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Rule of law or judicial activism –  
two perspectives on the  
European Court of Justice

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20 points

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**To my grandma M,  
who meant me more,  
than I ever realised**

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## Summary

The role and activities of the European Court of Justice (EJC) have been discussed for couple of decades now. Without any doubt the role that ECJ fulfils today in the European Community is not what it was in the beginning of its existence and perhaps not even what was strictly prescribed by the EC Treaty. In the present thesis will be firstly examined, how the present role of the ECJ, as a quasi-constitutional court was established and secondly if there are any limits for ECJ's Community and thereby also self-developing activities.

At the beginning the European Community was governed primarily by international law, this view was upheld even by ECJ in case 26/62 known as van Gend en Loos, according to which "...the Community constitutes a *new legal order of international law...*". But it took only a year until the ECJ changed its opinion, stating in its decision in case 6/64 known as Costa vs ENEL in 1964, that "By contrast with ordinary international treaties, the EC Treaty has created *its own legal system...*". As 20 more years had passed, ECJ was ready to take the ultimate step – in case 294/83 known as "Les Verts" the ECJ declared the Treaty to be "*constitutional charter*", result of which made the ECJ the apex of the Community court system.

Ever since the ECJ started to break free from the limits set by the Founding Fathers, the existence of the separation of powers on Community level has been a disputed topic. Despite of the fact, that the principle of separation of powers is the traditional structural guarantee of democracy, it is difficult to apply the same principle to the Community institutional system, as there is no clear separation between a legislative and executive branch, but rather a complex system of checks and balances between different institutions performing a number of roles. Therefore it is rather the balance of powers or institutional balance doctrine that applies on Community level. The ECJ seems to be the only institution having quite clear functions being the judicial power, at many aspects similar to the one known under the full separation of powers concept. But the ECJ has not always very keenly followed the principle stipulated in article 7 (1) of the Treaty. On the

contrary, the ECJ has not in the past hesitated to arrogate itself a legislative power in judicial clothing, not expressly foreseen in the Treaties. This kind of action by the ECJ has raised questions about the legitimacy of such a judge-made higher law. Since *Costa vs ENEL* it has been the ECJ that chose the constitutional law road, stating in Opinion 1/91, that the Treaty, although concluded in the form of international agreement, is nevertheless the Constitutional Charter of a Community law, a legal order for the sake of which the Member States have limited their sovereign rights in ever wider fields and the subjects of which are not only the Member States, but also the individuals. This constitutional order is characterised by the twin pillars of Community law – supremacy and direct effect; and it is exclusively the ECJ, who has to assure the respect towards the autonomy of the Community legal order.

These developments were not always very warmly welcomed by the Member States. In Germany the Bundesverfassungsgericht in its famous Maastricht-judgement indicated very clearly the constitutional possibilities and limits of Germany's participation in European integration by putting quite harsh restraints upon the future development of the European Union by its members, its political organs and mostly the ECJ. BVerfG declared, that if not acting in accordance with the powers expressly stipulated in the Treaty, the European Union and its institutions act *ultra vires*. Such legal acts would not be binding in Germany and even more – German state organs would be constitutionally prohibited to implement them. According to the doctrine of co-operation, the BVerfG will examine itself, whether the legal acts of the European institutions and organs, including those of the ECJ, are within or exceed the sovereign powers transferred to them, being, with respect to Germany, itself, instead of the ECJ, thereby the final arbiter of the disputes concerning the division of powers between the Community and Member States and decide, when those legal acts are *ultra vires*.

The ECJ, while being the watchdog over the compliance with the Community law, was the first one who started to break free from the usual boundaries set by the concept of institutional balance. As a result the Member States responded with the automatic sovereignty-protection reflex.

Therefore – whatever high-visions about the Europe and its role in there the ECJ may invent, in the end of the day it is for the Member States to decide about the future of Europe. There are really only two possibilities to choose from – whether to continue the integration in growing amount, in which case the goal would be “the United States of Europe” or to declare, that the intentions of the Member States have never been more ambitious, than cooperation under the international agreement. Until no clear decisions are made, the ECJ should keep and protect the institutional balance in Community and for preserving the respect towards itself, it should take a pace back and be again more of an interpreter than a creator, that is start dealing again more with law than politics.

## Introduction

The role and activities of the European Court of Justice (EJC) have been discussed for couple of decades now. Without any doubt the role that ECJ fulfils today in the European Community is not what it was in the beginning of its existence and perhaps not even what was strictly prescribed by the EC Treaty. In the present work it shall be examined in the first place, how the present role of the ECJ, as a quasi-constitutional court was established and secondly that are there any limits for ECJ's Community and thereby also self-developing activities. Although the ECJ's jurisdiction covers not only the European Community, but as well Euratom, the latter will be set aside in the present work and only ECJ's role in the European Community will be discussed.

The topic is at the present moment more important, than ever, both from objective as well as subjective point of view. From the objective side it is connected with the ongoing process of creation of the constitution for Europe. The results of this process are also mirroring the Member States' attitude towards the relatively long saga of constitution making in Community guided by ECJ. From the subjective side it is connected with the next enlargement in 2004, after which shall Estonia among other states become a member. For a state having just 12 years of re-established independence behind its back, the questions concerning the limits of Community powers and protection of state's sovereignty can't be underestimated.

The work is based on the analyses of different views concerning the nature of the European Community. At the first place it is necessary to know the three main standpoints of the theory of Community system, therefore in the Chapter 1 the establishment and the content of the public international law model, constitutional law model and separate legal order model will be presented. To designate the actual limits of the roles of the institutions, including the ECJ in the European Community, the Chapter 2 presents first the overall theory concerning the concept of the separation of powers and

then examines its suitability into the Community model. Chapter 3 deals with one of the most famous cases of the EJC's self-development, Opinion 1/91, together with the strict reply from the German Constitutional Court, trying to prevent losing more sovereignty to the Community, than it was prescribed by the Treaty. Finally conclusions are made and the some possible scenarios concerning the future of the ECJ will be presented.

Due to the importance of this matter to all Member States, the debate between the scholars about the future and balance of Europe has been long and heated. Writers are divided into two competing schools – the first group thinks, that it is inexcusable, that the ECJ has not kept the limits set to it by Member States, as almighty Founding Fathers, and has created some sort of judicial Kompetenz-Kompetenz<sup>1</sup> creating thereby nothing more than judicial uncertainty<sup>2</sup>. At the same time there is an other group that considers the same activities of the ECJ to be magnificent contributions to the integration of Europe<sup>3</sup>. The basic positions of both of the schools will be introduced in the framework of the present thesis.

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<sup>1</sup> T.Schilling, *The autonomy of the Community legal order – an analysis of possible foundations*, 37 Harvard International Law Journal 1996, 389

<sup>2</sup> T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 78

<sup>3</sup> G.F.Mancini, *The making of a constitution for Europe*, Common Market Law Review, 1989, 595



# 1. Three models of the European Community

## 1.1 *Beginning. Public international law model*

It all began on 9<sup>th</sup> of May 1950, when the French Foreign Minister Robert Schumann presented his famous plan to organize the coal and steel production of France and Germany and put it under the direction of common High Authority. The deriving forces behind this plan were political – the most important one was preserving the peace, or as looking from French point of view, it was the desire to obtain effective guarantees against a revival of a German menace to French security<sup>4</sup>. But there were also economic considerations included, like free movement of coal and steel products, the very first step leading to full economical integration.

There were 6 European countries that on 18<sup>th</sup> of April 1951 signed in Paris the Treaty establishing European Coal and Steel Community. Though it regulated mainly questions relating to the common market for coal and steel, the importance for ECSC Treaty was greater than that. ECSC Treaty operated in three levels – it solved post-war political and economical problems, provided a sound basis for relations between Germany and France and most importantly laid the foundations for a new Europe<sup>5</sup>.

From the start the Founding Fathers decided to deviate from the so far known pattern of international agreements. They decided to create a legislative authority, called the High Authority, running the ESCS on everyday level and operating side-by-side with national governments. The peculiarity here was, that this High Authority was independent of the Member States and possessed an ability to adopt decisions binding to the Member States. The rights of High Authority were very strictly limited by Treaty provisions and also an independent Court of Justice was created to

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<sup>4</sup> P.J.G Kapteyn, P.VerLoren van Themaat, *Introduction to the Law of the European Communities 3<sup>rd</sup> Ed*, Kluwer Law International 1998, 5

<sup>5</sup>T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 78

ensure, that the law was observed in the course of action of the High Authority<sup>6</sup>.

Driven by the enthusiasm that the success of the ESCS has brought to the Member States, in April 1956 the Spaak-report was presented. The ultimate goal of this report was to create common market and to deepen the co-operation of the Member States as well on economical level. Based on the report, the Treaty establishing the European Economic Community (as well as Euratom Treaty) was signed on 25<sup>th</sup> of March 1957 in Rome by the same 6 Member States and it entered into force 01<sup>st</sup> of January 1958. On the institutional level it created 4 institutions – Council of Ministers, European Commission, European Court of Justice (ECJ) and a Parliamentary Assembly. The functions of two last institutions were to be performed by the ECJ and the Common Assembly of ECSC<sup>7</sup>. The role of ECJ was significantly changed under EEC Treaty. According to the ESCS Treaty ECJ's main task was to rule over the acts of the High Authority. The EEC Treaty added some important tasks, that later became the main driving-forces for ECJ breaking free from the static role of interpreter of the Community acts. Among others, the power to settle disputes regarding the fulfilment of obligations by Member States was conferred upon ECJ<sup>8</sup> and most importantly, the ECJ was empowered with the right to interpret Community acts, including Treaty, by the request by Member State courts<sup>9</sup>. So far it seems to be clear, that at the beginning the European Community was seen as governed primarily by international law. It was based on the Treaty concluded by Member States and according to the doctrine of the international law its acts were binding on the Member States. The principles that the European Community was built upon were quite similar to other international organisations, like United Nations or World Trade Organisation. Most importantly – its decisions did not enjoy the higher law status regarding to the laws of the Member States.

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<sup>6</sup> Art 31 ECSC Treaty

<sup>7</sup> P.J.G Kapteyn, P.VerLoren van Themaat, *Introduction to the Law of the European Communities 3<sup>rd</sup> Ed*, Kluwer Law International 1998, 5

<sup>8</sup> Art 226 EC Treaty

<sup>9</sup> Art 234 EC Treaty

This view was upheld even in 1963, when ECJ made its celebrated judgement in case 26/62 known as van Gend en Loos<sup>10</sup>, stating, that:

“...the Community constitutes a *new legal order of international law*, for the benefit of which the states have limited their sovereign right...”.

But it took only a year and the ECJ changed its opinion. The Community was no longer regarded as a sub-system of international law.

## **1.2 Development. Constitutional law model**

ECJ made its decision in the case 6/64 known as Costa vs ENEL<sup>11</sup> in 1964 and declared, that

“By contrast with ordinary international treaties, the EC Treaty has created *its own legal system...*”.

And went even further, at the very same year in cases 90/63 and 91/63 Commission vs Luxembourg and Belgium<sup>12</sup>, stating, that EC Treaty establishes *new legal order*.

And even this was not the final destination for ECJ, but as 20 more years passed, it was ready to take the ultimate step – in case 294/83 known as Les Verts<sup>13</sup> the ECJ stated bravely

“...the European Economic Community is a community based on rule of law, inasmuch as neither its Member States, nor its institutions can avoid a review of the question whether the provisions adopted by them are in conformity with the *basic constitutional charter*, the Treaty.”

