy, leading them out of the walls of the European city, into the river of national constitutional dogmatics. It remains to be seen whether the Piper will receive the promised reward. Otherwise he may come back with a vengeance...

The first to react was the Danish Supreme Court in *Carlson and Others v Rasmussen*,<sup>44</sup> which dealt with proceedings brought by several Danish citizens for a declaration that the implementation of the Maastricht Treaty in Denmark was unconstitutional. The tone of the judgment is softer than that of the Maastricht decision, but it adopts the same conceptual matrix and normative solutions. The Supreme Court, interpreting the Danish Constitution, rejected the claims of the appellants. It declared that in principle Danish courts are obliged to abide by the supremacy of Community law and by the jurisdiction of the European Court of Justice. 'However', it added, 'national courts cannot be deprived of their right to examine the question of whether a particular EC legal act exceeds the limits for the transfer of sovereignty brought about by the Act of Accession. Consequently Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that it can be established with the requisite certainty that an EC act which has been upheld by the European Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty brought about by the Act of Accession. A similar interpretation would apply with regard to rules of Community law and legal principles developed in the practice of the European Court of Justice'.<sup>45</sup> In addition, the Supreme Court remarked that the new interpretation of Article 235 of the Treaty (now Article 308 EC) by the European Court was compatible with the requirement of specification enshrined in Article 20 of the Danish Constitution (the clause allowing for the delegation of powers to supranational organisations). The new interpretation of Article 235 had supposedly become stricter as a reaction to the German Maastricht decision. The Danish Court highlighted that the new

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42 See the text of the communication to the parties in the press release of 31 October 2006 of Peter Gauweiler, the complainant.

43 J. Dutheil de la Rochère and I. Pernice, 'General Report to FIDE XX Congress 2002 in London', *FIDE XX Congress London*, BIICL, London, 2002, p. 1, at p. 31: the Maastricht judgment 'seems to have been a 'leading' case also for other Member States'.

44 Case No I-361/1997, judgment of 6 April 1998, in A. Oppenheimer, cited in note 5, vol. 2, p. 174.

45 *Ibid.*, p. 191.

interpretation had to be ‘taken as the basis even though, prior to the amendment of the Treaty, this provision may have been applied on the basis of a wider interpretation’.<sup>46</sup> The implication is that a wider interpretation of that provision could be incompatible with the Danish Constitution. Thus, the Danish Court took favourable note of what it saw as a reaction of the Luxembourg Court to the Maastricht-Urteil.

After Maastricht and its aftermath, the constitutional scene was quiet for a while, until the Treaty establishing a Constitution for Europe and the implementation of the Framework Decision on the European arrest warrant led to a new wave of jurisprudential developments.

In 2005, the Polish Constitutional Court entered the arena of European Union law with two judgments: one declaring unconstitutional and annulling the Polish provisions transposing the Framework Decision on the European arrest warrant—while suspending the effects of the judgment for 18 months during which the Constitution could be amended to avoid that unconstitutionality; another, declaring constitutional the accession of Poland to the European Union, with a series of reserves and limitations.<sup>47</sup> Both are clear creatures of the conceptual matrix of the Maastricht-Urteil. Both deny the autonomy of the European legal order and attribute its validity to the Polish Constitution. Both claim a very active role for the Polish Constitutional Court in the review of European Union law. They are not limited to the particular conditions of the third pillar, in which the jurisdiction of the European Court of Justice is limited (and Poland had not yet accepted it, which meant that, unlike the German Constitutional Court, the Polish Constitutional Court could not make a preliminary reference in the first case), but seem to extend also to the Community pillar.<sup>48</sup> The second decision cites expressly the Maastricht-Urteil to justify the review by the Polish Constitutional Court of the extent of European Union competences and also of respect for fundamental rights.

In the wake of the Polish Court, the Supreme Court of Cyprus, quoting extensively the Polish judgment, has also annulled the law implementing the Framework Decision on the European arrest warrant in that country.<sup>49</sup>

In a recent decision, the French Constitutional Council has also denied the absolute supremacy of European Union law and the exclusive competence of the European Court with regard to provisions of Union law in conflict with express provisions of the French Constitution, even if this can be seen as a progress in comparison with the prior position of absolute supremacy of the French Constitution.<sup>50</sup> Like the Italian Constitutional Court, however, the *Conseil Constitutionnel*, also the heir of a strong and autonomous legal culture, does not seem to be directly influenced by the Maastricht-Urteil. The Italian and French positions seem to be similar, but they have developed autonomously and are normatively ‘thinner’. What can be said is that the Maastricht decision and the Italian and French case law support each other with their convergent perspective and attitude.

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46 Ibid., p. 189.

47 Judgments of 27 April 2005, P 1/05, and of 11 May 2005, K 18/04 (both available at [www.trybunal.gov.pl](http://www.trybunal.gov.pl)).

48 See the judgment of 27 April 2005 (Case P 1/05), paragraph 9: ‘The Tribunal is not relieved of [its] obligation [to review the conformity of normative acts with the Polish Constitution] where the allegation of non-conformity with the Constitution concerns the scope of a statute implementing European Union law.’

49 Judgment of 7 November 2005 (summarised in document 14281/05 of the Council, of 11 November 2005). Curiously, but not surprisingly, all these decisions have been seen as examples of ‘constitutional pluralism’ in action. See J. Komárek, ‘Pluralismo Constitucional Europeo tras la ampliación: Un análisis de la jurisprudencia comunitaria del Tribunal Constitucional Polaco’, *Revista Española de Derecho Europeo*, 2005, p. 627.

50 See Décision n° 2004/496, of 10 June 2004 (Loi pour la confiance dans l’économie numérique); see also Décision n° 2004/505 DC, of 19 November 2004 (traité établissant une Constitution pour l’Europe). See also Décision n° 2006/540 DC, of 27 July 2006 (Loi relative au droit d’auteur et aux droits voisins dans la société de l’information), in which the *Conseil Constitutionnel* declares that it will not send a preliminary reference to the Luxembourg Court in view of the short delay in which it has to rule according to the French Constitution (thus ignoring the primacy of Article 234 EC over that Constitution), and proceeds to review on its own the constitutionality of the French law transposing a Directive.



That may not be the case with the Spanish *Tribunal Constitucional*, which operates in a younger constitutional culture heavily influenced by German public law. Thus, the declaration of the Spanish Constitutional Court concerning the Treaty establishing a Constitution for Europe<sup>51</sup> follows the normative framework of the Maastricht-Urteil, taking also some inspiration from the case law of the *Corte Costituzionale*,<sup>52</sup> and departing from its earlier more formalistic position.<sup>53</sup> First, the Spanish Court put forward a distinction between primacy and supremacy, which was based on the traditional German distinction between precedence in application and precedence in validity (*Anwendungsvorrang* and *Geltungsvorrang*).<sup>54</sup> Second, the limitations on the transfer of the ‘exercise of competences’ to international organisations pursuant to Article 93 of the Spanish Constitution, which are ‘respect for State sovereignty, basic constitutional structures, and the system of values and fundamental principles enshrined in [the] Constitution, among which fundamental rights are of particular importance’, are also modelled on the German Maastricht decision. They take for granted that European Union law is effective in Spain by virtue of the Spanish Constitution, and that it only has precedence of application within the bounds set by that Constitution, which remains supreme. In particular, respect for State sovereignty and basic constitutional structures could easily become the excuse for a marginal review of the extent of European competences.<sup>55</sup>

In contrast to these courts, the Belgian *Cour d'arbitrage* has recently referred to the European Court of Justice all its doubts concerning the validity of the Framework Decision on the European arrest warrant, arguing that ‘differences of interpretation among judicial bodies concerning the validity of Community acts and the validity of the legislation that implements them in national law endanger the unity of the Community legal order and put into question the Community general principle of legal certainty’.<sup>56</sup> The Belgian Constitutional Court has thus taken seriously Union law and its role in the European judicial system.

But the influence of the Maastricht-Urteil is not limited to national constitutional courts. In some cases, national constitutions have been amended to incorporate concepts and principles that are related to that decision, which sometimes was mentioned in the debates leading to a constitutional amendment.

