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Europe under Reconstruction
- A Study on the Idea of a Constitution for the European
Union

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Summary

The European project has, since its birth in the 1950's, transformed into a supranational organization with strong constitutional features. The current legal order of the Union has developed into a complex system that is hard to comprehend. Together with the enlargement eastwards, the need for a simplified European Treaty has been intensified. Today, the debate about a European constitution is a topic that nobody can avoid. The European Convention, which was established in Laeken 2001, is assigned to present a draft to a Constitutional Treaty that will serve as a basis for the IGC in 2004. On 28 of October 2002, the Convention put forward the first draft Treaty. A final and revised version will be introduced in June 2003. Hereby, the Union is standing before an almost inevitable constitutional choice.

The purpose with this thesis is to examine the notion of a constitution for the EU. I will explore the motives for a constitution and the possible reservations towards one. Since the protection of fundamental rights in the EU has a significant role in the constitutional debate, I will also examine the system of protection in the Union and the ways to strengthen it. In order to create a better understanding for the distinctive character of the EU, I will make a comparison with the US federal model of governance.

The thesis is divided in three main chapters. Chapter two focuses on the constitutional transformation of the European governance and the main constitutional features in the Union's legal order. As an introduction to this chapter, the term constitution and constitutionalism as well as the nature of the Union will be clarified. Chapter three briefly describes the constitutional debate that preceded the adoption of the US Constitution in 1787. Here, I will also outline the US Constitution including the Bill of Rights and examine the legal power of the US Supreme Court. Finally, chapter four will analyze the issue of a constitution for Europe and the ways to strengthen the protection of human rights in the EU.

The definition of constitutions and constitutionalism is strongly linked with the understanding of nation states. Since the EU is not a state, rather a unique organization, it is important to see the Union on its own merits. Generally, is a constitution for Europe, as a clear and simplified document, a necessity in an enlarged Europe. A constitution would make the EU's framework more visible and could thereby also improve the citizens' interest and support for the cooperation. The current system of protection of fundamental rights in the EU is not sufficient and needs to be strengthened of similar reasons as a constitution. Just like the US Constitution and the Bill of Rights is a symbol for common values that enjoy a strong support in the American society, a simplified document for the EU with a binding catalogue of rights could serve the same purpose. An improvement of the democratic legitimacy in the Union might be a precondition for that a further enhanced cooperation shall be successful.

Preface

The European Union and its development has always been a great subject of interest for me. Since it is the Member States that together are forming and settling the framework for a continued cooperation, the Union's structure is very unique and dynamic. Over the years, the Union has been constitutionalized and has now reached a phase where the issue about a European Constitution is inevitable. The progress of the European Union is now in a very active phase and important issues, which will have a great impact on the future cooperation, will be settled in a soon future. I have found the subject of the thesis very interesting and writing it has been very motivating and instructive.

For great support and supervision from start to finish of the thesis, I would like to thank my supervisor Peter Gjørtler. My former professor in EU law Henrik Norinder as well as Ph.D-student and friend Linda Gröning have given me valuable comments on the outline of the thesis, which I truly appreciate.

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Anna Dahlström
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Abbreviations

CFI	Court of First Instance
CMLRev	Common Market Law Review
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EC Treaty	Treaty of the European Community
EEC	European Economic Community
ELJ	European Law Journal
EMU	European Monetary Union
EP	European Parliament
ERT	Europarättslig Tidskrift
EU	European Union
EUI	European University Institute, Florence
Euratom	European Atomic Energy Community
EU Treaty	Treaty of the European Union
IGC	Intergovernmental Conference
JCMS	Journal of Common Market Studies
JT	Juridisk Tidskrift
SEA	Single European Act
YLJ	Yale Law Journal

1 Introduction

1.1 Background

Looking back, the European integration has proceeded in an extraordinary fast and profound way since its birth over fifty years ago. The Europe of today has never been stronger and more united.¹ However, the speed at which the development has taken place has left the Union with outdated institutional and administrative solutions. The successive treaty amendments have been an effort to modernize and adapt the Union to new circumstances and challenges. This has resulted in a complex organization and a legal order that is difficult to comprehend. The Union's scattered legal order has many constitutional features that in all often are recognized as a de facto constitution. By that reason, the EU resembles a state in many ways. The international basis of the European cooperation together with the constitutional elements makes the Union a distinctive organization.