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<sup>10</sup> Case 26/62, 1963 ECR 1; emphasis added

<sup>11</sup> Case 6/64, 1964 ECR 585; emphasis added

<sup>12</sup> Cases 90/63 and 91/63, 1964 ECR 631

<sup>13</sup> Case 294/83, 1986 ECR 1339; emphasis added

So – there it was, Community was now governed by its own constitution, which contained three new characteristics: Member States and institutions are at the same level regards constitution; judicial system of the Community is a specific device for the review of constitutionality of the activities of public authorities and lastly, the ECJ appears as the apex of the Community court system<sup>14</sup>.

And the doctrine was made very clear with decision in case 43/75 known as Defrenne<sup>15</sup>, made actually earlier as Les Verts, but makes more sense as presented after last mentioned case. In that decision ECJ turned once and for all away from international law perspective while stating, that

“Apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Art 236 (now Art N.48 TEU).”.

Therefore it is not enough if Member States, wanting to change the Treaty, gather and decide so, they also have to follow the interinstitutional procedure, stipulated by the EC Treaty. This is just the opposite to the principles of the international law, where the status or existence of the Treaty is dependent only on the Member States will and third persons cannot declare the acts based on this kind of will void.

### **1.3 Shared sovereignty. Separate legal order model**

Despite of the bold opinions, that ECJ has given within last 40 years, pushing Community away from the sphere of international law, the nature of the Community is still actively debated. If trying to classify the Community’s legal order under the constitutional law point of view, for example, we have to make a checklist of characteristics illustrating that point of view. It is commonly shared view that the three principal doctrines describing the constitutionalization are supremacy, direct effect and pre-

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<sup>14</sup> M.L Fernandez Esteban, *The rule of law in the European Constitution*, Kluwer Law International 1999, 29

<sup>15</sup> Case 43/75, 1976 ECR 455

emption<sup>16</sup>. These characteristics and their content in Community sphere will be examined briefly.

1. The doctrine of supremacy. According to this doctrine the Community norms, including the Treaty and other legislative acts, are above the conflicting national law, including the constitution. It has to be mentioned, that the Treaty itself does not contain such a clause prescribing the supremacy of Community law. Doctrine of supremacy was created by the ECJ in 1964 in case *Costa vs ENEL*<sup>17</sup>.
2. The doctrine of direct effect. According to that doctrine, the Community law has even without being transformed into national law an authority that can be invoked by Member State nationals before national courts. Doctrine applies to Treaty and secondary legislation under the presumption, that these norms are clear, precise and self-sufficient. This doctrine was introduced by the ECJ in 1963 in case *van Gend en Loos*<sup>18</sup> and developed afterwards<sup>19</sup>.
3. The doctrine of pre-emption. This doctrine plays a decisive role in the allocation of power and it is an essential complement of the supremacy doctrine, since it determines, whether a whole policy area has been actually or potentially occupied by the central authority so as to influence the intervention of the States in that area<sup>20</sup>. One of the most important decisions in this area was made in year 1977 in case *Simmenthal*<sup>21</sup>.

Therefore it becomes clear, that Community fulfils the criterion of the primary checklist for constitutionalisation. In addition some other aspects

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<sup>16</sup> G.F.Mancini, *The making of a constitution for Europe*, Common Market Law Review, 1989, 595; J.H.H Weiler, *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge University Press 1999, 19

<sup>17</sup> Case 6/64, 1964 ECR 585

<sup>18</sup> Case 26/62, 1963 ECR 1

<sup>19</sup> Case 41/74, 1974 ECR 1337

<sup>20</sup> G.F.Mancini, *The making of a constitution for Europe*, Common Market Law Review, 1989, 603

<sup>21</sup> Case 106/77, 1978 ECR 629

have to be looked at as well, before it can be decided, if the Community legal order belongs to the constitutional system<sup>22</sup>. These are the questions of judicial review of the legislation, issues of citizenship and human rights protection<sup>23</sup>.

1. Judicial review of the legislation. Judicial review in Community is operating on two levels – Community level i.e the acts of Community itself<sup>24</sup> and Member State level i.e acts of Member States<sup>25</sup>. Though the methods of judicial review are stipulated in the Treaty, then at the end of the day this system of review requires the co-operation and goodwill of Member State courts. That is mainly because litigants lack the power to appeal to ECJ and, as there are no means of enforcement of the decisions of latter<sup>26</sup>.
2. Issues of the citizenship. The concept of European citizenship is included in the Treaty under art 17 stipulating, that European citizenship is established, but it shall only complement the national citizenship. In practice this is deemed to be weak conception, as Europe lacks ethnic uniformity and is therefore denied strong pan-European cohesion<sup>27</sup>.
3. Human rights protection. The Treaty itself does not contain s.c bill of rights, stipulating standards for protecting the human rights. ECJ filled that gap stating in 1974 in case known as Nold<sup>28</sup>, that fundamental rights form integral part of the general principles of law, observance of which the ECJ ensures. To determine such a rights, the ECJ is allowed to draw inspiration from constitutional traditions common to the Member States, as

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<sup>22</sup> For more detailed discussion look J-C.Piris, *Does the European Union have a Constitution? Does it need one?*, European Law Review 1999, 557

<sup>23</sup> G.F.Mancini, *The making of a constitution for Europe*, Common Market Law Review, 1989, 595; J.H.H Weiler, *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge University Press 1999, 19

<sup>24</sup> Art 230 EC Treaty

<sup>25</sup> Art 226-228 and 234 EC Treaty

<sup>26</sup> M.Cappelletti, *The judicial process in comparative perspective*, Clarendon Press 1989, 367

<sup>27</sup> G.F.Mancini, *The case for statehood*, European Law Journal 1998, 35

<sup>28</sup> Case 4/73, 1974 ECR 491

well as from the international treaties on which the Member States have collaborated.

As it was clearly seen from the analysis above, formally the Community legal system fulfils the criteria of constitutional order presented in the checklist discussed above. But if looking the content of this checklist closer, one can see that most of the doctrines named above have been brought into the Community system by ECJ. They were not included into the Treaty by Founding Fathers and they are not written into the EC Treaty nowadays. It is argued, and not without a good reason, that Community law is separate from the international law, precisely because it was the ECJ who declared, that it is separate<sup>29</sup>.

Therefore the Treaty seems to be on its way to constitution, but cannot be regarded as one yet. It has been considered to be something between international law and constitutional law by supporters of both points of view<sup>30</sup>. As being so, it can be truly claimed, that this is a new legal order illustrated by the shared sovereignty that the Community is built upon.

If that is the case, is it possible that the constitutional principles, having not been included to the Treaty and being common to the Member States can apply to Community in every field, like they do for example in questions of the protection of human rights. More precisely – if Community is something in between international law and constitutional order, can the principle of separation of powers, that is often deemed to be one of the cornerstones of democracy, be applied to the Community as well. This matter will be investigated in the following chapter, first giving shortly the background theory concerning the basics of the notion separation of powers, then clarifying, which are the common principles of Member States and lastly trying to place them into the Community's legal order.

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<sup>29</sup> T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 139

<sup>30</sup> J.H.H Weiler, *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge University Press 1999, 29; T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 125

## 2. Separation of powers

### 2.1 *Creating the concept of separation of powers*

The beginning of the theory of separation of powers goes back to 17<sup>th</sup> century.

Thomas Hobbes, one of the most important figures of creating and developing the state theory, did not share the idea of the necessity of the concept of separation of powers. His main thoughts concerning this topic come from his most important work *Leviathan*, first published 1651. As a matter of fact, he had quite an opposite opinion, calling the separation of powers concept to be the doctrine directly against the essence of a Commonwealth, as the powers divided mutually will destroy each other<sup>31</sup>. According to Hobbes it shall be then three different persons and three different sovereigns, which, as he considered, is not possible on earth, as due to their diversity of opinions.

It took less than 40 years, when another English philosopher, among other things dedicated on state theory, John Locke issued one of his main works, *Two Treatises of Government*. In the second treatise he established the separation of powers as the main characteristic for the civil society<sup>32</sup>. For creating the civil society, there has to be legislative (power of making Laws), executive (power of War and Peace) and judicial (impartial common Judge) powers.

Locke's ideas were further developed by French philosopher Charles Montesquieu, who stated in his celebrated work *The Spirit of Laws*, published 1748, the principle of separation of powers<sup>33</sup>. According to Montesquieu there should be two basic powers active in state level – legislative and executive, judicial power should be created as well, but it is connected with the executive power. The essential structural guarantee

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<sup>31</sup> T.Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge University Press 1996, 225

<sup>32</sup> J.Locke, *Two treatises of government*, ed. Peter Laslett, Cambridge University Press 1988, 338 ff, 368

<sup>33</sup> C.Montesquieu, *The Spirit of Laws*, Cambridge University Press, 1989



stems here from the fact, that each power can fulfil its tasks efficiently only, when at least one other power cooperates to that effect, thereby controlling the use, which the first power makes of its authority. This principle should condition every exercise of public authority, at least, when the state claims to be democratic<sup>34</sup>.

The first major application of that principle was inclusion of it into the constitution of the United States of America. It has to be mentioned, though, that despite of the fact, that these term “separation of powers” is not written into the constitution, it was one of the fundamental principles, the constitution was built upon and courts have always upheld it. It was already 1776, when the constitution of Virginia stipulated, that in the new government the legislative, executive and judiciary department shall be separate and distinct, so that neither exercise the power properly belonging to other<sup>35</sup>. While composing the constitution for the United States of America, the authors considered the separation of powers to be the establishment of the executive, judiciary and two houses of Congress, as legislator, all of them being separate institutions, all having its own constitutional status and none of them subordinated to other. Therefore the ultimate goal was, that these three powers should be always politically independent of each other<sup>36</sup>. Later on, in 1803, the Supreme Court of United States also created the supporting principle of judges, as guardians of the Constitution<sup>37</sup>. This kind of modern way of thinking has had its influences on Europe as well.

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<sup>34</sup> K.Lenaerts, *Some reflections of the separation of powers in the European Community*, Common Market Law Review 28 1991, 11

<sup>35</sup> S.Gordon, *Controlling the state*, Harvard 1999, 296

<sup>36</sup> *ibid*, 312

<sup>37</sup> 5 U.S. 137 (1803) (*Marbury vs Madison*)

## **2.2 The concept of separation of powers in a unitary system**

In United Kingdom the movement towards civil society, as defined by John Locke<sup>38</sup>, started in 1215 with the adoption of Magna Charta, limiting the powers of government and subordinating government to laws as well. The independence of judiciary was developed by courts themselves in 1608, when judges of England declared, that only appointed judges have the ability to give judgements and perfected 1610, when it was stated in the celebrated Dr.Bonham's case<sup>39</sup>, that when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the courts will control it, and adjudge such acts to be void. In 17<sup>th</sup> century the evolution in legislature's role took place – parliament can create law, as well as repair and restore it, but still the absolute sovereignty was not granted to the Parliament<sup>40</sup>.