The Swedish constitution was revised upon accession in order to include a new provision, Article 10:5, itself amended in 2003, which now reads:

The Riksdag may transfer a right of decision-making which does not affect the principles of the form of government within the framework of European Union cooperation. Such transfer presupposes that the protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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51 Declaration 1/2004, of 13 December 2004 (in *Boletín Oficial del Estado*, 4 January 2005, No. 3, Supplement, p. 5).

52 See the main judgments (*Frontini*, *Granital* and *Fragd*) in A. Oppenheimer, cited in note 5, at pp. 629, 643 and 653.

53 Compare with the declaration on the Maastricht Treaty (cited in note 5), which predated the Maastricht-Urteil.

54 See BVerfGE, 31, 145 (1971); English translation in A. Oppenheimer, cited in note 5, vol. 1, p. 415.

55 As argued by A. Estella de Noriega in ‘A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration’, *European Public Law*, 1999, p. 269, at pp. 293-295. F. Castillo de la Torre, *Common Market Law Review*, 2005, p. 1169, at pp. 1193-1196 considers that the Opinion is more in line with the Italian case law on the guarantee of the constitutional core of fundamental values and principles than with the German case law on review of *ultra vires* acts; but the latter is also based on the protection of that core and the fundamental right to democratic participation.

56 Judgment of 13 July 2005 (No 124/2005), paragraph B.10 (my translation). The reference is Case C-303/05, *Advocaten voor de Wereld*. Advocate General Ruiz-Jarabo Colomer delivered his Opinion on 12 September 2006. He mentions the annulment of the transposition of the Framework Decision in Poland, Germany and Cyprus, expressing the ‘hope that other constitutional courts, which are reluctant to accept their responsibilities as Community courts, will follow the example and enter into a dialogue with the Court of Justice which is essential for the purpose of building a united Europe’ (footnote 20).

This provision was influenced by the jurisprudence of the German Constitutional Court, in particular the *Solange II* judgment and the Maastricht decision.<sup>57</sup> In proposing the amendment, the Swedish government wanted to make sure that Swedish courts should at least have the same powers as German courts with regard to European Union law.<sup>58</sup>

The Austrian Constitution was also revised upon accession. In its proposal, the Austrian government mentioned the German Maastricht decision and highlighted that clear *ultra vires* acts of the Communities would represent a possible fundamental change of circumstances that could justify unilateral withdrawal from the European Union.<sup>59</sup>

More recently, in 2004, the Portuguese Constitution was amended to incorporate the principles of direct effect and supremacy ‘in the terms defined by Union law’, but only ‘in the exercise of the corresponding competences [...], without prejudice to the fundamental principles of the democratic State and the rule of law’ (Article 8(4)). The reference to ‘the exercise of the corresponding competences’ and the limits imposed recall the rhetoric of the Maastricht-Urteil. Like Spanish legal culture, Portuguese public law is heavily influenced by German dogmatics. Apparently, the reform was launched by a group of constitutional lawyers in reaction to the primacy clause of the draft Treaty establishing a Constitution for Europe prepared by the European Convention. The final version, with its ambiguous mixture of openness and mistrust, was the result of a political compromise.<sup>60</sup>

The ongoing project for a reform of the Spanish Constitution is another example of this more diffuse and distant influence of the Maastricht-Urteil and of German constitutional dogmatics. The Spanish government has asked the *Consejo de Estado*, a consultative organ, to issue a report on the reform of the Constitution including the introduction of a new European clause. That provision should not only enshrine Spanish participation in European integration and the direct effect and supremacy of European Union law. It should also entrench the limits to integration that the Constitutional Court has found to be implicit in the Spanish Constitution. Thus, the government argues, those limits would be ‘enshrined expressly, as it is the case in the Constitutions of other European countries’.<sup>61</sup> The report of the *Consejo de Estado* follows closely the jurisprudence of the Spanish Constitutional Court, which is influenced by German constitutional jurisprudence, but it also uses comparative law, citing the constitutions of several Member States. It contains language that echoes the Maastricht-Urteil, such as ‘the need to safeguard the permanent character of the essence of Spanish statehood’ or ‘the intangible content of the Constitution’.<sup>62</sup>

## 5. The European Court of Justice and the Convention

The Maastricht-Urteil sent a clear message to the European Court of Justice and to European institutions, and we need to trace its legacy in the case law of the Luxembourg Court and on the powers entrusted with the revision of the Treaties. The possible influence on the European Union legislator will not be examined in this paper.

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57 See M. Claes, ‘Constitutionalizing Europe at its Source: The ‘European Clauses’ in the National Constitutions: Evolution and Typology’, *Yearbook of European Law*, 2005, p. 81, at p. 105.

58 See F. Mayer, cited in note 25, at p. 325, note 263.

59 See J. Kokott, cited in note 19, at p. 130.

60 See the debates leading to the amendment in [www.parlamento.pt](http://www.parlamento.pt).

61 Consejo de Estado, *Informe sobre modificaciones de la Constitución española*, February 2006, p. 46 ([www.consejo-estado.es](http://www.consejo-estado.es)). See also F. Rubio Llorente and J. Álvarez Junco (eds.), *El informe del Consejo de Estado sobre la reforma constitucional: Texto del informe y debates académicos*, Centro de Estudios Políticos y Constitucionales, Madrid, 2006.

62 *Ibid.*, pp. 87-88 and p. 85: ‘la necesidad de garantizar la permanencia de la esencia de la estatalidad española’; ‘el contenido irrenunciable de la Constitución’.

With regard to the first issue, it may seem that after October 1993 the European Court began to act much more cautiously in cases related to Community powers. Although the change may have not been as dramatic as some believe, interpretation seems to have become more restrictive in those cases. *Effet utile* and teleological arguments seem to appear less frequently in judgments about competences. The leading decision would be Opinion 2/94, in which the European Court declared that the Community is not competent to adhere to the European Convention on Human Rights, that mere interpretation would not grant such a competence, and that the Treaty had to be amended to make accession possible.<sup>63</sup> A restrictive approach to competences can also be discerned in the tobacco advertisement case,<sup>64</sup> in which the European Court annulled a Directive because it went beyond the scope of Article 95 EC, and in Opinion 1/94 (on the World Trade Organisation),<sup>65</sup> in which it rejected a dynamic interpretation of the common commercial policy. In addition, *Keck* limited the scope of review under the provision on free movement of goods.<sup>66</sup> A restrictive turn, however, did not take place in other areas such as European citizenship or State liability for breaches of Community law.

The causes of this limited change may be many. A number of scholars have expressed the widespread view that the Court was reacting to the Maastricht-Urteil.<sup>67</sup> As with fundamental rights, the pressure from the German Constitutional Court would have had a virtuous effect on the case law of the Luxembourg Court. Ulrich Everling has denied the influence on fundamental rights, however, for the relevant line of case law of the European Court of Justice started long before *Solange I*. Besides, he argued that it is ‘an odd supposition that the personalities who were or are judges of the Court of Justice are squinting timidly at the judgment of a German or other national court and that they can be influenced by pressures of national institutions. According to [his] experience, the judges are never impressed if national courts even of the highest level threatened to ignore their obligations under the Treaty’.<sup>68</sup>

What, then, is the truth of the matter? We do find language in Opinion 2/94 that is almost identical to some of the language of the German Maastricht decision: a somewhat rigid differentiation between interpretation and amendment of the Treaty is used to justify a restrictive construction of Treaty provisions. But perhaps there was another reason for the European Court’s limited turn than just responding to the German Court’s unilateral pressure. After 1986 the Treaty had been amended twice (Single European Act and Maastricht) and another intergovernmental conference was foreseeable. Those frequent and substantial Treaty amendments, unprecedented in the history of European integration, signalled a new impetus in integration. They added several new powers to the European Community. The Court may have felt that it no longer needed to be expansive on competences, as the drafters of amending treaties could now quickly put an end to any undesirable shortcoming concerning those competences. It seems to me, however, that the European Court’s intervention on competences has remained for the most part marginal, being limited to a few spectacular cases. Thus, in the field of competences the Court tries to carry out this essential constitutional function by interpreting the Treaty and striking a balance between the interests of the Member States and those of the Community.<sup>69</sup> In

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63 Opinion 2/94 [1996] ECR I-1759.