A radical reform for the Union including a set up of a simplified Constitutional Treaty has, for a long time, been called for. The European Convention, which was established in Laeken December 2001, is assigned to debate on the future of the EU and to propose a draft to a constitution for Europe. On 28 of October 2002, the European Convention settled the first draft to a Constitutional Treaty. The draft Treaty is, at the time of writing, continuously discussed and revised in the forum. The aim is to present a final draft to a Constitutional Treaty sometime during June 2003, so it later can serve as a basis for the discussion at the next IGC, which will be convened in 2004.

A parallel topic, or rather a question embraced in the general issue of a constitution, is the protection of fundamental rights in the EU. The European project was initially only an economic cooperation, where human rights had no place. Over time, however, a mainly judge-made protection of human rights has emerged to somewhat correspond to the Union's impact on the European citizens. In December 2000 the Charter of Fundamental Rights of the EU was proclaimed as a codification of the rights that the EU already respects through case law and the basic treaties. The Charter is only a political declaration today, even though the intention by creating it was to make it binding. The reason why the Charter was not made binding was that many Member States feared that a binding Charter would be an introduction to a constitution. Consequently, the EU of today has no binding catalogue of rights. In connection with the draft to a Constitutional Treaty, the question about a written catalogue of fundamental rights is re-established. Currently, the main proposals are to incorporate the Charter in the constitution and enable the EU to accede to the ECHR.

¹ Karlson, Nils, in Karlson, Nils, Nergelius, Joakim (Eds.), EU- skvadern- om den Europeiska Unionens konstitutionella framtid, City University Press, Stockholm, 2001, p.9.

With the recent constitutional development and debate concerning a constitution and a binding catalogue of rights, the EU is standing at crossroads. Either way chosen will comprise a sweeping change for the Union's future. Strong political forces are exchanging their views on how the future Union shall be designed. It is, unarguably, a challenge to create a complete new framework like a constitution, even though no greater material revisions are encompassed. The constitution shall function, be stable and the effect shall correspond with its fundamental purpose. Furthermore, the constitution shall continue to give the European citizens an opportunity to strengthened peace, freedom and development.²

1.2 Purpose and Research Issues

The purpose with this thesis is to examine the question whether the EU ought to have a constitution in light of its constitutional background and future challenges. Well aware of the almost inevitable establishment of a Constitutional Treaty, the question still serves a purpose. It is important to understand why a constitution for Europe is at stake, how it should be designed and whom it shall address. I will further explore the positive motives for a constitution as well as pointing out possible concerns and reservations towards one.

The protection of fundamental rights is often seen as a core element in a constitution like that of a state. The guarantees of protection to the people also provide them with a control over the government's exercise of power. Along with the study of a European constitution, I will also examine the standing and sufficiency of the human rights protection in the EU. Since the discussion about a binding and written catalogue of fundamental rights is highly topical in the constitutional debate, I will explore the different possibilities and highlight the arguments for and against a binding catalogue of rights. Also, I will focus on the option to incorporate the Charter of Fundamental Rights in the Constitutional Treaty and the alternative for the EU to accede to the ECHR. The arguments for and against the creation of a constitution and a legally binding catalogue of rights are often very similar. For clarity, I will however deal with those issues separately.

With the dual system of governance between the EU and the Member States, the Union not only resembles a state but also a federation. A comparison with a federation like the US can therefore be useful in order to better comprehend the characteristics of the European system. Here, the US experience is by far the most valuable comparison for the European integration. Both entities have experienced a successful and fast integration and they share issues descendent from common arrangement of decentralized division of power. Although the EU is founded by international treaties, I see it as more appropriate to make an analogue with

² Karlson, N., in Karlson, N and Nergelius, J., p. 10.

a political institution like a federal state rather than an organization based on international law. This approach, I believe, is in conformity with the constitutional and federal-like nature of the Union today. As a reference, I will only draw up the main outlines of the US Constitution and specifically examine the protection of human rights and the legal power of the US Supreme Court. I intend to use this presentation as a reference point in the analysis of the constitutional future of the Union.