This notion was not shared by Albert Venn Dicey, one of the main developers of the English theory of Constitution. According to him any act of parliament or any part of an act of parliament, which makes a new law, repeals or modifies an existing law, will be obeyed by courts<sup>41</sup>. But even Dicey admits, that there are some apparent exceptions to that rule, for example, if the judges of the High Court of Justice are making the rules repealing Parliamentary enactments. And even further, Dicey points out the peculiarity of common law system, namely judicial legislation. The adhesion by English judges to precedent as deciding one case in accordance with the principle, which governed a former case, leads to the gradual formation by the courts of fixed rules by decision, which are in effect laws. So at the first glance this kind of judicial legislation may seem to be inconsistent with the supremacy of parliament, but Dicey disavows that fact,

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<sup>38</sup> J.Locke, *Two treatises of government*, ed. Peter Laslett, Cambridge University Press 1988, 324

<sup>39</sup> 8 Co.Rep 107a, 1610

<sup>40</sup> M.L Fernandez Esteban, *The rule of law in the European Constitution*, Kluwer Law International 1999, 72

<sup>41</sup> A.V.Dicey, *Introduction to the study of the law of constitution*, Liberty Fund, Indianapolis 1982, 4

as English judges do not claim or exercise any power to repeal an act of parliament, at the same time, when an act of parliament may override the act of judges. Therefore he admits, that judicial legislation exists and it is a subordinate legislation<sup>42</sup>. And referring to the Burke, he even admits, perhaps indirectly, that the House of Commons is the higher part of the government, in the meaning of the legislator, where juries are the lower part<sup>43</sup>.

As even Dicey, a strong supporter of the theory of absolute sovereignty of parliament, admitted, the legislative and judicial branches of government are not absolutely separated. It was Montesquieu, who admired the English system of government, where there was only partial separation of powers. This kind of partial separation of powers made them according Montesquieu interdependent in exercising state authority. Exclusive domains of jurisdiction for the legislative, executive and judicial branches would endanger the liberty as much as would the concentration of power in a single agency<sup>44</sup>. The balance between three branches should be perfected by mutual checks and balances, instead of clear-cut separation of powers.

Therefore it can be concluded, that even nowadays there is no clear separation of powers in United Kingdom, but, as Hamilton, one of the author of the Federalist papers named it, partial mixture of the branches. Only by allowing one power to influence the other, the “checks and balances” of government can be achieved. According to H.W.R.Wade, who stated the principles of modern definition of the rule of law in England, disputes on the legality of acts of government shall be decided by judges who are wholly independent of the executive<sup>45</sup>. But the executive has veto right regards the legislation and on the other hand the legislative can remove the executive from its tasks by impeachment-proceedings. Judicial power also fulfils the role of legislator<sup>46</sup>.

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<sup>42</sup> *ibid*, 18

<sup>43</sup> *ibid*, 35

<sup>44</sup> S.Gordon, *Controlling the state*, Harvard 1999, 309

<sup>45</sup> M.L Fernandez Esteban, *The rule of law in the European Constitution*, Kluwer Law International 1999, 74; H.W.R.Wade, *Administrative law*, Clarendon Press 1988, 23

<sup>46</sup> T.Fleiner-Gerster, *Allgemeine Staatslehre*, Springer-Verlag Berlin Heidelberg New York 1980, 323

### **2.3 The concept of separation of powers in a non-unitary system**

Contrary to England, the German system of government was at the first place not built upon the development of strong parliament. Due to the heterogeneous structure of the state, the non-unitary system, the parliament did not possess a central role. It was bound by the separate independence of the Länder (the member states of the federation) on the one hand and on the other it was dependent of the level of co-operation provided by the Länder<sup>47</sup>. Until the Peace of Wesfalen in 1648 it was the Emperor, who was possessing most of the sovereignty. After that the Länder were granted the power to conclude agreements as long as they were not contrary with the objectives set by the Emperor. The powers remained to the Emperor were delegated to the Reichstag (parliament), what was established 1663. Still the Reichstag was obliged to coordinate all legislation and appointment of taxes with the Emperor<sup>48</sup>. The Reichskammergericht (Supreme Court) was dependant of the Emperor and his Hofgericht (Royal Court). There was no executive power to enforce courts' judgements<sup>49</sup>.

The reminder of Emperor's rights were withdrawn 1867, where the new organisation of government was stipulated. Bundesrat was appointed as the highest body of state, having the right to approve or decline the legislation<sup>50</sup>. The modern concept of German separation of powers was established after the World War II. The most important improvement here was the creation of parliamentary sovereignty. Also the system of limiting such a power was established by the creation of Bundesverfassungsgericht (Constitutional Court), who has the right to supervise if the norm of law is in accordance with the constitution as well as to declare such a norms void. Such a right gives the Bundesverfassungsgericht political counterbalance against the sovereignty of parliament<sup>51</sup>.

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<sup>47</sup> *ibid*, 233

<sup>48</sup> *ibid*, 244

<sup>49</sup> *ibid*, 235

<sup>50</sup> *ibid*, 238

<sup>51</sup> *ibid*, 241

The principle of separation of powers is established under art 20 II 2 in Grundgesetz (German Constitution), stipulating, that the state power should be carried out “by specific organs of legislative, executive and judicial branch”. This principle is valid both on federal level as well as in Länder. The separation of powers has four purposes: it should weaken accomplishing the state power (weakening function), establish rational state organisation (rationalisation function), let the state organs to control each other (control function) and protect the nationals (protection function)<sup>52</sup>. In Germany the legal theory considers the legislative power to be supreme in front of the other powers, mainly due to the supremacy of law (Vorrang des Gesetzes). The basic norms, that the limits of the competences stipulated by the Grundgesetz can be specified only by laws (Vorbehalt des Gesetzes) as well as the ability of legislative power to control the executive are securing the fulfilment by the executive of the decisions adopted by legislator<sup>53</sup>. The protection of the executive for the interruption of the other powers is established in Grundgesetz in a weaker way, still the government and administration have maintained some sort of independence. For example the judiciary can control the administrative activities only regards the legal aspects but not in regards the purposefulness. The judicial power is more protected against the interference by other powers<sup>54</sup>. The independence of judiciary is guaranteed by the state judicial monopoly, the organisational independence of the courts and the professional and personal independence of the judges as well as the circumstance, that court decisions cannot be declared void or changed by other powers<sup>55</sup>. In Germany the Bundesverfassungsgericht is also authorized to control the acts of legislator, possessing thereby to the certain extent the supervising power over the latter<sup>56</sup>.

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<sup>52</sup> H.Schulze-Fielitz, in H.Dreier (Hrsg.), *Grundgesetz-Kommentar*, Bd.2, J.C.B. Mohr (Paul Siebeck) Tübingen 1998, Art.20, 158

<sup>53</sup> *ibid*, 160

<sup>54</sup> A.Bleckmann, *Staatsrecht*, Carl Heymanns Verlag KG 1993, 256

<sup>55</sup> H.Schulze-Fielitz, in H.Dreier (Hrsg.), *Grundgesetz-Kommentar*, Bd.2, J.C.B. Mohr (Paul Siebeck) Tübingen 1998, Art.20, 161

<sup>56</sup> A.Bleckmann, *Staatsrecht*, Carl Heymanns Verlag KG 1993, 262

## **2.4 The concept of the separation of powers in the European Community**

The existence of the separation of powers on Community level has been a disputed topic ever since the ECJ started to break free from the limits set by Founding Fathers<sup>57</sup> and since the European Parliament was granted some actual rights in the Community<sup>58</sup>.

Even more – since the EC Treaty has been moving, mostly due to the case law of the ECJ, towards the constitution of the Community, this is not yet regarded to be the constitution of a federal state. Instead this “constitution” ranks alongside of the constitutions of fifteen national constitutions, one of them being unwritten<sup>59</sup>. These constitutions are built upon the principle of the separation of powers, whether fully or partly. Whether this principle has also been adapted to the Community, will be investigated subsequently.

There are considered to be two definitions of separation of powers – organic and functional one<sup>60</sup>. According to the organic definition of the separation of powers, the distinction is made between those, who hold legislative, executive and judicial offices. It has been common understanding for decades now, that this kind of clear-cut organic separation of powers is not practicable in the Community. It is quite impossible to characterize several Community institutions as holding one or the other power. Therefore the understanding of the separation of powers in community context should preferably be a functional one<sup>61</sup>.

According to the functional definition of the separation of powers, the different functions (legislative, executive and judicial) must be allocated to different institutions, but at the same time still considering the interplay between them. Therefore the functional understanding looks to the identity

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<sup>57</sup> look at cpt 1 above

<sup>58</sup> About the development of the role of European Parliament look P.J.G Kapteyn, P.VerLoren van Themaat, *Introduction to the Law of the European Communities 3<sup>rd</sup> Ed*, Kluwer Law International 1998, 217 and following

<sup>59</sup> B.de Witte, *Community law and national constitutional values*, Legal issues of European integration 1991/2, 1

<sup>60</sup> K.Lenaerts, *Some reflections of the separation of powers in the European Community*, Common Market Law Review 28 1991, 11

<sup>61</sup> *ibid*, 13

of the different organic inputs in the performance of these functions and assesses critically these inputs in terms of Community checks and balances. The different functions in the Treaty are divided among the following institutions – Commission<sup>62</sup>, Council of Europe<sup>63</sup>, European Parliament<sup>64</sup> and European Court of Justice<sup>65</sup>, all fulfilling different tasks in the Community. Therefore there is a division of power prescribed by the Treaty<sup>66</sup>. As considering the organic inputs in the exercise of these three powers, it has to be mentioned, that only the legislative function is performed almost entirely by the Community organs themselves. At the same time the executive and judicial functions are performed to the larger extent by the Member States acting on behalf the Community interests. There are only limited areas in which the executive and judicial functions are exclusively performed by the Community organs themselves. These areas are for example EC competition law, EC international trade law and some Euratom policies<sup>67</sup>.

Considering the aforesaid, the organic elements of the three traditional state powers can be located in Community legal order as following:

1. The legislative power. It lies with the Community and is exercised through interaction between the Commission, Council and European Parliament. The organic definition of legislative power of the Community therefore refers to a result, which appears to be different from one Treaty provision to another<sup>68</sup>. Still given its mode of appointment and the structuring of its political accountability, the Commission is considered to be more an executive than a legislative organ<sup>69</sup>.
2. The executive power. Regards to the matters, where the Community itself executes its legislation, it lies with the

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<sup>62</sup> art 211 of the Treaty

<sup>63</sup> art 202 of the Treaty

<sup>64</sup> art 189 of the Treaty

<sup>65</sup> art 220 of the Treaty

<sup>66</sup> M.L Fernandez Esteban, *The rule of law in the European Constitution*, Kluwer Law International 1999, 156

<sup>67</sup> K.Lenaerts, *Some reflections of the separation of powers in the European Community*, Common Market Law Review 28 1991, 15

<sup>68</sup> *ibid*, 16

<sup>69</sup> *ibid*, 27

Commission or the Council<sup>70</sup>. When the Council holds the executive power for itself, then the separation of powers principle is at its lowest ebb, but when these tasks are entrusted to the Commission, then the separation of powers principle can play its full role<sup>71</sup>.

3. The judicial power. It consists of all national courts applying and enforcing Community law and of the ECJ and the Court of First Instance, exercising their jurisdiction in cases listed in Treaty<sup>72</sup>. The ECJ itself fulfils three tasks – first acting as a constitutional court, secondly as a supreme court and third as an administrative court together with the Court of First Instance<sup>73</sup>.

In its case law, the ECJ has also stated the principle of institutional balance between the Community institutions, originating from article 7 (1) of the EC Treaty. For example in the case 60/81, known as IBM<sup>74</sup>, the ECJ stated following:

“It would thus be incompatible with the system of *division of powers* between the Commission and the ECJ and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission.”