64 Case C-376/98, *Germany v Council* [2000] ECR I-8419.

65 Opinion 1/94 [1994] ECR I-5281. On this decision, see my ‘Disintegration of the Law of Integration in the External Economic Relations of the European Community’, *Columbia Journal of European Law*, 1997, p. 257.

66 Joined Cases C-267 & C-268/91, *Keck and Mithouard* [1993] ECR I-6097.

67 See, for example, A. Peters, *Elemente einer Theorie der Verfassung Europas*, Duncker & Humblot, Berlin, 2001, p. 425; A. Arnulf, ‘From Bit Part to Starring Role? The Court of Justice and Europe’s Constitutional Treaty’, *Yearbook of European Law*, 2005, p. 1, at p. 10; M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, *European Law Journal*, 2005, p. 262, at p. 296.

68 U. Everling, ‘The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union’, *Yearbook of European Law*, 1994, at pp. 14-15.

69 On this constitutional function of the European Court of Justice, see G. C. Rodríguez Iglesias and J. Baquero Cruz, ‘Funciones constitucionales del Tribunal de Justicia de las Comunidades Europeas’, *Fundamentos*, 4/2006, p. 291, at pp. 324-331.

sum, the Court's turn in the early 90s was not only a reaction to the threats of the German Constitutional Court in order to achieve judicial peace in Europe. The Court was mainly trying to find its place in a more dynamic Union.

In addition, although the Maastricht decision was to my knowledge never mentioned explicitly in the public documents of the European Convention, some key elements of the Treaty establishing a Constitution for Europe seem to be related to aspects of that decision. Let us mention just three: the procedurally framed but at bottom unilateral right of withdrawal (Article I-60); the guarantee of essential State functions (Article I-5); the persistent and perhaps excessive emphasis on the role of national parliaments in the functioning of the Union (Articles I-11(3), I-18(2), I-42(2), etc., and the Protocols on the role of national Parliaments in the European Union and on the application of the principles of subsidiarity and proportionality).

These new normative and institutional conceptions have much in common with the Maastricht-Urteil. The guarantee of basic State functions and constitutional structures particularly resounds with the fear of the withering away of the State (*Entstaatlichung*), and the European arrest warrant judgment of the German Constitutional Court made that connection clear when it linked the Maastricht decision and Article I-5 of the Constitutional Treaty.<sup>70</sup>

## 6. *Idées Reçues I: the State*

So far I have attempted to trace the direct and indirect legacy of the Maastricht-Urteil in the practice of various courts and also in the practice of constitutional revision, but there is another important dimension that should not be ignored: its influence on the way we think about the European Union and its law, and also about its relationship to State constitutional law.

Gustave Flaubert would be delighted with the Maastricht-Urteil, for he would be able to include some of its statements, transformed into slogans, in the *Dictionnaire des idées reçues*. And if Bouvard and Pécuchet were to discuss European Union law, they would surely use at least these four: 'the European Union is not a State and should not become one'; 'the Member States should remain States, preserving functions and powers of substantial importance'; 'there is no European people, only European peoples'; 'the Member States are the Masters of the Treaties'. But the world is full of Bouvards and Pécuchets, for we hear those received ideas too often, by journalists, by politicians and also by scholars. And yet they are all too simplistic. They deform the European Union and prevent us from seeing it for what it is.

These received ideas are at the basis of the conceptual framework or rather the conceptual maze of the decision, conceptual maze from which, according to the German Court, the Union will never escape. They are all axioms which we find in the previous writings of judge Kirchhof, the *rapporteur* of the Maastricht decision, which is a gloss of his previous writings as much as his subsequent articles on the Union are a gloss and vindication of that decision.<sup>71</sup> Three years before the judgment, in November 1990, there was a conference to celebrate the 25<sup>th</sup> anniversary of *Europarecht*, the leading German journal on European law. Paul Kirchhof was invited to speak, and he presented the ideas that were to become the main elements of the Maastricht-Urteil. His talk is a model of how to 'philosophise with the hammer'. It is structured in 'theses': First, 'The Federal Republic of German is a State and must remain a State; the EEC is a community of States and should not become a State.'<sup>72</sup>

70 Judgment cited in note 35, paragraph 75.

71 See, in particular, his articles in the *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, which he directs with Josef Isensee: 'Die Identität der Verfassung in ihren unabänderlichen Inhalten', vol. I, Müller, Heidelberg, 1988, p. 775; 'Der deutsche Staat im Prozeß der europäischen Integration', vol. VII, *ibid.*, 1992, p. 855.

72 P. Kirchhof, 'Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht', *Europarecht*, Beiheft 1, 1991, p. 11, at p. 12.

Second, ‘the sovereign powers of the European Economic Community are legitimised by the membership of the States; the Member States have remained the ‘Masters of the Treaties’; in connection to this he also referred to the existence of a unilateral right of withdrawal from the then European Economic Community.<sup>73</sup> The rest of the elements of the Maastricht decision are all there: the critique of the European Court of Justice and of its flexible interpretation of Community powers; the potential for conflict if the integrity of the German Constitution is not preserved; the practical possibility of avoiding conflict through informal cooperation... His conclusion is telling: the relationship between European law and Constitutional law must be developed from the point of view of the German Constitution as long as: ‘the national ground of validity for European law remains Article 24 [of the German Constitution] and the legislative act of application’; ‘the boundaries of the constitutional competence for the transfer of sovereign rights are not reliably established’; and ‘the cooperation of national and European organs is not clarified in a constitutional procedural law’.<sup>74</sup>

This makes *tabula rasa* of European Community law: the preliminary reference procedure is totally ignored; the Treaty itself does not seem to exist; everything comes from the German Constitution and should return to it. This clearly involves a sort of constitutional fetishism. In addition, the German Court appears as the supraconstitutional power in charge of preserving these *arcana*, and as some kind of Big Brother that is watching not only the European Court of Justice, but also national and European political institutions.

The reification of the State involved in the first two slogans did not escape Ulrich Everling, at the time a judge at the Luxembourg Court. In the debate he argued that he would rather leave the decision on whether the Community should become a State or not to his children, that in any event the State is no longer what it was a century ago.<sup>75</sup> Against these views, Kirchhof and the Constitutional Court engraved the State in stone. Thus, the withering away of the State (*Entstaatlichung*) would be constitutionally impossible in view of the eternity (*Ewigkeit*) clause of the German Constitution. Not even the strong majorities required for a constitutional amendment could wither away the German State by transferring essential functions and powers beyond a certain point. The German Constitution thus appears as a superstructure imposed on all public powers, even on the large majorities required to amend it, and enforced by the Constitutional Court. Important amendments of the German Constitution, such as Article 23, designed to render more flexible the Constitution with regard to European integration, are interpreted restrictively in the light of the old Constitution and almost ‘rewritten’.<sup>76</sup> The power of constitutional revision is seen as a subordinate power. The original *pouvoir constituant* has become a myth to be perpetuated by the German Constitutional Court. This is clearly a consequence of the constitutional choices taken after the experiences of Weimar, war and reconstruction, which led to an excessive judicialisation of constitutional politics in Germany, but perhaps the time has come for that Court to take a less rigorous approach to the eternity clause and a more open-minded attitude towards the interpretation of constitutional revisions.

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73 Ibid., pp. 13-14.

74 Ibid., p. 25.

75 Ibid., p. 45.

76 C. Grewe, ‘L’arrêt de la Cour constitutionnelle fédérale allemande du 12 octobre 1993 sur le Traité de Maastricht: l’Union européenne et les droits fondamentaux’, *Revue universelle des droits de l’homme*, 1993, p. 226, at p. 230: ‘réécriture de l’article 23’. The restrictive interpretation of Article 23 of the German Constitution with a view to safeguard State sovereignty was defended by P. Kirchhof, cited in note 72, at p. 16; D. Murswiek, ‘Maastricht und der *pouvoir constituant*: Zur Bedeutung der verfassungsgebenden Gewalt im Prozeß der europäischen Integration’, *Der Staat*, 1993, p. 161; U. di Fabio (currently a judge at the German Constitutional Court), ‘Der neue Art. 23 des Grundgesetzes: Positivierung vollzogenen Verfassungswandels oder Verfassungsneuschöpfung?’, *Der Staat*, 1993, p. 191. The same logic was followed in the judgment on the European arrest warrant: Article 16(2), introduced to allow for the extradition of German nationals, was interpreted restrictively in order to preserve as much as possible of the previous normative state of affairs.