1.3 Method and Material

The thesis is written in accordance with traditional methods of legal science and is presented in both a descriptive and an analytical way. Case law and legal doctrine represent a major part of the research material. The basic material on the European integration and the constitutional background in the EU and the USA is massive. This has forced me to be selective in the process of collecting data. I have mainly used books and journal articles to cover this period. Contrary to the historical part, the recent European development, including the debate on the constitutional future of the EU, is less updated in the literature. Since the subject is highly topical and fast advancing, I have used articles, internet sources and official documents in the presentation of this period.

1.4 Outline and Terminology

The presentation is by pedagogical reasons divided in three main chapters. Chapter two focuses on the European integration and its constitutional features. The term constitution and constitutionalism will be explained as an introduction to this chapter as well as a presentation of the character of the Union. A special emphasis will be laid on the position of the human rights in the EU that symbolizes an important part in the European constitutionalization process. Chapter three outlines the US Constitution including the Bill of Rights and other elements of comparative relevance. Lastly, chapter four will conclude and bring together the presented information and serve as a foundation for the analysis of the constitutional future of the EU.

I will refer to the term of EU or other equivalent words in general European contexts. Overall, this is in line with the recent proposals by the European Convention to provide the Union with one single legal personality.³ The notion is that the whole so-called pillar structure will be abolished and be replaced by one Union as such. Since the draft proposals on the subject are not yet settled, I will however confer to the European Community in contexts concerning the integration pre-Maastricht and in legal and

³ See Art. 4 that aims for an "explicit recognition" of the legal personality for the Union, Preliminary Draft to a Constitutional Treaty, Brussels 28 Oct 2002, CONV 369/02, later amended in Draft of Articles 1 to 16 of the Constitutional Treaty, Brussels 6 Feb 2003, CONV 528/03 to "The Union shall have legal personality".

constitutional matters. Today, it is mainly the EC that possess the supranational features like law-making power and the Rome Treaty with its amendments encompass many of the constitutional features of the Union.

Regarding chapter 2.5 on human rights in the EU, I will use human rights as an overarching term for fundamental rights provided by the ECJ case law, the ECHR and the Member States.

1.5 Limitations

To understand the contemporary European experience it is crucial to be acquainted with its history.⁴ Despite the well-covered literature and general knowledge of the European integration as well as the American, I see it as vital to present a brief historical background of the two systems. However, I would like to note that I do not aspire to present a complete picture of the constitutional history and nature of neither the European nor the US system. I will rather emphasize on describing the general development by pointing out some specific milestones and trends that has influenced the integration process. It is my hope that this will supply the reader with a comprehensive understanding of the European situation.

The constitutional debate about the EU often focuses on the question if the EU already has a constitution or if it needs one. The studies on if the EU has or not has a constitution is more descriptive whereas the question whether the EU needs a constitution is of normative nature.⁵ I do not intend to answer the question if the EU already has a constitution. It is clear that the European integration has moved towards a federal-like structure consisting of constitutional elements. I will only highlight the constitutional features of the Union in order to be able to analyze the need for an impending constitution for Europe.

Furthermore, the topic of this thesis is by natural reasons very dynamic and decisive decisions on the constitutional destiny of the Union will be taken in a near future. I therefore see it as necessary to reserve my analysis to be based on facts officially known until 1 May 2003, when I am handing in the thesis.

⁴ Nergelius, Joakim, *Amsterdamfördraget och EU:s institutionella maktbalans*, 1998, p. 17.

⁵ Verhoeven, Amaryllis, *The European Union in search of a democratic and constitutional Theory*, European Monographs 28, Kluwer Law International, The Hague/London/New York, p. 15.

2 Constitution-building in the EU

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”

Robert Schuman, 1950⁶

The European Community was founded by an international order but has over time transformed into a Union with both intergovernmental and supranational features. The European integration process, which has resulted in the today's EU, has developed in an amazingly fast speed. This chapter will present a short background of the essential constitutional tendencies and landmarks in the European integration and point out the main constitutional elements in the Union's legal architecture. To give a further dimension to the constitutional characteristics of the Union, the development and status of the fundamental rights protection of the EU and its relation to the ECHR will be dealt with.