Further on the ECJ made the existence of institutional balance in Community even more clear. In the case C-70/88, known as Chernobyl<sup>75</sup>, the ECJ was stating:

“The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.

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<sup>70</sup> *ibid*, 17

<sup>71</sup> *ibid*, 31

<sup>72</sup> *ibid*, 18

<sup>73</sup> *ibid*, 33

<sup>74</sup> Case 60/81, 1981 ECR 2639

<sup>75</sup> Case C-70/88, 1990 ECR 2047



Observance of the *institutional balance* means, that each of the institutions must exercise its powers with due regard for the powers of the other institutions.’<sup>76</sup>

Despite of the fact, that the principle of separation of powers is the traditional structural guarantee of democracy, it is difficult to apply the same principle to the Community institutional system, where, as shown above, there is no clear separation between a legislative and executive branch, but rather a complex system of checks and balances between different institutions performing a number of roles. Therefore it is perhaps not the separation of powers, but rather the balance of powers or institutional balance, that applies on Community level and it is as well taken seriously within the Community legal order<sup>77</sup>. There are two elements, which embody the principles of institutional balance – mandatory cooperation between the constituent bodies for achieving the objectives and the preservation of autonomy of each constituent body<sup>78</sup>.

It has been shown, that Community is based more on institutional balance than on usual notion of separation of powers. And even in such a case it can render difficult to determine the balance between legislative and executive powers in Community on the one hand and between the Community and the Member States on the other. The ECJ seems to be the only institution having quite clear functions while fulfilling the judicial power, at many aspects similar to the one known under the full separation of powers concept. But the ECJ has not always very keenly followed the principle stipulated in article 7 (1) of the Treaty. On the contrary, the ECJ has not in the past hesitated to arrogate itself a legislative power in judicial clothing, not expressly foreseen in the Treaties. This kind of action by the ECJ has raised question about the legitimacy of such a judge-made higher law. It has been stated, that the rule of law, constituting fundamental element of any political legitimacy, including the Community one, as being governed by

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<sup>76</sup> *ibid*, 2072

<sup>77</sup> B.de Witte, *Community law and national constitutional values*, Legal issues of European integration 1991/2, 15

<sup>78</sup> R.Bieber, *The settlement of institutional conflicts on the basis of article 4 of the EEC Treaty*, Common Market Law Review 21 1884, 306

the constitutional charter based on the rule of law, emanates from the independence of the judiciary<sup>79</sup>. It is the function of such an independent judiciary to guard the unique legal system, as Community one, for the benefit of the Member states as well as their nationals. Those nationals depend upon an independent judiciary to adjudicate in neutral and objective but nevertheless energetic fashion on the existence or otherwise of their individual rights<sup>80</sup>.

The matter, if the ECJ has adjudicated in “neutral and objective way” while following at the same time the institutional balance established in the Community, will be examined in the next chapter.

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<sup>79</sup> D.Curtin, *The constitutional structure of the Union: a Europe of bits and pieces*, Common Market Law Review 30 1993, 65

<sup>80</sup> *ibid*, 66

### **3. The development of ECJ's role and Member States' responses**

In the present chapter we follow the mutation of ECJ's role during the existence of the European Community. First we take look at the ECJ's role at the first place, as the Founding Fathers determined it as well as development of that role as the Treaties were changed. Then will be examined, how the ECJ has itself developed its role in the passage of time and see, if there are limits to its self-development. At the end some possible scenarios for the future are shown.

#### **3.1 *The role of the ECJ in the European Community***

The establishment of the ECJ goes back more then 50 years now. It was 1952, when the Treaty of European Coal and Steel Community came into force and among other institutions was also created the Court of Justice with the main task to ensure, that the law is observed in the Community<sup>81</sup>. At the first place the ECJ was designed only for reviewing the acts of the High Authority of the ECSC as it was at that time the only authority having the right to issue legally binding acts. Besides the abovementioned, the ECJ had also right to give preliminary rulings to the national courts concerning only the validity of the Community enactment<sup>82</sup>, as well as some other limited powers<sup>83</sup>.

The EEC Treaty (together with the Euratom Treaty) entered into force on 01<sup>st</sup> of January 1958. By the conclusion of the EEC Treaty it was decided, that besides the ESCS Treaty, the ECJ should fulfil the tasks of the court also in the framework of EEC Treaty. Under the EEC Treaty the ECJ was granted more general powers. The principle, though, remained the same – its main task was still to ensure the observance of law in the interpretation

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<sup>81</sup> Art 31 ECSC Treaty

<sup>82</sup> Art 41 ECSC Treaty

<sup>83</sup> Art 32-40 ECSC Treaty

and application of the treaties and their implementing rules<sup>84</sup>. According to the EC Treaty, as it stands now, the powers of the ECJ can be divided into three main categories – settling of disputes in a form of reviewing the legality of Community actions, giving of binding opinions and giving of preliminary rulings. An examination of the first of powers, mentioned here, extends the ECJ's jurisdiction to the interpretation and application of Community law between the Community institutions, between the Member States and between the institutions and Member States or private parties. It is a hallmark of the ECJ that there are real possibilities for access to private persons, who want their Community rights to be upheld. What concerns the power of giving binding opinions, then this has happened relatively occasionally, but has shown the increasing tendencies, as the Community has become active in ever-increasing spheres on the international plane<sup>85</sup>. Despite of its rareness, this procedure has already had great impact on Community and the juiciest fruits of it will be discussed further in this chapter. And last, but not least, – according to the art 234 of the EC Treaty the ECJ is empowered to rule on the interpretation and validity of the Community acts and on the interpretation of the Treaty itself. This power has proven to be most important of them all, because the ECJ has been using it as its principal instrument for developing Community law<sup>86</sup>. Based on that ability to interpret the Community law, the ECJ has given a bold interpretation regarding many of the provisions of the Treaty, defining the legal relationship between Community and the Member States as well as it has used the interpretation-power as an axis for a crucial growth in its own authority, legitimacy and prestige<sup>87</sup>.

It was already at the early stage of development of the Community, when the ECJ assumed the role as one of its chief architects<sup>88</sup>. With the passage of time the magnitude of the ECJ's contribution to the integration of Europe

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<sup>84</sup> Art 220 EC Treaty, art 31 ESCS Treaty, art 136 Euratom Treaty

<sup>85</sup> P.J.G Kapteyn, P.VerLoren van Themaat, *Introduction to the Law of the European Communities 3<sup>rd</sup> Ed*, Kluwer Law International 1998, 258

<sup>86</sup> T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 14

<sup>87</sup> H.Rasmussen, *The European Court of Justice*, GadJura Thomson Information A/S 1998, 46

<sup>88</sup> H.Rasmussen, *On law and policy in the European Court of Justice*, Nijhoff 1986, 8

has not been unnoticed<sup>89</sup>. The most remarkable contributions of the ECJ are first that it has provided the constitutionalisation of Treaty and secondly it has perfected the constitutional order of the Community<sup>90</sup>. During the history of the constitution-making by the ECJ, it has developed such principles, like supremacy<sup>91</sup>, direct effect<sup>92</sup>, protection of human rights<sup>93</sup>, implied powers<sup>94</sup>, pre-emption<sup>95</sup> etc<sup>96</sup>. These principles are not and were not written into the Treaty<sup>97</sup>, but are measures of ECJ's interpretation of the Treaty. This kind of creativity was so great as to be consonant with a self-image of a constitutional court in a "constitutional" polity<sup>98</sup>, therefore possessing the ultimate authority to make such structural and material determinations<sup>99</sup>. The ECJ set down its new role as an exclusive defender of the autonomy of Community legal order in opinion concerning the draft agreement on the European Economic Area<sup>100</sup>.

This kind of outcomes as the results of quite loose interpretation of the Treaty or, even more, the principles "inherent to the Treaty" can oppose the national and Community interests, that are sometimes contradictory or difficult to reconcile<sup>101</sup>. The ECJ has been accused for example of using its existing jurisdiction to grant itself further jurisdiction and at the same time to cut down the jurisdiction of the national courts, by stating, for example, that national courts have no power to declare Community legislation invalid on the grounds that it is outside the jurisdiction of the ECJ, despite of the fact that the Treaty does not give the ECJ the power to determine the jurisdiction of national courts<sup>102</sup>. The main problem is that the ECJ can use

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<sup>89</sup> G.F.Mancini, *The making of a constitution for Europe*, Common Market Law Review, 1989, 595

<sup>90</sup> M.L Fernandez Esteban, *The rule of law in the European Constitution*, Kluwer Law International 1999, 189

<sup>91</sup> Case 6/64, 1964 ECR 585

<sup>92</sup> Case 26/62, 1963 ECR 1

<sup>93</sup> Case 4/73, 1974 ECR 491

<sup>94</sup> Case 22/70, 1971 ECR 263

<sup>95</sup> Case 106/77, 1978 ECR 629

<sup>96</sup> for longer discussion look cpt 1.3 above

<sup>97</sup> with exception of article 249 (2) prescribing the direct effect of the regulations

<sup>98</sup> J.H.H Weiler, *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge University Press 1999, 24

<sup>99</sup> *ibid*, 189

<sup>100</sup> Opinion 1/91, 1991 ECR 6079, at p 35

<sup>101</sup> H.Rasmussen, *On law and policy in the European Court of Justice*, Nijhoff 1986, 16

<sup>102</sup> Case 314/85, 1987 ECR 4199

its powers to advance the position of Community law to such an extent that the remained sovereignty of the Member States will be undermined or even extinguished<sup>103</sup>. On the one hand this kind of possibility is excluded by the art 5 (1) of the Treaty, stipulating, that the Community shall act only within the limits of the powers conferred upon it by the Treaty and the objectives assigned to it therein. But on the other hand the ECJ maintains, that it never gives itself new powers, but merely discovers, that certain powers were inherent in the Treaty all along<sup>104</sup>. Who has a final word in this dispute, is it the ECJ, as an exclusive defender of the Community legal order, whose action is based mostly on the guidelines in a great extent developed by itself, or is it for the Member States to determine. Analysis of two following court cases, one from the European Court of Justice and other one from the German Constitutional Court can perhaps shed some light into this dark maze.

### ***3.2 The ECJ as an exclusive defender of the European Community legal order – Opinion 1/91***

#### **3.2.1 Background**

The economic relations between the Community and the individual EFTA countries had been governed since 1972-73 by Free Trade Agreements. In April 1984 at ministerial meeting the Luxembourg Declaration was issued, in which the importance of strengthening cooperation was stressed and the creation of dynamic and homogenous European Economic Space as a goal, was set. Following years did not bring ESS into realisation. Still in June 1990 began formal negotiations between Community and European Free Trade Association (EFTA) countries, for creation of a more structured

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<sup>103</sup> T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 150

<sup>104</sup> *ibid*, 161

partnership<sup>105</sup>. These negotiations proved to be more complicated, then assumed at the first place, and had, at times, seemed likely to break down over a number of issues, including the procedural aspects of the new agreement<sup>106</sup>.

In October 1991 the agreement between the Community and its Member States and the EFTA countries on the creation of a European Economic Area (EEA) was reached. According to the preamble of this agreement the objective of EEA is to establish a homogenous European Economic Area, based on common rules and equal conditions of competition and providing for adequate means of enforcement also in judicial level. This area was supposed to be achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the contracting parties<sup>107</sup>. In reality it was meant to be, that the EFTA countries should adopt a parallel system of rules borrowed from Community law. In many ways, this agreement is considered to be an alternative model of association leading to the membership or an interim agreement that will wither away as the association is succeeded by membership<sup>108</sup>.