The conceptual maze in which European integration must remain is too rigid to account for what the European Union is today, but it was already too rigid to account for what it was in 1993. When people repeat ‘Germany, or France, or Cyprus... is a State and shall remain one; the European Union is not a State and shall never become one’, there is a nervousness in both the tone and the insistence that reveals that Germany is probably no longer a State; that Europe already is, in a way, a State. Or, more precisely, that the nation-State, the historical form that the sovereign political community has taken for a while in Europe, has radically changed; that public power is now shared between two or more coordinated levels of government; that sovereignty is relative and pooled, and no longer really defines the political community. The defence of a static and unrealistic image of the nation-State goes against a process that is well under way.<sup>77</sup> It ignores the existing coordination in order to reassert itself. It reinterprets federal elements into softer international elements: for example, the lack of *Kompetenz-Kompetenz* is also the mark of any federation, which ceases to be a federation when its powers become unlimited. But all this is ignored in the maze of *idées reçues*.

### 7. *Idées reçues II: Pouvoir Constituant*

The third and fourth slogans about the absence of a European people and about the States as ‘Masters of the Treaties’ tend to deny the constitutional character of the European Union. The *pouvoir constituant*, which would be the only true author of a constitution, is equated with the people. Since there is no European people, Europe would not be the creation of a constituent power, but of the sovereign Member States. Hence it would not be sovereign, but in control of those States. The Treaty would not be a constitution in the proper sense of the word, but just a *sui generis* international treaty.

This has been defined by Miguel Maduro as a situation of ‘low intensity constitutionalism’ in which ‘a true *pouvoir constituant*’, seen as ‘the power of the polity to define its own destiny’, is missing.<sup>78</sup> One would have to decide which is ‘the polity—¿Europe or the states?—chosen as the locus of democracy’,<sup>79</sup> and opt between a ‘strict limitation of competences, denying constitutional authority to the Union [...] or else a clear definition of its constitutional authority with regard to the Member States. In the second instance, the Union should assume a form of *pouvoir constituant*.’<sup>80</sup> In a similar way, Mattias Kumm wonders whether the Union is ‘a compact between states or a constitution based on a European people’, assuming that only in the second case could European Union law have a ‘compelling claim’ of unconditional supremacy over national law.<sup>81</sup>

It seems to me that this ‘either-or’ thinking reflects a resistance on the part of many legal scholars to theorise the relationship between constituent power and federations or divided-power systems. We should try to think about that relationship, because the constituent power of a divided-power system need not and perhaps cannot really be like the constituent power of a unitary State. If we take the idea of the constituent power of the people as an axiom, the conclusion can only be that the European Union is not the creation of a constituent power, that it has no true constitution, and that it will probably never have one. However, in a divided-power system such as the Union it is misleading to look for the constituent power of a unitary state, that is, for the people acting as constituent power. In such systems, the people need not act directly as constituent power, unless the federation is to be dissolved into a unitary polity. The constituent power cannot be autonomous in the federal context, because its member units already exist as constituted political entities that cannot be ignored.

77 See Ch. Tomuschat, cited in note 24, at p. 496; S. Hobe, ‘The German State in Europe After the Maastricht Decision of the German Constitutional Court’, *German Yearbook of International Law*, 1994, p. 113, at p. 121.

78 M. Maduro, ‘The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism’, *International Journal of Constitutional Law*, 2005, p. 316, at p. 336.

79 *Ibid.*, p. 328 (emphasis added).

80 *Ibid.*, p. 331.

81 M. Kumm, cited in note 67, at p. 275.

Unfortunately, many of the theorists of constituent power ignore the case of divided-power systems,<sup>82</sup> in which the federal pact, a *constitutional treaty*, can be the constitution of the federation, changing fundamentally and permanently the status of the parties and the nature of their relationships, and being protected against unilateral interpretation, alteration or withdrawal. A main objective of such a pact is to neutralise the negative dimensions of State sovereignty among its parties.

The Treaty of Rome, as amended from time to time, can be seen as a federal constitutional pact.<sup>83</sup> The Member States do hold the constituent power in the European Union, but they do so jointly, not individually, as the expression ‘masters of the Treaty’ sometimes seems to convey. That constituent power refers both to the creation of the Treaty and to its amendment, for both are subject to the same requirements and procedures. Insofar as the Member States are organised democratically, as the Treaty itself requires, their constituent act will reflect the common will of the various peoples as citizens of the Member States and as European Union citizens. Direct popular involvement via referenda may be positive in terms of legitimacy, but it is not indispensable and in any event it will not cure the democratic imperfections of the European Union, which are mainly due to its decision-making process, not so much to the drafting of the Treaty and its subsequent amendments. After all, Sieyes, the father of the theory of the *pouvoir constituant*, argued that that superior power could act in any way it wanted, also through representatives.<sup>84</sup> And concerning democratic legitimacy, the institutions and processes that the constitution establishes for ordinary politics seem to me to be much more important than the process followed for the adoption of the constitution itself. Democracy in ordinary politics may sometimes ‘redeem’ an undemocratic beginning, but the most democratic of beginnings cannot replace democracy in ordinary politics.

### 8. *Idées reçues III: Democracy*

The *idée reçue* that ‘there is no European people, only European peoples’ also has consequences for the possibilities of democracy in the European Union. In his article on the Maastricht-Urteil, Joseph Weiler argued that the German Court had embraced a monolithic and organic notion of the people, which would need to be homogeneous in order to legitimise a polity. This notion would not be compatible with European integration, based on overlapping and non-exclusive identities that run counter the idea of a homogeneous people.<sup>85</sup> This critique, which is very interesting in itself, was perhaps somewhat misplaced in connection to the Maastricht decision. The point on the homogeneity of the people was really made in passing and it was a minor one in the reasoning of the German Court. It was not *völkisch* or ‘organic ethnic’, but based on the need of a European public sphere as a secular societal precondition for genuine democracy. It accepted that such a material precondition could develop in future if and insofar as it did not exist at present. It also accepted that democracy in the European Union does not have to be organised in the same way as in a nation-State. All this seems to me to be reasonable and compatible with a developmental theory of democracy in the

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82 But see C. Schmitt, *Verfassungslehre*, Duncker & Humblot, Berlin, 9th edition, 2003, reproducing the 1928 edition, pp. 62-75 and 366-368; A. Greber, *Die vorpositiven Grundlagen des Bundesstaates*, Helbing & Lichtenhahn, Basel, 2000, pp. 173-207; O. Beaud, ‘De nouveau sur l’État fédéral’, *Droits*, 2006, p. 229.

83 See Ch. Schönberger, ‘Die Europäische Union als Bund’, *Archiv des öffentlichen Rechts*, 2004, p. 81, at pp. 109-113; A. Peters, cited in note 67, pp. 234-239. N. Walker, ‘Post-Constituent Constitutionalism? The Case of the European Union’, in N. Walker and M. Loughlin (eds.), *Constituent Power and Constitutional Form*, Oxford University Press, Oxford, forthcoming 2007, acknowledges that ‘we lack an ideal understanding of the supranational conception of constituent power’. He does not contemplate the federal constitutional treaty as a possibility, proposing instead a post-constituent constitutionalism that unveils the complexities of the notion of constituent power in the European Union.

84 E. Sieyes, *Qu’est-ce que le Tiers état?* (published in 1789; edition of R. Zapperi, Droz, Geneva, 1970), pp. 180-204.

85 J. H. H. Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’, *European Law Journal*, 1995, p. 219.

European Union. Be it as it may, Weiler's reflection on the so-called 'no-demos thesis' has directed the debate in a certain direction, distracting our attention from other dimensions which may also be important.