Before examining the constitutional status of the European Union, one should be clear on the definitions. To be able to discuss and analyze the subject of a constitution for Europe, it is necessary to understand the uniqueness of this complex organization. The Union's new legal order and the constitutional future it is standing before, bears a connotation with the terms constitution and constitutionalism. It is important to define the meaning of a constitution and constitutionalism because the notion of these terms is closely related to the matter of the character of the EU.⁷ It is, however, not obvious that the debate about a constitution for Europe will teach us more about the nature of the EU.⁸

2.1 On Constitutions and Constitutionalism

Commonly, the understanding of constitutions is that it forms the legal basis of a state. The notion of constitutionalism can in a deeper sense explain why a constitution is legitimate and authoritative and how it should be interpreted.⁹ Concerning constitutions it is from this, usually written,

⁶ The Shuman Declaration, 9 May 1950. Accessible at http://europa.eu.int/abc/symbols/9-may/decl_en.htm, 24/03/2003 18:15. (My italics).

⁷ Piris, Jean- Claude, Does the European Union have Constitution? Does it need one?, ELR, 1999 (24), No 6:557-586, p. 559 .

⁸ Dehousse, Franklin, Coussens, Wouter, The perils of a European Constitution, <http://www.irri-kiib.be/papers/ConstitutionofEuropemotivation.pdf>, 4/30/03 10:29.

⁹ Alexander, L (Ed.), Constitutionalism, Cambridge University Press, 1998, p. 1-13.

document that the state refers its existence, legitimacy and power.¹⁰ In a traditional sense, constitutions are often associated with nation states and explained in such terms. Constitutions, however, can just as well be a founding text of an organization or apply to other entities outside the national field such as the EU.¹¹

Legal and political science theories on what characterizes a constitution are many.¹² In general, the term constitution is defined as a higher judicial norm that derives from the people and aims at the state power. The constitution often lay down rules on the competence and limits of the State's power. Guarantees from the state to protect fundamental rights for the people are commonly settled.¹³ But of what reasons do we need a constitution? Kaarlo Tuori has expressed that "the constitution shall mediate the relations between the society's legal and political system; it shall define the power of the political organization and promote both their stability and their legitimacy and indicate the limits for its exercise of powers".¹⁴

The meaning of a constitution is best understood by examining the phenomenon from both a political and a legal perspective. The creation of an effective constitution is to a great deal depending on how the society receives and acts towards it. Factors such as the behavior of the political governance and the role of the national courts can to some extent measure whether the constitution is supported in the society. Also, is the legal clarity and the success to which amendments are carried through of importance for an effective constitution. A constitution that is difficult to amend generally has a stronger support and is better suited as a political instrument than a text that is easier to change. In addition, can rigid constitutions increase the tolerance towards active interpretation of the constitution. The age-factor is naturally also something that may symbolize a strong position of the constitution in a state. The US Constitution is unquestionably a momentous example of a document that is a deeply rooted symbol for the citizens and holds a decisive status in both legal and political fields.¹⁵ Consequently, this shows that the meaning of a constitution can be expressed in various ways.

¹⁰ For definitions see for example Smith, Eivind (Ed.), *Grundlagens makt- konstitutionen som politiskt redskap och som rättslig norm*, 1st ed., SNS Förlag, Stockholm, 2002, Grimm, Dieter, *Does Europe need a constitution?* ELJ, Vol 1, No 3, November 1995:282-302 and Dehousse, F. and Coussens, W. *Even though constitutions usually are written, Great Britain is a good example on a state that has not codified its constitution.*

¹¹ The European Post Union from 1865 and ILO are examples on organizations founded on a constitution, see Dehousse, F. and Coussens, W., and Smith, E., p. 11.

¹² See for example Raz, Joseph, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in Alexander, L. (Ed.), p. 152-153.

¹³ See Grimm, D., p. 287 and Husa, Jaakko, *Constitutional transformation in Europe-mixing law and politics*, ERT No 3, 2002, Årg. 5, p. 458, Piris, J.C., p.559, Craig, P., *Constitutions, Constitutionalism, and the European Union*, ELJ Vol. 7, No 2, 2001, p. 126ff.

¹⁴ Tuori, Kaarlo, *Vad skall vi ha en "grundlag" till?*, in Smith, E., *Grundlagens makt*, 2002, p. 228. (my translation).

¹⁵ Smith, E., p. 7-18.