An effective legal system requires court control. And the problem of creating such a control within the area is the very essence of this opinion given by the ECJ. According to the agreement, the parties agreed to create the special court and also a court of first instance of the EEA. This EEA court was supposed to be independent, though functionally integrated with the ECJ and competent to deliver binding decisions concerning the interpretation and application of the agreement<sup>109</sup>. The judges of both of these courts were in part nominated by EFTA countries and in part by the ECJ or the Court of First Instance of the Community accordingly. These courts had competence only in matters concerning the EEA. The right of

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<sup>105</sup> B.Brandtner, *The "Drama" of the EEA ; Comments on Opinions 1/91 and 1/92*, European Journal of International Law 1992, 302

<sup>106</sup> N.Burrows, *The risks of widening without deepening*, European Law Review 1992, 352

<sup>107</sup> H.G.Schermers, *Case Law; A.The Court of Justice; Opinion 1/91 of the Court of Justice, 14.December 1991*, Common Market Law Review 1992, 991

<sup>108</sup> N.Burrows, *The risks of widening without deepening*, European Law Review 1992, 353

<sup>109</sup> B.Brandtner, *The "Drama" of the EEA ; Comments on Opinions 1/91 and 1/92*, European Journal of International Law 1992, 303

giving preliminary rulings was not conferred upon the EEA courts<sup>110</sup>. Additionally, EFTA countries' national courts were given an opportunity to ask the ECJ to "express itself" on questions concerning the interpretation of EEA provisions<sup>111</sup>. But there would be no obligation for any of the EFTA countries to give this power to its courts and a court from EFTA country would never be obliged to request such a ruling. And even more – there was no provision that any preliminary rulings of that kind were to be considered binding in EFTA countries. For assuring uniform interpretation of the EEA rules, the Community courts, EEA courts and the national courts of the EFTA countries were supposed to inform each other of their decisions and to take account of the decisions previously taken by any of these courts. Lastly the EFTA countries were given possibility to intervene certain cases before the ECJ<sup>112</sup>. In the Commission's view these arrangements, despite of their complexity, were required in order to fulfil the aims and objectives of the agreement. It was obvious, that EFTA countries would not agree to submit disputes to the ECJ, as they had no control over the composition and membership of that court. Therefore by developing a parallel system of courts with equivalent procedures and the obligation to take account of the decisions taken by each other, the Commission believed, that the problems of jurisdiction could be avoided<sup>113</sup>.

The EEA legal system was deemed to consist of all the relevant areas of the Community law, including the case law of the ECJ, as it existed when the EEA agreement was signed, together with the modifications and additional rules laid down in the EEA agreement. To safeguard the existence of the principle of homogeneity, the EFTA countries were given extensive consultation rights in the Community legislative process. Where new legislation was adopted in Community, the EEA was required to amend the relevant EEA provisions to bring them into line<sup>114</sup>.

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<sup>110</sup> H.G.Schermers, *Case Law; A.The Court of Justice; Opinion 1/91 of the Court of Justice, 14.December 1991*, Common Market Law Review 1992, 993

<sup>111</sup> art 104 (2) Draft EEA agreement and Draft Protocol 34

<sup>112</sup> H.G.Schermers, *Case Law; A.The Court of Justice; Opinion 1/91 of the Court of Justice, 14.December 1991*, Common Market Law Review 1992, 994

<sup>113</sup> N.Burrows, *The risks of widening without deepening*, European Law Review 1992, 355

<sup>114</sup> T.C.Hartley, *The European Court and the EEA*, International and Comparative Law Quarterly 1992, 843



The Commission was itself convinced as to the compatibility of those provisions. It also has a good cause to believe, that the text of the agreement would be broadly acceptable, given the difficulties of negotiating the EEA agreement itself. But in the interests of legal certainty and also in the light of the ECJ's previous opinion in case relating to the agreement on the European laying-up fund for inland waterway vessels<sup>115</sup>, it decided to request an opinion from the ECJ concerning the compatibility of the judicial machinery set up to oversee the operation of the EEA with the EC Treaty<sup>116</sup>. Despite of the Commission's statement, that this request was made "in the interest of legal certainty", it was rumoured, that this reference was brought in front of the ECJ by back-door lobbying by the ECJ itself<sup>117</sup> and even before the request was filed, the ECJ's opposition of principle to an EEA court was widely known<sup>118</sup>. So the supporters of the conspiracy theory claim, that the real purpose of this opinion was the ECJ's desire to demolish the system of courts stipulated in EEA agreement and thereby to preserve its own well-developed position as an ultimate interpreter of Community law and competences.

In any case, the Commission wished to have ECJ's opinion on four points:

1. the question of the compatibility of the presence of judges of the ECJ on the EEA court in view of the ECJ's opinion 1/76;
2. the question of compatibility with the Treaty of extending to the EFTA countries the right to intervene in Community cases pending before the ECJ;
3. the question, whether it is possible, without amending the Treaty, to allow the courts from EFTA countries to submit to the ECJ questions on the interpretation of the agreement;
4. the question, whether the system of courts provided in the agreement is permissible under the art 238 of the Treaty.

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<sup>115</sup> Opinion 1/76, 1977 ECR 741

<sup>116</sup> N.Burrows, *The risks of widening without deepening*, European Law Review 1992, 353

<sup>117</sup> T.C.Hartley, *The European Court and the EEA*, International and Comparative Law Quarterly 1992, 848

<sup>118</sup> B.Brandtner, *The "Drama" of the EEA ; Comments on Opinions 1/91 and 1/92*, European Journal of International Law 1992, 304

### 3.2.2 ECJ's opinion

The ECJ gave its opinion in this matter in 14<sup>th</sup> of December 1991<sup>119</sup>. The content of the opinion will be discussed here only in parts relevant for this work.

The ECJ began its opinion by comparing the aims and objectives of the EEA with those of Community and highlighted the fundamental distinction between those two organisations<sup>120</sup>. In case of the EEA agreement the purpose is to extend the application of the trade and competition rules to the territory of the EFTA countries, at the same time, when these same rules on Community context are not an end in themselves, but contribute to the achievement of concrete progress towards the goal of European Union. Furthermore - the EEA agreement is a traditional international agreement, according to which the contracting parties transfer no sovereign rights to the institutions they set up<sup>121</sup>. By contrast, the EEC Treaty, although concluded in the form of international agreement, is nevertheless the Constitutional Charter of a Community law, a legal order for the sake of which the Member States have limited their sovereign rights in ever wider fields and the subjects of which are not only the Member States, but also the individuals<sup>122</sup>. This constitutional order is characterised by the twin pillars of Community law – supremacy and direct effect. By pointing out the differences between those two legislative texts, the ECJ rejects the view, that the application of the same legal texts would secure homogeneity. True homogeneity, at least according to the ECJ's implications, can only be achieved within the boundaries of the Community itself<sup>123</sup>. And furthermore – the ECJ continues this exact line of reasoning, while analysing article 6 of the EEA agreement, which seeks to apply ECJ's rulings, given by the ECJ prior to the date of the signature of EEA agreement, to the substantive provisions of the agreement. The ECJ objected, that this stipulation is

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<sup>119</sup> Opinion 1/91, 1991 ECR 6079

<sup>120</sup> recitals 13-22 of the opinion

<sup>121</sup> recital 21 of the opinion

<sup>122</sup> B.Brandtner, *The "Drama" of the EEA ; Comments on Opinions 1/91 and 1/92*, European Journal of International Law 1992, 306

<sup>123</sup> N.Burrows, *The risks of widening without deepening*, European Law Review 1992, 356

unclear, as it cannot be determined, whether it applies to the entire body of case law, including the principles of supremacy and direct effect, or merely to the interpretation of the substantive rules. It is clear, though, that as the EFTA countries are not members of the Community, they do not accept its constitutional base. Therefore the ECJ is again reiterating the fact, that homogeneity is possible only within the confines of full membership<sup>124</sup>.

After clarifying the problems concerning the homogeneity, the ECJ moves on to its main argumentation concerning the purpose of the request of this opinion – the establishment of EEA courts. The ECJ analyses, whether the proposed EEA courts might undermine the autonomy of the Community legal order and concludes by finding, that it will indeed be so. The ECJ built its decision on four objections<sup>125</sup>, structured a bit differently, than the four questions asked.

Firstly the ECJ deals with the issue, that the EEA court could be called upon to define the notion “Contracting Parties”. Under the article 96 (1) of the EEA agreement it was the EEA court, which had the jurisdiction to settle disputes between the Contracting Parties to the EEA agreement. So if there was a dispute regarding the interpretation of the agreement, the EEA court might be obliged to interpret the phrase “Contracting Party”. And as a result of this, the EEA court would also have a jurisdiction to rule on who are the Contracting Parties from Community side. By doing this, the EEA court should rule on the division of competences between the Community and the Member States and thereby jeopardize the autonomy of the Community legal order. It is the ECJ, who has to assure the respect towards the autonomy of the Community legal order and this jurisdiction, established by art 292 of the Treaty, is exclusive<sup>126</sup>. Therefore the ECJ concluded this passage stating, that conferring such a jurisdiction on the EEA court is incompatible with the Community law.

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<sup>124</sup> *ibid*, 357

<sup>125</sup> T.C.Hartley, *The European Court and the EEA*, International and Comparative Law Quarterly 1992, 844-846

<sup>126</sup> recital 35 of the opinion

Secondly the ECJ analyses the overall suitability of the mechanism of EEA courts with the Community law<sup>127</sup>. First the ECJ reminds the Commission, that such an international agreement, as EEA agreement, is deemed to be act of institutions, as defined by the art 234 of the Treaty. Therefore giving the EEA court the power to determine issues and to interpret the EEA agreement, would in result be binding on the ECJ. Consequently – the further interpretation of the Community law can be influenced by the decisions of the EEA court. And that is in conflict with the “very foundations of the Community”, even despite of the fact, that according to the EEA agreement, the EEA court, while sitting in plenary session, would have had a Community majority among its members<sup>128</sup>.

The third problem, what the ECJ deals with, is the question of the compatibility of the presence of judges of the ECJ on the EEA court with the ECJ’s opinion 1/76<sup>129</sup>. As it might have been expected from the result of the opinion 1/76, the ECJ considered, that the organic links between the EEA courts and the ECJ, providing, that they have some judges in common, would not reduce the problem<sup>130</sup>. Because of the divergent objectives of EEA agreement and the EC Treaty, the judges of the ECJ, when sitting in the EEA court, would have to apply and interpret the same provisions but using different methods, approaches and concepts, making it very difficult, if not impossible, for them to examine in realm of the ECJ, with completely open minds the questions already examined by the EEA court. Additionally the ECJ was afraid, that the appointment of some of its members to the EEA court might have resulted in divided loyalties<sup>131</sup>.