Democracy is very problematic as a standard of judicial review, for various reasons. First, it is difficult to devise a predictable legal test to judge upon the democratic legitimacy of political institutions and processes. Second, courts, the legitimacy of which is mediated through law and is not directly democratic, are ill-suited to judge upon the democratic credentials of other institutions. They may play an important role correcting particular instances of democratic malfunctioning, but they cannot correct the systemic deficiencies of a political system. Third, if democracy is a matter of degree there is the risk of admitting too many exceptions and limits, and it is very difficult, in any event, to trace the line of what is the minimum intangible content of democracy.

It has been argued, in defence of the German Court, that the proceedings on the Maastricht Treaty allowed for a public debate which had not taken place because of the very wide consensus that existed among the German political classes and through which it had been approved by the German Parliament. Constitutional lawyers playing statesmen and the Constitutional Court would have provided for that essential deliberation on an important public issue.<sup>86</sup> But was it legitimate for the German Court to reopen a debate that had been already held and closed by an extremely large consensus among the representatives of the German people? The Act of Accession had been approved by a majority of 543 out of 568 votes in the Bundestag. The Bundesrat had approved it unanimously.<sup>87</sup> Before the Constitutional Court, the German government, the Bundestag and the Bundesrat had argued that the complaints were inadmissible.<sup>88</sup> The decision on admissibility was indeed criticised, because it is hard to argue that the act of ratification may violate *directly* the right of German citizens to democratic participation enshrined in Article 38 of the German Constitution. It is likely, therefore, that in declaring the complaint admissible insofar as it related to Article 38, the German Court used that provision in order to be able to give its doctrinal views on integration,<sup>89</sup> and perhaps also for other reasons that I shall explore in the concluding section of this paper. This tends to prove that the people behind the complaint were really a small political minority backed by constitutional lawyers. Initiating a constitutional complaint, they gained a resonance they did not have in the political sphere. Radical minority positions were overrepresented. To worsen things, the problem was European and the debate was German. A constitutional complaint was and remains no appropriate substitute for a public political debate.

Finally, by imposing a restrictive interpretation of European Union competences, courts may actually exacerbate democratic problems rather than the opposite. At first sight it may seem a good idea, since less would be done by the European Union and more by the supposedly more democratic Member States. In reality, however, all depends on a number of complex factors: the nature and scope of the policies concerned; the democratic character of national decision-making processes; the alternatives to European regulation; the nature of European regulation if the competences of the Union are strictly interpreted. In view of these factors, State legislation as an alternative to European legislation may sometimes be less democratic both in terms of input and output democracy. First, if policies have significant cross-border effects, as is often the case, a measure adopted by the democratic legislator of a Member State (a legislator that may also be affected by similar democratic problems such as expert decision-making, lobbying, predominance of the executive, etc.) may actually have less democratic legitimacy than a measure adopted by the European Union legislator, because it

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86 See, for example, M. Herdegen, 'Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'', *Common Market Law Review*, 1994, p. 235, at p. 249.

87 See K. Hailbronner, 'The European Union from the Perspective of the German Constitutional Court', *German Yearbook of International Law*, 1994, p. 93, at pp. 93-94.

88 See the pleadings of these institutions in I. Winkelmann, *Das Maastricht-Urteil des Bundesverfassungsgericht vom 12. Oktober 1993*, Duncker & Humblot, Berlin, 1994.

89 See the article by C. Grewe, cited in note 76, at pp. 227-229.



will not take into account the interests of all those affected. In other words, a State measure will generally not take into account interests placed outside its borders. Thus, the alternative to European regulation, which is Member State regulation, may not always be more democratic even if Member State institutions seem to be more democratic. In terms of output democracy, the insistence on a restrictive interpretation of Community competences may tie the hands of the Community legislator to deal effectively with a number of social problems, by limiting the options available and reinforcing the neoliberal inertia of European decision-making processes. These restrictions and the very structure of the European political process may force the Union legislator to opt for a second best. The limitation of competences may lead to suboptimal regulation, sometimes against scientific evidence, and to serious social harm, for example to human health. By putting pressure on the definition of Union competences, therefore, national constitutional courts could aggravate the democratic deficit also in output terms, leading to bad and risky legislation. Fortunately the Court of Justice and other European institutions have only rarely bent to that pressure. But if and when they do, the welfare losses ensuing from this power-game among courts may be dramatic.

## 9. The Pluralist Movement and Its Critique

There is another area in which the Maastricht-Urteil has shaped our way of looking at the Union: the relationship between European law and national law. According to the decision, the validity and application of Community law in Germany rests solely on the act of ratification, and ultimately on the German constitution, and is limited thereby. The autonomous claim of validity and supremacy of European law is meaningless from the internal constitutional point of view, which is the only point of view adopted by the German Constitutional Court. In its stronger aspects, the Maastricht decision thus claims final authority for the German Constitution. In its softer aspects, however, it recognises a relative supremacy of European law, based on the German Constitution and subject to exceptional limitations. This state of affairs would be worked out by the German Court and the European Court in an informal cooperative relationship. Some have tried to come to terms with, and sometimes also to justify in normative terms, this softer dimension of the Maastricht-Urteil and its legacy through a non-hierarchical conception of the relationship between norms and courts. This position has come to be known as legal pluralism.

The first scholar that applied the notion of pluralism to the relationships between European Community law and national law was also the first to react to the Maastricht-Urteil. In an article published in 1995, Neil MacCormick saw that decision as a confirmation of his theory of overlapping and non-hierarchical legal systems. He argued that ‘the most appropriate analysis of the relations of legal systems is pluralistic rather than monistic, and interactive rather than hierarchical’. He thought that ‘the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate’. Thus,

the constitutional court of a Member State is committed to denying that its competence to interpret the constitution by which it was established can be restricted by decisions of a tribunal external to the system, even one whose interpretative advice on points of EC law the constitutional court is obligated to accept under Article 177 EC. Conversely, the European Court of Justice is by the same logic committed to denying that its competence to interpret its own constitutive treaties can be restricted by decisions of Member State tribunals.

From these premises, he concluded, the criticisms of the Maastricht-Urteil ‘are altogether too hasty. A pluralistic legal theory in the spirit of legal institutionalism suggests that this much-criticised judgment has after all a sound basis in legal theory’.<sup>90</sup>

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<sup>90</sup> N. MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’, *European Law Journal*, 1995, p. 259, at p. 265; his theory was first presented in ‘Beyond the Sovereign State’, *Modern Law Review*, 1993, p. 1. In *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford University Press, Oxford, 1999, pp. 120-121, he departed from

Others have embraced and developed this pluralistic view, with a number of variations and additions. There are many pluralisms, and the hard-liners may argue that some of them are not actually pluralist. Some would favour a ‘contrapuntal’ system that informally accommodates values and principles, leaving the supremacy question forever open.<sup>91</sup> Others would like to take equally seriously the claim of the European legal order and those of national legal orders, ‘standing beyond the perspective of any particular system’.<sup>92</sup> Some would accept Community primacy only within the limits required to safeguard national democratic processes and constitutional identities. The attendant conflicts could be solved by political negotiation, constitutional amendment or Treaty amendment.<sup>93</sup> Curiously enough, in his most recent writings Paul Kirchhof himself has joined the company of the pluralists, arguing that ‘[n]either the fact that constitutional law is the final standard for the application of European law in the respective Member State nor the cohesion of the European community of law in European treaty law and its final responsibility for interpretation by the European Court of Justice must be reinterpreted in one hierarchy or another’. The present situation would offer us ‘the chance to discover anew the classic legal ideal of the balance of powers’.<sup>94</sup>

Other pluralist scholars argue, from the point of view of multilevel constitutionalism, that there already exists a ‘virtual European Constitutional Court’ composed of the highest national courts and the European Court of Justice, whose relationship would be based on cooperation rather than hierarchy.<sup>95</sup> Or else they propose to adjudicate constitutional conflicts in a new Constitutional Council that would deal with competence issues,<sup>96</sup> or through arbitration based on international law.<sup>97</sup> And there is at least a ‘moderate pluralism’ that would like to safeguard an indispensable measure of verticality and coherence in the system, and that seems to me to be quite indistinguishable both in theory and in practice from the traditional Community position.<sup>98</sup>

Beyond all these variations, it is important to acknowledge that the movement of legal pluralism is connected to the Maastricht-Urteil, first of all as an attempt to come to terms with it, with the underlying normative framework and with its legacy. Secondly, because it shares and sometimes justifies the softer claims of the Maastricht decision, implying a distinctive point of view which is closer to that of some national constitutional courts than to that of the European legal order. The point of view of legal pluralism may not be as neutral and comprehensive as it is believed. In this issue, it is very difficult to stand ‘beyond the perspective of any particular system’. It is indeed difficult not to embrace a point of view, and the alleged neutrality may already involve an inbuilt preference for the national constitutional position, which stands to gain much more from pluralism than the European

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‘radical pluralism’ and embraced ‘pluralism under international law’, which would be ‘a kind of ‘monism’ in Kelsen’s sense’, designed to ‘diminish the risk of normative collisions’.