As mentioned, constitutionalism can be an instrument for illustrating certain features of a constitution. Specifically, constitutionalism can measure to what extent a specific legal system may contain features that correlate with those typical of a constitution. Constitutionalization is the process towards the attainment of such features. Not only does constitutionalism express whether a legal system has the features of a constitution, but also the type of desirable culture of constitutionalism as for example good governance.¹⁶ The striving for restraining the exercise of powers may be the most pinpointing description of what constitutionalism is today.¹⁷

2.2 Federalism and the Character of the EU

The European transformation from an international to a supranational organization was early confirmed by the ECJ. The ECJ has repeatedly called the Rome Treaty a “basic constitutional charter”.¹⁸ The exact meaning of this term is unclear, but can definitely be interpreted as the Community has partly left the clear international structure of the organization behind.¹⁹ In times of enlargement of the Union and when its democratic legitimacy is being questioned, the issue about the character of the Union has arisen. In an effort to understand the nature of the Union, it is common to look at traditional systems of governance. Generally, the discussion about the nature of the Union takes its starting point from two traditional organizations. These are confederations, or in other words associations of states, and federations.²⁰

A traditional confederation is commonly founded by an international agreement. Usually, the international cooperation is not able to exercise any binding power over the Member States. Instead, the contracting parties are guaranteed a veto in confederal decisions, whereas democracy questions and binding rules remain on the national level. A federation is considered to be a state from an international point of view. The federation has common institutions on a federal level, where the executive organs are democratically chosen. The local governments have a various amount of autonomy, but in a conflict with the federal norm, the latter is supreme.²¹

Due to the constitutionalization of the European legal order and the divided governance between the Union and the Member States, the character of the

¹⁶ Craig, P., 2001, p. 127 f.

¹⁷ Bull, Thomas, Nationella domstolar och europeisk konstitutionalism, ERT 1999: 678-701, p. 679.

¹⁸ See for example Case 294/83, *Les Verts v. European Parliament*, ECR 1986, p. 1339.

¹⁹ Nergelius, J., 1998, p. 180.

²⁰ SOU 1994:12 s 90 ff, kap 2.4 EU:s demokratiska legitimitet. See also Gustafsson, Sverker, Förbundsstat i vardande? in Sterzel, Fredrik (Ed.) EG och den svenska grundlagen, 29 Rättsfondens skriftserie, Göteborg, 1993, p. 75 ff. and Hallström, Pär, Är EU ett statsförbund?, ERT 1/1998, p 88-101, EU- varken statsförbund eller das ding an sich and Nergelius, Joakim, ERT 2/1999, p. 344-353, EU- statsförbund, förbundsstat eller das ding an sich, ERT 1999, p.705-708.

²¹ SOU 1994:12, p. 93ff and Hallström, P., 1998, p. 91ff.

Union is often explained in terms of federalism.²² Federalism is often synonymous with leagues of states where each state has a separate identity in the common nation. The people are united under a nation, but are at the same time holding a dual identity. The political scientist William H. Riker expresses that the conditions for a federalist constitution is the presence of two levels of government that govern the very same people and land. Moreover, each level should have at least one area of where they are autonomous. This autonomy of the local government shall also be guaranteed in some form.²³ The American people, for example, have empowered two sets of governments, which are the federal and the state governments.²⁴ However, federalism is not synonymous with federations. The EU is a good example on an organization with federalism without being a federation. The EU is not a state and the features of federalism do not necessarily mean that it will lead to a federation.²⁵

As mentioned, the EU has both confederal and federal characteristics. The starting point for the confederal part of the cooperation is the function of the Member States as the masters of the treaties. It is the Member States that dictate what power it will confer to the Union. The Union itself does not have a so-called Kompetenz-Kompetenz, i.e. a competence to provide itself with new powers. Furthermore, the most influential EU organs, the Council of the EU and the European Council, are controlled by the Member States.²⁶ The German Bundesverfassungsgericht did even, in the 1993 *Maastricht-judgment*,²⁷ define the EU as an association of states or a Staatenverbund. Yet, the Union's legal order has many federal features, which is exemplified by the legislative competence, the majority decisions in the Council, the direct elected European Parliament, and the existence of a de facto constitutional court. The Community legal system is also, according to fundamental principles, superior to national law and the EC law may also have direct effect in the Members States.²⁸ The meaning of those principles will be explored more closely in chapter 2.4. Furthermore, the institutional arrangement of the EU, with institutions independent from the national governments, illustrate the federal element of the organization. It is the Commission, the EP and the ECJ that constitute this independent set up.