Fourthly the ECJ was dealing with the possibility, that EFTA countries could allow their national courts to ask the ECJ to “express itself” i.e to give kind of a preliminary ruling on the interpretation of EEA rules<sup>132</sup>. This

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<sup>127</sup> recitals 37-46 of the opinion

<sup>128</sup> T.C.Hartley, *The European Court and the EEA*, International and Comparative Law Quarterly 1992, 845

<sup>129</sup> recitals 47-52 of the opinion

<sup>130</sup> H.G.Schermers, *Case Law; A.The Court of Justice; Opinion 1/91 of the Court of Justice, 14.December 1991*, Common Market Law Review 1992, 998

<sup>131</sup> T.C.Hartley, *The European Court and the EEA*, International and Comparative Law Quarterly 1992, 845

<sup>132</sup> recitals 54-65 of the opinion

procedure was in three respects fundamentally different from the usual preliminary ruling procedure under the art 234 of the EC Treaty – firstly the EFTA countries were free to accept or refuse the procedure’s application, secondly there was no obligation for the courts of last resort to present the questions to the ECJ and thirdly it was not guaranteed, that those rulings given by the ECJ would bind these countries’ courts<sup>133</sup>. The ECJ did not have anything against the fact that article 234 procedure would be extended to the courts of the non-member states. But the real problem here was, that it was impossible to admit that the rulings of the ECJ can be purely consultative nature and have no binding effects. Such a procedure would change the nature of the ECJ’s function under the Treaty, which is to deliver binding decisions<sup>134</sup>. Additionally the ECJ was feared, that this kind of non-binding character of preliminary rulings would finally undermine the whole authority of the preliminary decisions. The ECJ was puzzled with such a questions, as would the courts of the Member States consider themselves bound by a preliminary ruling given at the request of a non-bound EFTA court and further more, would the existence of non-binding preliminary rulings change the overall character of all such a rulings<sup>135</sup>. On the basis of these doubts the ECJ had and for preserving the legal certainty, indispensable for proper functioning of art 234 of the Treaty, the ECJ concludes, that also this envisaged mechanism was incompatible with Community law.

### **3.2.3 Conclusions**

Above was given an overview of the ECJ’s crusade against the foreign powers trying to sway its self-built throne in the Community. Due to the judge-made development of the Community into something that may be called quasi-constitutional entity, it seems, that the standing of the

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<sup>133</sup> B.Brandtner, *The “Drama” of the EEA ; Comments on Opinions 1/91 and 1/92*, European Journal of International Law 1992, 311

<sup>134</sup> *ibid*, 312

<sup>135</sup> H.G.Schermers, *Case Law; A.The Court of Justice; Opinion 1/91 of the Court of Justice, 14.December 1991*, Common Market Law Review 1992, 998

Community has been developed into the level, where the ECJ can prevent 19 sovereign states from accepting particular rules in an international agreement. This is a good example of how much the sovereignty of the Member States has been limited over the years, not only in Community's internal, but also in external relations<sup>136</sup>.

As considering the traditional understanding of the rank of international agreements in the Community legal order, then the understanding is, that they stand between primary and secondary Community law. The problem of the present case would be, that the whole EEA acquis is made up of the secondary Community law, then duplicated into the EEA and subsequently reincorporated into Community law by international agreement, therefore having a higher rank, than originally held. This sort of incorporation of EEA norms would probably upset the hierarchy of Community norms. Moreover, and regards the present case, most importantly, in such a setting, the installation of an autonomous judicial system must result in a loss of autonomy for the Community institutions, particularly the ECJ. The resulting parallel applicability of identically worded provisions holding different ranks in Community legal system would have threatened an erosion of the ECJ's judicial prerogatives in the Community legal order<sup>137</sup>.

It has been all along the ECJ, who has said out loud, that it is its exclusive task to assure the autonomy and originality of the new legal order for the benefit of which the Member States have limited their sovereign rights. So the essence of the ECJ's objections to the EEA agreement was that it saw the creation of an EEA court as a threat to its own position as the supreme authority on Community law. In other words, the ECJ felt that its freedom of developing the Community law might have been restricted by the establishment of the EEA court. Here it is more than obvious, how the ECJ is using its judicial power to protect its own institutional interests. Besides grounding of the opinion, one must also consider the method, how that request for the opinion was made<sup>138</sup> as well as the ECJ's later idea,

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<sup>136</sup> *ibid*, 1004

<sup>137</sup> H-P.Folz, B.Brandtner, *Opinion 1/91*, 4 *European Journal of International Law* 1993, 438

<sup>138</sup> look above 3.2.1 footnote 110

presented by the Commission during the renegotiations of the EEA agreement, that the whole EEA should be submitted under the ECJ's jurisdiction<sup>139</sup>.

The ECJ's activism and its arrogation itself a judicial powers not expressly foreseen in the Treaty has not remained unnoticed in the Member States. Is this kind of "undemocratic" judge-made higher law legitimate? There is no common view concerning this matter. But there are some indications that the Member States are starting to loose their tolerance towards the ECJ constantly fulfilling the role of legislator and breaking the limits of institutional balance in a way shown above. One most famous case of resistance will be examined subsequently.

### **3.3 Constitutional control of European Community law by the Member State – German Maastricht Case**

#### **3.3.1 Background**

The Grundgesetz (German Constitution), entered into force 1949, as the constitution of the West Germany. Since the beginning it was favouring Germany's integration to Europe, as it was said in its preamble: "...inspired by the will to be an equal member of a united Europe and thereby to serve the peace of the world". The Grundgesetz contained also article 24, enabling the federation to transfer sovereign powers to an interstate organisation. This served as the basis for Germany's accession to Community. The Bundesverfassungsgericht (Constitutional Court, BVerfG) decided upon the constitutionality of Germany's membership first time in 1967<sup>140</sup>. It recognised, that the transfer of the public powers form the Member State to the Community created a new public power, which is not subordinate to national law and approved Community law as an independent legal order.

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<sup>139</sup> B.Brandtner, *The "Drama" of the EEA ; Comments on Opinions 1/91 and 1/92*, European Journal of International Law 1992, 320

<sup>140</sup> 2 BvL 29/63, BVerfGE 22, 134

At the same year BVerfG held, that the Community has a constitution of its own, laid down in the foundation treaty<sup>141</sup>. The ECJ followed exactly the same line of thought only 1991, while giving its opinion in EEA case<sup>142</sup>. Subsequently in 1971 the BVerfG accepted the priority of Community law over national law<sup>143</sup>. But then the first passion towards the Community and unification was over, and BVerfG started to introduce quite different criteria in matters related to the Community. In 1974 the BVerfG issued its Solange I<sup>144</sup>, stating, that as long as the Community has not set in force the catalogue of fundamental rights similar to those stipulated in Grundgesetz, German courts will refuse the application of relevant Community provision in case of a collision with fundamental rights in Grundgesetz. After the ECJ stated, that the protection of fundamental rights in Community is guaranteed<sup>145</sup>, the BVerfG indicated, that it might revise its position stated in Solange I. The change was brought in 1986 by decision Solange II<sup>146</sup> stating, that as long as the protection of fundamental rights in the Community is protected, the BVerfG will not longer review the Community acts, using the fundamental rights in Grundgesetz as a measure<sup>147</sup>.

As it was shown above, the Member State(s) and the Community itself do not have anymore the same opinion concerning the nature of the Community. The ECJ took during last 40 years straight track towards constitutionalism. Germany, represented by BVerfG, chose a round-track, bringing it back to the international law point of view. Regardless of the case law of the ECJ, quite a number of German scholars deny the existence of the European constitution and everything that follows with it. The BVerfG has warned, that authorisation contained in article 24 of the Grundgesetz does not allow giving up the identity of the existing constitutional order in Germany. The scholars therefore draw limits to the

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<sup>141</sup> 1 BvR 248/63 and 216/67, BVerfGE 22, 293

<sup>142</sup> Opinion 1/91, 1992 ECR 6079

<sup>143</sup> 2 BvR 225/69, BVerfGE 31, 145

<sup>144</sup> 2 BvR 52/71, BVerfGE 37, 271

<sup>145</sup> Case 4/73, 1974 ECR 491

<sup>146</sup> 2 BvR 197/83, BVerfGE 73, 339

<sup>147</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 European Law Review 1997, 22-24



binding force of the Community law in favour of the German constitutional principles, though with a wide range of intensity.

At the end of 1992 the Grundgesetz was amended and article 24 reformulated into article 23. As to the substance, article 23 demands that the European Union must respect democratic, social and federative principles like the principle of “Rechtsstaat” and of subsidiary and must guarantee a protection of fundamental rights essentially equivalent to that of the Grundgesetz.

In public disputes concerning the Maastricht Treaty, the scholars accused the Community of exceeding the limits of its competences and the ECJ of backing up such an activities. Additionally, the ECJ was severely accused of usurpation of powers by developing the Community law while pretending to fill the gaps. One of the judges of BVerfG, Paul Kirchhof, later the reporting judge in the Maastricht case, stated, that it is the state, who is the sole guarantor of freedom, equality and law<sup>148</sup>.

Under such a circumstances, there were many constitutional complaints presented to the BVerfG prior to the Maastricht Treaty, mostly by constitutional lawyers and economists.

Despite of all those objections against the accession to the Maastricht Treaty, Germany managed to sign it. Soon after the latter occasion BVerfG decided to accept one of the complaints, presented “incidentally” by a former member of the Commission and four members of the European Parliament, acting as private citizens<sup>149</sup>, despite of the fact, that they failed to present their personal concern about the act of accession.

The acceptance of such a claim put the BVerfG at the centre of the decision-making process. Among other factors, one of the bases for the BVerfG’s mutation into the political institution was the lack of profound political debate concerning the substance of the Maastricht Treaty in German Bundesdag (Parliament). So the essential political disputes over the consequences of the Maastricht Treaty for state and society were transferred

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<sup>148</sup> *ibid*, 26

<sup>149</sup> M.Herdegren, *Maastricht and the German Constitutional Court: constitutional restraints for an “ever closer union”*, 31 *Common Market Law Review* 1994, 235

to the BVerfG<sup>150</sup>. The BVerfG's activities outside its role determined by the concept of separation of powers in Germany were severely criticised. It was even accused of destroying the concept altogether<sup>151</sup>.

Be it, as it may, the significance of the decision is best illustrated by the reaction of the Bundespräsident, who decided to suspend the ratification of the Treaty until the judgement of the BVerfG is announced<sup>152</sup>.

The constitutional complaint contained several grounds, like the question of protection of fundamental rights, constitutional restraints for Germany's accession to monetary union, interference of freedom of expression, infringement to act through political parties because of the latter's European dimension etc. The BVerfG accepted only one of them, as admissible, namely the allegation, that the right to participate in the election of Bundesdag conferred by article 38 of Grundgesetz, might be infringed<sup>153</sup>.

### 3.3.2 BVerfG's decision

BVerfG delivered its long and theoretical decision 12<sup>th</sup> of October 1993<sup>154</sup>. Despite of the fact, mentioned above, that the BVerfG accepted only one of the grounds as admissible, it could not resist the temptation and opened itself the possibility of deciding the question, whether or not the Maastricht Treaty was in conformity with the principles of democracy, stipulated in Grundgesetz, and while doing this, examined still whole act, including functioning of the monetary union. Due to the wide scope of the decision, its content will be discussed here only in parts relevant for this work.

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<sup>150</sup> U.Everling, *The Maastricht judgement of the German Federal Constitutional Court and its significance for the development of the European Union*, 14 Yearbook of European Law 1994, 1

<sup>151</sup> R.Lamprecht, *Oligarchie in Karlsruhe: Über die Erosion der Gewaltenteilung*, Neue Juristische Wochenschrift 1992, 3272

<sup>152</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 European Law Review 1997, 27

<sup>153</sup> U.Everling, *The Maastricht judgement of the German Federal Constitutional Court and its significance for the development of the European Union*, 14 Yearbook of European Law 1994, 5

<sup>154</sup> 2 BvR 2142/92 and 2 BvR 2159/92, BVerfGE 89,155, in English Common Market Law Review 1994, 1

Before going to the analysis of the BVerfG's decision, it should be mentioned, that the BVerfG decided for the ratification of the Maastricht Treaty, but at the same time indicated very clearly the constitutional possibilities and limits of Germany's participation in European integration by putting quite harsh restraints upon the future development of the European Union by its members, its political organs and mostly the ECJ.