91 M. Maduro: ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), *Sovereignty in Transition*, Hart, Oxford, 2003, p. 501.

92 N. Walker, ‘Late Sovereignty in the European Union’, in N. Walker (ed.), book cited in note 91, p. 3, at p. 18. See also N. Walker, ‘The Idea of Constitutional Pluralism’, *Modern Law Review*, 2002, p. 317.

93 See, for example, M. Kumm, ‘Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice’, *Common Market Law Review*, 1999, p. 351. See also his more recent article cited in note 67.

94 P. Kirchhof, ‘The Legal Structure of the European Union as a Union of States’, in A. von Bogdandy and J. Bast (eds.), book cited in note 26, p. 765, at p. 794. See also P. Kirchhof, ‘The Balance of Powers between National and European Institutions’, *European Law Journal*, 1999, p. 225.

95 F. Mayer, cited in note 25, at p. 323.

96 J. H. H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999, pp. 322-323.

97 Ch. Schmid, ‘From Pont d’Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the Member States through the Principles of Public International Law’, *Yearbook of European Law*, 1998, p. 415.

98 A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, Kluwer, The Hague, 2002, pp. 291-325.

position. From the point of view of the European legal order, supremacy is absolute and unconditional, and it springs from the special nature of the Treaty. For the pluralists, there is no absolute supremacy; the relationships between European Union law and national law are based on both national constitutions and the Treaty; relationships among courts and legal systems should be worked out through informal dialogue, with no fixed rules of precedence and no particular need to respect the preliminary rulings procedure. It seems to me that this is as much as national constitutional lawyers pretend to obtain when they defend the supremacy of State constitutions and invoke limits to Union law.

For all its intellectual appeal, the pluralist view seems to me to be problematic, specially in its radical versions. Let me also make clear that I am concerned with the institutional and legal consequences of radical pluralism, not with discursive pluralism. We need pluralism as an element of legal discourse and interpretation, that is, we need to take seriously into account the position of the actors and legal orders concerned. I also think that ‘discursive pluralism’ has been present from the outset in the Treaty and in the case law of the European Court, which in view of its composition and position in the institutional setting has always been receptive to it. The same cannot be said of most national courts. In addition, discursive pluralism should take place within a coherent institutional and normative framework. It is that framework that radical pluralism fatally undermines.

The first problematic aspect of radical pluralism is that it may have much to commend it in the social, economic and political spheres, and also in law-making, but not so much in judicial activity and law-application, where the rule of law, legal certainty and the effective protection of individual rights may be endangered by the lack of clear relationships among judicial institutions. ‘Heterarchical’ and ‘horizontal’ are instinctively appealing notions, while ‘hierarchy’ and ‘vertical’ sound old-fashioned, ‘anti-modern’, almost reactionary, but any legal *order* would decay and collapse sooner or later without a minimum degree of predictability regarding its application. In this sense, with ordinary interpreters—*virtuosi* do not abound—and without some measure of hierarchy, the ‘contrapuntal’ law of Miguel Maduro may easily degenerate into dissonance or outright cacophony, with dramatic consequences for the legal situation of individuals. A judicial dialogue that may result in the annulment of important policy measures agreed in common should take place in a structured way, not informally and through unilateral statements. In the absence of a better system, the preliminary reference procedure of Article 234 EC provides the framework in which such a structured dialogue may, and with regard to national courts of last resort including constitutional courts should, take place. It allows the Community institutions and all the Member States to intervene. The obligation of national courts of last resort to refer questions of Community law to the Court of Justice is the indispensable hierarchical element in that framework—but one which is only rarely respected.

Second, the unilateral character of the review is very problematic. In a community of law, decisions would be taken by one and imposed on all. The jurisdiction of the European Court of Justice, which is obligatory and exclusive, would be ignored, or worse: its decisions would sometimes be disregarded. In addition, some of the actors may not be able or willing to carry out that sort of review, and loyalty and trust, essential elements in any divided-power system, would decay, leading to anarchy and to a possible domino effect. The experience with the European arrest warrant may be a first example. The pluralist view would also produce an appropriation of European Union law by national constitutional courts. As Franz Mayer has argued, the Maastricht-Urteil and other related judgments point to a parallel interpretation of European Union law from the point of view of national constitutions, ‘generating national constitutional law versions of EU law’ parallel to the ‘official’ version of the European Court of Justice.<sup>99</sup> This is dangerous for the uniformity of European Union law, and inimical to the very spirit of integration. The unilateral and asymmetric character of the review has been defended, however, by Mayer himself, with the argument that the court reviewing European Union law (the German Constitutional Court, for example) would not only be the guardian of the German

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99 F. Mayer, article cited in note 25, at p. 306.

Constitution, but the guardian of State Constitutions in general.<sup>100</sup> All Member States and all European citizens would benefit from its attitude, and we should be grateful for that. The German Court and other courts would thus virtually represent other constitutional orders, even if they do not have a constitutional court or if that court abides by its obligation to refer and respects the rules of the game. This defence is not particularly convincing. It seems to me that not many European citizens would rejoice at the prospect of being ‘protected’ by the constitutional court of another Member State.

Third, the decision-making process of the European Union is fragile enough to add another hurdle at the level of application. That process already includes many political safeguards. The possibility not to apply the law that was agreed at Union level may increase mistrust and endanger the decision-making process. It transforms the law into a continuation of politics by other means.

Fourth, even though the validity of State constitutions and State law is not based and cannot be affected by European Union law, there must be a hierarchy among them at the level of application, in the rule of conflict. Conflicts of norms can either be resolved by preferring the application of one norm over another, which is not applied but continues to exist, or by declaring the invalidity of one of them, which actually ceases to exist. These are technical options, however, and do not tell us much about the essence of the system. The distinction would be, in addition, a weak cover for the ‘supremacy’ of one of the norms in conflict, which would be just ‘disapplied’ but not ‘annulled’ if in contrast with the other. In European Union law, conflicts between European law and national law are solved through precedence in application, not in the sphere of validity.<sup>101</sup> However, even if the technical solution applied is not that of the invalidity of the lower norm but that of its non-application, priority of application of either European Union law or State constitutional law presupposes a hierarchy of some sort or another.<sup>102</sup> Now, in a Union of 27 or more Member States the only practical solution, if we really care for our common endeavour, seems to be to give precedence of application to European Union law.

Fifth, it has been suggested by Kumm that the review by national constitutional courts of European Union law is justified when the need to guarantee State democracy and the values attached to the State outweigh the need to ensure the uniformity and effectiveness of European Union law, that is, the rule of law in the European Union.<sup>103</sup> This argument is puzzling. When European Union law is annulled or unilaterally disapplied to make a constitutional provision prevail, what is being protected is the national constitution, not State democracy. What is more, the principles of democracy and the rule of law are fundamentally heterogeneous and cannot be balanced in that way. The rule of law is a necessary precondition of democracy. There may be rule of law without democracy, but there cannot be democracy without the rule of law. If one accepts the democratic shortcomings of the European Union as a valid ground to make national constitutions prevail in a number of hard cases, the only consequences is that the constitution prevails and that the rule of law is sacrificed in the European Union. Democracy in the Union, or in the Member States for that matter, will not be improved. It will suffer in both spheres as a consequence of the damage caused to the rule of law.

Sixth, the unilateral selective ‘disapplication’ of European Union law in very exceptional cases could at most be justified as an unwritten final right of resistance if and when the European Union legal system imposed decisions that would be manifestly inimical to the basic values and principles of a national constitutional system. It seems to me dangerous, however, to transform this exceptional right of resistance, which may be healthy in extreme cases, into a constitutive element of the system.

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100 Ibid., at p. 325.

101 This is clear already in Case 106/77, *Simmenthal* [1978] ECR 629, paragraph 24: ‘refusing of its own motion to apply’. See also Case C-184/89, *Nimz* [1991] ECR I-197, paragraph 19; Joined Cases C-10/97 to C-22/97, *IN. CO. GE.* [1998] ECR I-6307, paragraphs 18-21.

102 M. Nettesheim, cited in note 31, at pp. 148-149.

103 Article cited in note 67, at p. 300.

The values and principles of the constitutional orders of the Member States are similar to those of the European Union legal order. If radical pluralism becomes the basis of the relationship between those legal orders, we may have a problem of redundancy or double constitutional review which is a sign that the real concern of State constitutional courts is not substance but rather form, prestige and power. In addition, the monopoly of the European Court of Justice over the constitutionality of secondary Union law and over the application and interpretation of the Treaty needs not lead to conflicts with the constitutional traditions of the Member States. The Luxembourg Court may accommodate such differences and simultaneously preserve the integrity of the European legal system. A case in point is the *Omega* judgment, in which the European Court declared compatible with the Treaty rules on free movement the German prohibition to import the ‘laserdrome’ (a game in which people shoot each other with laser guns) with a view to safeguard human dignity.<sup>104</sup> This did not mean, however, that Germany *must* prohibit it or that the United Kingdom, the place in which the game was produced, should also prohibit it. The Court only held that the Treaty did not preclude the German prohibition. Various balances and conceptions of what human dignity requires are thus compatible with European Union law. Traders know what their legal position is. The unity of the market was restricted for a good reason. And there was no threat to a controlled diversity of constitutional traditions.

Finally, legal pluralism is based on the legitimacy of various points of view, but we may indeed question those which are particularistic and at bottom nationalistic, inasmuch as they do not take seriously the entire system, their consequences for that system and their role within it.<sup>105</sup> The radical pluralist view is, on another count, an application of postmodern ideas to the European Union. We see it clearly in the following language:

It is precisely multiperspective interconnectedness which will produce networks of interaction typifying a multilevel polity. What is emerging therefore is something much less unitary, something much more diffuse than the nation-state. Some would argue, the first political and constitutional order to be created in the postmodern era. The first postmodern polity in effect. Stephen Hawking would feel at home with the fragmentation, overlapping and indeterminacy implied by postmodernism in this context.<sup>106</sup>

It seems to me, in contrast, that we should never feel at home with a ‘system’ that betrays many of the basic values of constitutionalism and the rule of law. We have a pluralist ‘system’, that may be true descriptively insofar as the supremacy case law of the European Court of Justice is not unconditionally and systematically respected in all the Member States. We may want to understand it and also to improve it. But should we also justify it in normative terms and try to perpetuate it? For radical legal pluralism not only justifies the past and the present erosions of the rule of law in the Union: it also acts as a deforming lens that makes impossible any future legal development in a non-pluralist direction. This is shown by some reactions to two provisions of the ill-fated Treaty establishing a Constitution for Europe. First, Article I-6, a clause expressly enshrining the primacy principle as developed by the Luxembourg Court (that is, absolute primacy based on the Treaty), would not prevent national constitutional courts from setting aside Union law as a matter of national law.<sup>107</sup> Second, Article I-5, according to which the Union shall respect the constitutional structures of the Member States, ‘*should be interpreted by the Court of Justice to authorise national courts to set aside EU law on certain limited grounds that derive from the national Constitutions*’. Thus, ‘the new supremacy clause is balanced by a provision implicitly authorising national courts to set aside EU law under certain limited

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104 Case C-36/02, *Omega* [2004] ECR I-9609.

105 See, for a similar critique, H. P. Ipsen, ‘Zehn Glossen zum Maastricht-Urteil’, *Europarecht*, 1994, p. 1, at p. 20.

106 D. M. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy*, Kluwer, The Hague, 1997, at pp. 50-51.

107 M. Kumm and V. Ferreres Comella, ‘The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union’, *International Journal of Constitutional Law*, 2005, p. 473, at pp. 478-480.

circumstances'.<sup>108</sup> Both interpretations seem to me to be very odd, but the second is particularly daring. If the respect for national constitutional structures were to be expressly enshrined in the Treaty, how could those structures be exempt from the primacy of Union law? How could they be seen as exceptions to primacy, when they are incorporated in the system? How could the European Court of Justice surrender the application of Article I-5 to national constitutional courts without betraying its function? Perhaps it is less artificial to interpret these two provisions to mean that the Member States want the European Court to solve all constitutional conflicts arising within the scope of Union law as defined by that Court, and to exclude the disrupting shadow of unilateral review of Union law by national courts.

But the pluralist lens not only deforms the future. It also deforms the present: the protocol on subsidiarity and proportionality introduced by the Treaty of Amsterdam, according to which the application of those principles 'shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law', is conveniently glossed over by the radical pluralists. Now, that protocol is part of the primary law of the European Union, and as such it has been signed and ratified by all the Member States. The fact that most of the Member States acceded to a European Community in which the principles of direct effect and supremacy were well established in the case law is also glossed over...

In sum, the heterarchical postmodern system defended by the radical legal pluralists has a lot to do with the anarchy of the informal balance of powers, the system of international relations that prevailed in Europe for many centuries and that, for well-known reasons, was superseded by a more formalised and obligatory legal system to avoid the disasters of the first half of the 20<sup>th</sup> century. Now, to interpret the European Union as a balance of powers, as Kirchhof does and the radical pluralists do, restricting or even ignoring its thicker institutional and normative framework in order to protect national constitutions and constitutional courts, leads us back to a pre-war state of development in the international relations among the States of Europe. I wonder what is the interest of doing that.

## 10. In Twenty Years Time

We have seen that the Maastricht-Urteil is not part of legal history: it is well alive. Its practical legacy is manifold, important, and a risky one for European Union law. From a theoretical perspective, it distorts our view of the Union and leads to a stalemate in the politics of law. The power game among judicial institutions produces a situation that can damage the rule of law in Europe, the rights of citizens, supranational politics and the progressive democratisation of the Union.

Perhaps one should not exaggerate, however. There is a potential for conflict embedded in the system, but prudence and pragmatism have managed to prevent real conflicts most of the time.<sup>109</sup> For some, the important thing is that both the European Court of Justice and national constitutional courts arrive at convergent and compatible results, even if they reach them with different arguments and normative starting points.<sup>110</sup> Thus, constitutional courts would maintain a semblance of constitutional supremacy, preserving their own prestige and hierarchical position, without excessively disrupting European Union law.

But the picture may be more complex. One must not forget that the obligation of courts of last resort, including constitutional courts, to refer issues of Union law to the European Court is not always

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108 M. Kumm, cited in note 67, at p. 303. Similarly, F. Mayer, cited in note 25, at p. 324.

109 See G. C. Rodríguez Iglesias and A. Valle Gálvez, 'El Derecho comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales', *Revista de Derecho comunitario europeo*, 1997, 329, at pp. 373-376.

110 M. Maduro, article cited in note 91, at p. 524.

strictly observed. In some Member States it is actually seldom respected.<sup>111</sup> The consequences of this disregard for an essential element of the system are grave: the rule of law is only imperfectly ensured in the Union; the position of the Court within the judicial system is not as strong and central as it is supposed to be; Community rights are not always enforced; national courts often decide cases in breach of European Union law as interpreted by the Court, not because of a rebellious attitude, but because of ignorance. The same may be true of national political and administrative processes, but perhaps to a lesser extent: the resilience to Union law seems to be more of a judicial phenomenon. Although it is a symptom of the same disease, this silent erosion of the rule of law, with the attendant erosion of direct effect and supremacy, may be more damaging than the potential or actual limits on supremacy voiced by some constitutional courts.

In this delicate context, since national constitutions as interpreted by constitutional courts are binding on all national courts, the legacy of the Maastricht-Urteil may have contributed to this relative neglect of European Union law. At the very least it has not induced ordinary national courts to take European law seriously. With a very imperfect rule of law in the Union, the Maastricht decision and its progeny appear in part as a *fuite en avant*. They raise fundamental issues, but other themes may be more urgent and important in practice. We may have been building theories of constitutional conflict before European law is actually taken seriously enough in all the Member States.