The judgement centres on democracy in the European Community, arising from the Grundgesetz and stipulating, that all state authority emanated from the people. The main problem, as the BVerfG describes it, is that whether national powers are to be given away to such an extent, that the minimum requirements of democratic legitimation for the sovereign power exercised towards the citizen are no longer fulfilled<sup>155</sup>. Here the concepts of the BVerfG, which have significance for the present work, will be examined.

First the BVerfG clarified the limit to the number of competences, which may constitutionally be transferred and binds this limit with the democracy principle. This analysis by the BVerfG is based upon understanding, that the Maastricht Treaty does not set up some supranational entity governed by the constitution and moving towards the statehood, but is following the usual patterns of public international law. One of the cornerstones of the judgement is the notion "Staatenverbund" or a compound of states, the way how the BVerfG characterizes the Community. This term suggests, that only states act on European level, whereas the ECJ has underlined, that the Member States as well the individuals are subjects of European legal order<sup>156</sup>. The term was initially created by judge Kirchhof, the reporting judge of the present case, already at 1992, while discussing the matters connected with the European Community in one of his various publications. According to P.Kirchof the notion "Staatenverbund" is rooted into the legal unity created in determined sphere, strengthened by economic union for limited purposes and completed desirably also by the basic cultural union<sup>157</sup>. Based on the abovementioned concept, the BVerfG declares, that

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<sup>155</sup> M.Herdegren, *Maastricht and the German Constitutional Court: constitutional restraints for an "ever closer union"*, 31 Common Market Law Review 1994, 238

<sup>156</sup> Opinion 1/91, 1992 ECR 6097

<sup>157</sup> H.P.Ipsen, *Zehn Glossen zum Maastricht-Urteil*, Europarecht 1994, 8

Staatenverbund or the compound of states is not one state-like union, based on European people<sup>158</sup>, thereby stressing the need for protecting the identity of the Member States and the substance of the competences of national parliaments<sup>159</sup>. Therefore for the BVerfG the sovereignty still lies with the Member States, from which all Community power is derived. Here the BVerfG repeats its earlier decision, stating that “the Member States are now and have always been the masters of the Treaties”<sup>160</sup>. That means, that such a state, as Germany in the present case, may be open for European integration, as it is stipulated in the Grundgesetz, but the last responsibility must remain vested in the people of the state. In the consequence thereof, the sovereignty of the nation state must be preserved, in a meaning, that the state shall forever be the highest authority on its territory with the original power of legislation and coercion in legal independence of externally taken decisions. A close relation in an organisation with other states is tolerable only under the condition, that state may leave the organisation at its discretion, or otherwise the nation would lose its independence<sup>161</sup>. This kind of possibility is deemed to be one of the factual components of the kept sovereignty<sup>162</sup>. To point out the preserved sovereignty, the BVerfG declares, that there are at least three possibilities for Germany to leave the Community and Union:

1. as on of the “masters of the Treaties” it is able to terminate the membership by *actus contrarius*;
2. for maintaining its status, as a sovereign state, Germany is entitled in its own right to dispose the Act of Accession, from which the validity and application of European law in Germany is derived;

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<sup>158</sup> recital C II 3 d of the decision

<sup>159</sup> H.P.Ipsen, *Zehn Glossen zum Maastricht-Urteil*, Europarecht 1994, 9

<sup>160</sup> 2 BvR 687/85, BVerfGE 75,223

<sup>161</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 European Law Review 1997, 30

<sup>162</sup> V.Götz, *Das Maastricht-Urteil des Bundesverfassungsgerichts*, 48 Juristenzeitung 1993, 1085

3. if the long-term of stability of the monetary union should fail, Germany is free to withdraw from the Community<sup>163</sup>.

As making clear, that the sovereignty indeed still resides with the Member States, the BVerfG states, that the power ceded to the Community must be democratically legitimated. While examining the status of the democratic legitimation within the Community it found, that certain basic features of democracy, like transparent and understandable public authority are currently lacking. At the present stage of the development, the legitimation by the European Parliament has only a supportive function and the real power is exercised by the Council, not popularly-elected body, whose decision-making sessions are not transparent to the public. Given the lack of democratic infrastructure and the peripheral role of the European Parliament, the BVerfG concluded, that the democratic legitimation is achieved primarily through the participation of the national parliaments. Because this democratic legitimation is indirect in contrast to the direct legitimation of German state power, the BVerfG sets limits on the amount of power that may be transferred. Should the Bundesdag refer too many of its competences, too much state power would be legitimated only indirectly and as a result the democracy principle would be violated<sup>164</sup>. In that case, based on the constitutional reasons, disobedience would be mandatory. The possible grounds for disobedience will be shown subsequently.

The second postulate, deriving from the judgement is, that the contours of the power permissibly transferred to the European Union are determined and limited by the Maastricht Treaty and the accompanying implementing legislation, as it derives from the democracy principle. Without much more ado, the BVerfG states here, that any subsequent substantial amendments to the programme of integration agreed by the Act of Accession, are not covered by this Act<sup>165</sup>. If not acting in accordance with the powers expressly

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<sup>163</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 *European Law Review* 1997, 29

<sup>164</sup> S.J.Boom, *The European Union after the Maastricht decision: is Germany the "Virginia of Europe"*, <http://www.jeanmonnetprogram.org/papers/95/9505ind.html> , 5

<sup>165</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 *European Law Review* 1997, 30

transferred by the Bundesdag, the European Union and its institutions act *ultra vires*. By stating that, the BVerfG considers it necessary to underscore the fact, that there is a difference between Treaty interpretation and Treaty amendment, thereby clearly referring to the activities of the ECJ. With its words, the implementing legislation to the Treaty does not cover the subsequent fundamental changes to the integration program and to the associated competences. According to the BVerfG, legal acts adopted pursuant to such a Treaty amendment by the interpretation amounting to Treaty expansion would not be binding in Germany and even more – German state organs would be constitutionally prohibited to implement them<sup>166</sup>. Additionally, as the dynamic expansion of the Treaty has been too often based upon the liberal interpretation of the article 308 (then 235) of the Treaty, upon the considerations of implied powers and *effet utile*, then in future such standards of competence would not have any binding effect in Germany either, as they are in practice only unauthorised extensions of the Treaty, equivalent to an amendment not allowed to the Community institutions<sup>167</sup>. While stating that, the BVerfG also pointed out, who it had in mind primarily, implicitly rejecting the ruling of the ECJ in Foto-Frost case<sup>168</sup> that national courts have no power to declare Community legislation invalid on the grounds that it is outside the jurisdiction of the ECJ, since the Treaty does not give the ECJ the power to determine the jurisdiction of national courts<sup>169</sup>. In this context, the BVerfG coins a new formula: the relationship of co-operation towards the ECJ, different from the one prescribed by the article 234 of the Treaty. This most self-confident statement made by BVerfG was based on mutual consideration between those two courts to master potential conflicts<sup>170</sup>, but in reality giving the

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<sup>166</sup> S.J.Boom, *The European Union after the Maastricht decision: is Germany the “Virginia of Europe”*, <http://www.jeanmonnetprogram.org/papers/95/9505ind.html>, 6

<sup>167</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 *European Law Review* 1997, 30

<sup>168</sup> Case 314/85, 1987 ECR 4199

<sup>169</sup> T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 156

<sup>170</sup> M.Herdegren, *Maastricht and the German Constitutional Court: constitutional restraints for an “ever closer union”*, 31 *Common Market Law Review* 1994, 239

BVerfG sort of a supervising power over the ECJ's case law<sup>171</sup>. By the concept of co-operation the BVerfG takes over two areas from the ECJ: first in the area of the normative control between the Community law and the Grundgesetz and second in the area of the protection of fundamental rights<sup>172</sup>. According to the new doctrine of the co-operation the BVerfG will examine itself, whether the legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them, being, with respect to Germany, itself, instead of the ECJ, thereby the final arbiter of the disputes concerning the division of powers between the Community and Member States and decide, when those legal acts are *ultra vires*<sup>173</sup>.

Consequently, as from here on the BVerfG provides sufficient guarantees that the Community would not take further powers to itself without the consent of the Member States and their parliaments by using the aforesaid methods of the constitutional control of Community acts, the democratic rights of German voters would not be infringed by ratification of the Maastricht Treaty<sup>174</sup>.

### 3.3.3 Conclusions

The background of this judgement is the understanding of the state, as sovereign and independent body, master of its fate. These characteristics are preserved even in such a union of states, as European one<sup>175</sup>. This is the conception of state, known under international law point of view. That line of thinking is obviously in conflict with the doctrine established and developed by the ECJ, according to which the Community's legal order is a separate one and moving quickly towards full constitutionalism.

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<sup>171</sup> M.Zuleeg, *The European Constitution under Constitutional constraints: The German scenario*, 22 *European Law Review* 1997, 28

<sup>172</sup> H.P.Ipsen, *Zehn Glossen zum Maastricht-Urteil*, *Europarecht* 1994, 10-11

<sup>173</sup> S.J.Boom, *The European Union after the Maastricht decision: is Germany the "Virginia of Europe"*, <http://www.jeanmonnetprogram.org/papers/95/9505ind.html> , 6

<sup>174</sup> T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 155

<sup>175</sup> look at 3.3.2, the definition of "Staatenverbund"

It is widely known fact, that the German opposition to the ECJ's jurisdiction has been consistent. This present case is indeed mostly directed towards the ECJ, as the only authority having a weapon prescribed in article 234 of the Treaty, that is ability to interpret and thereby to create. BVerfG's feelings towards the ECJ can be also seen from the language and tone of the decision, as well from the way the BVerfG chastises the ECJ's permissive attitude and lack of caution in interpreting the Treaty. Undeniably – in many aspects the future of united Europe is in the hands of the ECJ. Although we cannot underestimate the “magnitude of the contribution made by the Court to the integration of Europe”<sup>176</sup> it has to be more dedicated to keeping the institutional balance in the Community and not forget to supervise itself in that regard as well. On the other hand, the deeds of the BVerfG were widely discussed also in Germany. Many writers accused the BVerfG of the same sin, as the latter accused the ECJ of – not keeping its role under the concept of the separation of powers<sup>177</sup>. The BVerfG was even seen by some as holding the control over the destiny of the Europe<sup>178</sup>. Despite of some domestic critics towards the legislative role of the BVerfG, the main attitude in Germany is still that if Germany wants to join an European Federal State, it can be done only via revolution in the legal sense or would at least call for an act possessing the constitutional-like power<sup>179</sup>.

What concerns the prospects for the future, then one way or another, the real impact of this decision will likely be felt. Possible effects of the judgement can be divided into three categories – short-, medium- and long term<sup>180</sup>.

The short-term effects are felt likely on two-level: it is on one hand the ECJ who will be influenced and on the other hand the institutions. Firstly, the ECJ will be forced to react, if the BVerfG exercises its authority determined under the present decision, an act that is not desirable by none of the parties. Therefore the most likely scenario would be, that both courts try to avoid

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<sup>176</sup> G.F.Mancini, *The making of a constitution for Europe*, Common Market Law Review, 1989, 595;

<sup>177</sup> about the concept look 2.3 above

<sup>178</sup> H.P.Ipsen, *Zehn Glossen zum Maastricht-Urteil*, Europarecht 1994, 19

<sup>179</sup> M.Herdgren, *Maastricht and the German Constitutional Court: constitutional restraints for an “ever closer union”*, 31 Common Market Law Review 1994, 249

<sup>180</sup> S.J.Boom, *The European Union after the Maastricht decision: is Germany the “Virginia of Europe”*, <http://www.jeanmonnetprogram.org/papers/95/9505ind.html>, 23-27



the real confrontation, as, what concerns the ECJ, the implementation of its decisions depends fully on national courts. So even if the BVerfG never uses the right it created itself under the present decision, the impact of this decision will still be felt by the ECJ, who is now motivated to interpret the Treaty in a more conservative manner. Unlike the Solange-cases, that never had practical consequences, the BVerfG has been using this Maastricht-case in at least one of its later decisions. In *Bananas-case*<sup>181</sup> the BVerfG clarified its role as the ultimate defender of the constitutional principles in accordance with the Solange II decision as long as Solange II is not in conformity with the Maastricht decision. BVerfG repeated once more, that the protection of fundamental rights has to be secured in every level in accordance with the abovementioned decisions<sup>182</sup>. The ECJ did not react to that statement. Secondly the institutions will probably construe the Treaty more strictly and give real meaning to the subsidiarity clause. As a result, this decision could on the practical level have the consequence of slowing down the harmonisation program and the process of European integration.

The medium-time implications focus primarily on whether the BVerfG will continue to claim jurisdiction or whether it will eventually accept the ECJ's authority to decide the limits of national court's power. As long as the creation of the European state is not determined, it seems unlikely, that the BVerfG will accept such a case law. Still it is likely, that both courts try to avoid real conflict. It is assumed, that in the course of time the BVerfG will accept also regards the present decision the Solange II type formula – as long as the ECJ generally interprets the Treaty in a restrictive manner, the BVerfG will remain from exercising its Maastricht authority.

Long-time effects are connected with the course and pace of the European integration, stemming directly from the BVerfG's discussion of the democracy principle. The movements towards a European state are not possible without the development of a democratic infrastructure at the Community level. The BVerfG gave explicit guidance, how the democracy should develop at the European level. Elimination of the democratic deficit

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<sup>181</sup> 2 BvL 1/97, BVerfGE 102, 147

<sup>182</sup> K.Schlaich, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen*, 5<sup>th</sup> edition, Verlag C.H.Beck München 2001, 349

in European level requires the development of a true democratic infrastructure. It is primarily the European Parliament, whose role has to be strengthened, but for becoming an institution directly legitimated by the European citizens, also the existence of the pan-European political parties, interest groups and media is needed.

Despite of the very controversial opinions concerning this present decision and the huge amount of critics that has been done, the Maastricht-decision of the BVerfG is one of the events in the running dispute to find the right equilibrium between the Member States, who will exist as such in the future, and the Community, on the other hand, which is (not yet) an European state<sup>183</sup>. The ECJ received a clear note – do not rush ahead of the events, it is for the Member States to amend the Treaty, not for the institutions, created under the very act. One thing is certain – both balances, the one between the institutions and the one between the Community and the Member States, as prescribed by the Treaty, have to be kept. Responsibility for overseeing this balance lies with the ECJ.

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<sup>183</sup> U.Everling, *The Maastricht judgement of the German Federal Constitutional Court and its significance for the development of the European Union*, 14 Yearbook of European Law 1994, 19

## Conclusions

The conclusions that can be drawn from the present analysis are, that the ECJ, while being the watchdog over the compliance with the Community law, was the first one that started to break free from the usual boundaries set by the concept of the separation of powers, in the Community correspondingly stipulated in the Treaty and known as the institutional balance<sup>184</sup>. Anyhow, it is widely held, that the present-day judicial behaviour cannot be analysed based on the definition of the separation of powers in the strictest sense<sup>185</sup>. Even in the Germany, governed by the principle of *Rechtsstaat*, the highest courts are creating law and the constitutional court has been practicing high-level politics<sup>186</sup>. The judicial legislation may be even somewhat better, than the usual one, as the judicial decisions must be rationally argued and justified in relation to existing sources of law<sup>187</sup>. This reasoning is even more valid in the Community context, where we do not possess any background material to the legal acts and therefore the legal reasoning behind certain acts may be difficult to grasp. Even more – as taking decisions in Community level is very often connected with unanimity, the ECJ can be the easier way to bring the reform into reality, without the difficult procedures of political consensus-building. The primary reform, that the ECJ has done and is still doing, is its fundamental contribution to the ideals of “a united, peaceful and federal Europe”<sup>188</sup>. This ECJ’s activity, as one furthering European integration, is supposed to be based on the text of the Treaty, in particular the preamble and the first articles. In most of the cases the ECJ has really managed to create a harmonious legal order through both of its main working methods – the constitutional interpretation of the general principles of law present in the Treaty and the formulation of new legal rules from the unwritten

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<sup>184</sup> look chapter 2.4 above

<sup>185</sup> H.Rasmussen, *On law and policy in the European Court of Justice*, Nijhoff 1986, 34

<sup>186</sup> look chapter 3.3 above

<sup>187</sup> H.Rasmussen, *On law and policy in the European Court of Justice*, Nijhoff 1986, 40

<sup>188</sup> M.Cappelletti, *Is the European Court of Justice “running wild”?*, 12 *European Law Review* 1987, 16; for a longer overview look G.F.Mancini, *The making of a constitution for Europe*, *Common Market Law Review*, 1989, 595

principles of Community law. The Member States have adopted those interpretations and in some cases even the subsequent amendments have been done, writing the new principles into the Treaty. For improving the value of democracy, the strengthening of the powers of the European Parliament was long based on the decisions of the ECJ, known as “Comitology”<sup>189</sup> and “Chernobyl”<sup>190</sup>, followed afterwards by the corresponding Treaty amendments. The Amsterdam Treaty brought a new recital into the preamble of the Treaty, bringing the fundamental social rights under the application of the Treaty as well as improved articles 2 and 3, dealing with social protection and equality between sexes. These amendments are fully based on the ECJ’s decision in the case known as Defrenne<sup>191</sup>. The Maastricht Treaty introduced the protection of the fundamental rights, as it was decided by the ECJ already in 1974 in a case known as Nold<sup>192</sup>. Some of the contributions made by the ECJ have remained at the judicial level i.e not incorporated into the Treaty and with some exceptions accepted like that, for example the issues of the separation of powers, defined as the institutional balance, autonomy of the institutions and the loyal co-operation between them<sup>193</sup>, as well as the principle of supremacy<sup>194</sup>.

So far the picture seems to be very rose-coloured. But the practice shows that as soon as the ECJ becomes too active and tries to decrease the sovereignty of the Member States, the result is resistance. One possibility for the Member States to show, that they are still the Masters of the Treaty, is to expressly reject the ECJ’s decision. As an example here is Kalanke-case<sup>195</sup>, a matter about allowed positive discrimination stipulated by the German laws but prohibited by the ECJ. Next time, when the Treaty was amended, the possibility to regulate the positive discrimination by national laws, was written into the Treaty<sup>196</sup>. Another example, and probably more

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<sup>189</sup> Case 302/87, 1988 ECR 5615

<sup>190</sup> Case C-70/88, 1990 ECR 2041

<sup>191</sup> Case 43/75, 1976 ECR 455

<sup>192</sup> Case 4/73, 1974 ECR 491

<sup>193</sup> Case C-70/88, 1990 ECR 2041

<sup>194</sup> Case 6/64, 1964 ECR 585, and number of subsequent cases

<sup>195</sup> Case C-450/93, 1995 ECR 3051

<sup>196</sup> Art 141 (4) of the Treaty

famous on, is the birth of Barber-protocol, attached to the Maastricht Treaty. This protocol helped to prevent arising significant financial costs implied upon the Member States by the Barber-decision<sup>197</sup>, as the decision could be understood in different ways<sup>198</sup>.

Even more important criterion of evaluating the ECJ's work is the social acceptability of its decisions in the Member States. This can be felt both on the national legislative as well as judicial levels. The national judges have been and are still quite sensitive to issues of national sovereignty. By continuously transforming the legal system of the Community, the ECJ could now rule also on national law and policy. The most savage opponents of the ECJ were the national highest courts – all of a sudden there was one court that could give decisions superior, than those from national highest courts and these decisions were binding even to the latter. Therefore only in rare occasions have the national highest courts made article 234 referrals to the ECJ; the Constitutional Courts in Germany, Italy, Belgium and France have made none of them. In Germany the Constitutional Court even called its activities, similar as discussed in chapter 3.3, as “restoring the legal order”<sup>199</sup>. But national courts are not the only ones, who are afraid of the disappearance of the nation states. There have been tremendous debates in Europe last 40 years about the fading sovereignty of the Member States without their own consent. As an example of the political non-acceptance of the ECJ's activism, its jurisdiction was not extended to the 2<sup>nd</sup> and 3<sup>rd</sup> pillar during the Maastricht negotiations<sup>200</sup>.

The future of the ECJ is determined in great amount by the Member States' vision of the future of Europe. In a long run there are basically two possibilities to choose from – whether to continue the integration in growing amount, in which case the goal would be “the United States of Europe” or to declare, that the intentions of the Member States have never been more ambitious, than co-operation under the international agreement. Some clear steps have been made lately towards creating a European Constitution. If

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<sup>197</sup> Case C-362/88, 1990 ECR I-1889

<sup>198</sup> further discussion T.C.Hartley, *Constitutional problems of European Union*, Oxford and Portland, Oregon 1999, 55

<sup>199</sup> K.J.Alter, *The European Court's political power*, 19 West European Politics 1996, 465

<sup>200</sup> *ibid*, 479

this project will be successful, it would be the biggest compliment to the ECJ, who has been the enthusiastic carrier of the constitutional flag for several decades. In that case the reasoning of the Opinion 1/91 shall be upheld<sup>201</sup> and the ECJ remaining in position, as a constitutional court, being thereby certainly above the highest or constitutional courts of the Member States. Neither will there be any more struggles regarding the question, which one is supreme, Community law or Member State's constitution.

But if the Member States shall pick the other option and keep the structure of nation states, all the most famous doctrines created by the ECJ will be swept away. Then the ECJ will fall back into its role as an interpreter, not creator of the Community law, the role that has been granted to it by the Treaty<sup>202</sup>. If it happens so, then it was the Bundesverfassungsgericht, who got it right and everything said in the Maastricht decision would be correct<sup>203</sup>.

Therefore – whatever high-visions about the Europe and its role in there the ECJ may invent, in the end of the day it is for the Member States to decide about the future of Europe. Until no clear decisions are made, the ECJ should keep and protect the institutional balance in Community. If it chooses not to do so, the automatic sovereignty-protection reflex starts both by the courts of the Member States as well as by the political circles. And it is certainly the ECJ, who suffers the most in such a case, as it is fully dependent of the co-operation of the national courts. The concluding message, that can be made based on this work is, that for preserving the respect towards itself, the ECJ should take a pace back and be again more an interpreter than creator, that is start dealing again more with law than politics.

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<sup>201</sup> look chapter 3.2 for further discussion about that opinion

<sup>202</sup> look chapter 2.4 about the separation of powers in the Community

<sup>203</sup> look chapter 3.3 for further discussion about that decision

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