This partial *fuite en avant* raises some suspicions concerning the actual motives behind the Maastricht-Urteil and its legacy. What did the German Court (and other courts) want to do? Were they anticipating future conflicts? Did they want to protect the German (or Polish, etc.) State and its constitutional democracy? Could they really do something to protect such things? I doubt it. It is more likely, in my view, that what they wanted was much more modest and prosaic, that the discourse of State-based constitutional democracy was instrumental to something else. From the perspective of the allegiance of ordinary courts, the relationship of the European Court and of national constitutional courts is one of competition rather than cooperation. Like the Luxembourg Court, constitutional courts strive daily to establish their own supremacy and that of the constitution over ordinary law and courts. Their position is sometimes weak, and can never be wholly taken for granted. The constitution, like European Union law, is not always respected. Sometimes it is also ignored as an unnecessary hurdle or as a waste of time. Constitutional courts may thus see European law and the Luxembourg Court as competitors that may allow lower courts to escape from their dominance and move into a different normative world. This may be a central concern behind the Maastricht-Urteil and its legacy, but it is hardly a legitimate one.

Another motive may be linked to developments in the political process of the Union. According to Franz Mayer, the banana litigation had to do with the extension of qualified majority voting and the outvoting of Germany on that issue in the Council. The same thing is true of the tobacco saga. He argues that

extending [qualified majority voting] also means that governments may no longer be able to act as guardians of certain interests in the Council. To the extent that these interests are well enough established to be covered by constitutional law (such as e.g. fundamental rights), the national courts may be forced into a more activist role as defenders of these interests against the EU, in particular when these interests can be designated integration-proof elements of national constitutional law.<sup>112</sup>

This may be presented as a ground for constitutional intervention at the national level, to be sure, but its legitimacy is also questionable for obvious reasons.

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111 See my articles 'La procédure préjudicielle suffit-elle à garantir l'efficacité et l'uniformité du droit de l'Union européenne?', in L. Azoulai and L. Burgogue-Larsen (eds.), *L'autorité de l'Union européenne* (Bruylant, Brussels, 2006), p. 241; 'De la cuestión prejudicial a la casación europea: Reflexiones sobre la eficacia y la uniformidad del Derecho de la Unión', *Revista española de Derecho Europeo*, 2005, p. 35.

112 F. Mayer, cited in note 25, at p. 331.

Regardless of their real motives, I wonder whether the strategy of these constitutional courts is really in their own long-term interest. It is justified from their limited normative horizon, of course. We are here on the fringes of the law, in the realm of competing perspectives which can only be assessed according to their consequences, but which must be assessed. I consider that national constitutional courts would serve better both Union law and national constitutions if they took their European role seriously, within the framework of Articles 234 EC and 35 EU, and contributed to the good functioning of an integrated European constitutional law. In other words, if they adopted an internal point of view when operating within the scope of European Union law, and if they saw Union law as containing its own rule of recognition.<sup>113</sup> This, not informal open-ended pluralism, may be a preferable option for all the judicial actors involved in the process of European integration.

National constitutional jurists will argue that this option is precluded by State constitutional law, that their constitution is supreme, that it establishes limits on integration, that the Union is not a self-validated order, that it has no *Kompetenz-Kompetenz* while the Member States have an independent existence and their competences know no limits. This is, once again, the view that excludes the federal model as a possibility. There would be nothing between the more or less decentralised unitary State and the more or less supranational international system. The federation would only be a dynamic process developing into a unitary State or decaying and disintegrating. For those who believe in the reality of federal systems, however, the lack of *Kompetenz-Kompetenz*, the fact that the Union is not a self-validating order, etc., are not defects that prevent us from recognising its supremacy and its constitutional character: they are the very mark of a federal system.

There are two easy but clearly utopian ways out of this conundrum. First, national constitutional jurists could acknowledge that the Treaty is a federal constitutional pact and that national constitutions have mutated implicitly when the Treaty was adopted or when their country joined the Community or Union, in which case European Union law supersedes national law, including the constitution, within the scope of Union law as defined by the European Court of Justice, leaving intact the supremacy of the constitution outside of it. Or else the national constitution could be expressly amended to recognise participation in the Union and the supremacy of its law as mandated and defined by that law itself, not by the constitution. (The second option being preferable for the sake of transparency.) The tendency, however, seems to be the opposite: there is no recognition, but constitutional reception and appropriation. The main traits of Union law are blurred because they are defined by reference to the national constitution with a series of limits and conditions. This tends to perpetuate and crystallise the conflict, transforming it into a constitutive part of the system.

At present, we cannot realistically hope that things will get better. We can only hope that they will not get worse. As with other problems of European integration, such as the democratic deficit, the social deficit, the shortcomings of economic governance or the weakness of foreign policy, the current situation of more or less potential constitutional conflict seems to be an endemic condition. It is clearly connected to those other instances of ‘invertebration’ or insufficient ‘vertebration’ of the European Union.<sup>114</sup> In all of them irrational forces and—more importantly—the vested interests of national politicians, judges or administrations in perpetuating suboptimal normative and institutional structures conspire together to make all reasonable solutions seem utopian. The problem with the national constitutional resistance to integration is, at bottom, one of sociology and legal culture, and not enough is being done to foster the European legal culture of national jurists and judges. Their language and

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113 See H. L. A. Hart in *The Concept of Law*, Oxford University Press, Oxford, second edition, 1994, pp. 89-90 and 100-110. The ‘internal point of view’ is that of the persons that see themselves as members of a group and subject to its rules. The ‘rule of recognition’ defines a number of criteria that allow the members of a group to identify the legal rules to which they are subject.

114 The notions of ‘vertebration’ and ‘invertebration’ are borrowed from José Ortega y Gasset, *España invertebrada*, in *Obras completas*, vol. III, Fundación Ortega y Gasset-Taurus, Madrid, 2005, first published in 1921, but I use them in a different sense. See my article ‘Europa invertebrada: una conversación con Ortega’, *Revista de Occidente*, No 300, May 2006, pp. 129-146.



their basic legal grammar is insufficient to cope with European Union law, and they refuse to enlarge their normative horizon. The monster is to be tamed in order to preserve as much as possible of the national constitutional tradition, which is seen as an end in itself.

What may happen in a more distant future? A comparison with the empty chair crisis and the Luxembourg compromise may give us reasons to be hopeful. In both cases, the solution to the crisis was an ambiguous and informal agreement to disagree that kept the conflict relatively under control. In both cases, the crisis itself was a sign of maturity, proving that the European Union, in spite of all its problems and shortcomings, had achieved critical constitutional mass. The threats to the European Court of Justice can also be seen as signs of respect, as the German Constitutional Court and other courts see it as a menace to their own institutional position and functions. As with the empty chair crisis, the constitutional conflict over the Treaty of Maastricht ‘add[ed] to our understanding of the dynamics of the system and of the various kinds of stress to which it is subject.’<sup>115</sup> And it prompted a healthy debate on the legitimacy of European law and on its relationship with national law. On a different level, both crisis can be seen as responses to the political pressure created by the extension of qualified majority voting. And de Gaulle’s *Europe des patries* and the German Court’s *Herren der Verträge* are just two ways of saying about the same thing.

Epochal changes are usually recognised slowly and sometimes also painfully, a long time after they have taken place. From this perspective, the Maastricht-Urteil, its legacy and the pluralist movement that attempts to come to terms with it may be less of a beginning than of an ending, with all the difficulties that endings entail. In twenty or perhaps thirty years time, the factors that render that conflict an endemic one and make all rational solutions seem unfeasible may no longer be present, and we will perhaps look back at all this as we look today at the empty chair crisis, at de Gaulle’s speeches and at the Luxembourg compromise: as legal and political history. Some will then be able to write that history as the narrative of how the true world became a fable, of how we realised that there was no longer a true world but just two fables, of how we tried to live with these two fables but after a while decided to reconstruct a true world out of them.

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115 See L. N. Lindberg, ‘Integration as a Source of Stress on the European Community System’, *International Organization*, 1966, p. 233.