With the known confederal and federal characteristics, the EU of today forms a unique mix of the initial international organization, a confederation and a federation. This hybrid of governance makes the Union an organization sui generis, i.e. something of its own kind or of distinctive

²² Nergelius, J., 1998, p. 47ff.

²³ Riker, William H., *Federalism- origin, operation, significance*, Little, Brown and Comp, Boston/ Toronto, 1964, p. 11.

²⁴ Beer, Samuel H., *To make a nation: The rediscovery of American Federalism*, Cambridge, Mass., Harvard University Press, 1993, p. 1f.

²⁵ Burgess, Michael, *Federalism and the European Union- the building of Europe, 1950-2000*, Routledge, London/New York, 2000, p. 24ff.

²⁶ SOU 1994:12 s 90 ff, and Nergelius, J., 1998, p. 180f.

²⁷ BverfGE 89, 155- the *Maastricht- judgment*, for English version see [1994] 1 CMLR 57.

²⁸ Nergelius, J., 1998, p.180f.

character. Others have just described the EU as a “very odd political animal” that has no counterpart elsewhere.²⁹

The scope of the EU’s area of competence very much resembles that of a state. The principles of primacy and direct effect of the EU norms stretches over public and private functions of the citizens’ life. The Union’s structure and procedures, however, differ from typical state features. The lack of democratic legitimacy in the EU institutions, in particular, constitutes such dissimilarity.³⁰ Despite the strong influence by the Union in the citizens’ day-to-day life, there is a lack of identification with the Union for individuals. The Union lacks a form of statehood.³¹ The possibility that the EU will transform to a state is today not very likely.

2.3 The Constitutionalization Process in the EU

2.3.1 Introduction

“The process of European integration is probably the biggest political challenge facing the states and peoples involved”

Joschka Fischer, 2000.³²

It is clear that the European integration project successively has adopted some constitutional features. In order to understand the EU of today it is important to know the historical and constitutional background. The answer to whether the current legal order constitutes a form of constitution or not, is not necessary for illustrating the background to what is at stake for the Union. As declared earlier, only the main outlines of the constitutional changes will be illustrated in the following chapter.

The constitutionalization process of the Community has been dealt with by many scholars in the literature. Alec Stone has described it as “the process by which the EC Treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities,

²⁹ McKay, David, *Rush to union- understanding the federal bargain*, Clarendon Press, Oxford, 1996, p.16.

³⁰ Weiler, J.H.H., Haltern, U., Mayer, F., *European Democracy and Its Critics- Five Uneasy Pieces* in Weiler, J.H.H., Aubert, J-F., Bieber, R., Emmert, F., *Democracy and Federalism in European Integration*, Swiss Papers on European Integration I/95, Verlag Stämpfli+Cie AG, Bern, 1995, p. 5.

³¹ See the discussion about statehood in Mancini, Frederico, *The case for statehood and Weiler, J.H.H, The case against the case for statehood*, No.6/98 at <http://www.jeanmonnetprogram.org/papers/index.html>, 3/24/2003 and Nergelius, J., 1998, p. 47ff.

³² Speech by Joschka Fischer, Humboldt University in Berlin, 12 May 2000, “From Confederacy to Federation: Thoughts on the finality of European Integration”, <http://www.jeanmonnetprogram.org/papers/index.html>.3/30/03 7:13 AM, (My italics).

public and private, within [the sphere of application of EC law]”.³³ Looking back, the European cooperation has profoundly changed since the original six Member States signed the Treaty of Paris in 1951, which established the ECSC. Joseph Weiler defines the European project, originally a real international organization, as a transformed polity.³⁴

For pedagogical reasons, the historical overview of the European integration progress is presented in four phases.³⁵ Each phase has profoundly changed the relationship between the Community and the Member States. However, it is only the combination of all the phases that has transformed the Community’s governing system to a supranational polity.³⁶ As the title reveals, the foundational period embraces the very beginning of the European project and about fifteen years ahead. The second period contains the time from the early 1970’s until the IGC in Maastricht, whereas the third phase covers the ratification of Maastricht to Nice. Lastly, the fourth period will describe the current and ongoing movements of the Post-Nice era.

2.3.2 Foundational Period

In broad outlines, the European saga began with the establishment of the signing of the Treaties of Rome, i.e. the EEC Treaty and Euratom, in 1957. The characteristics of the initial phase of the European cooperation are essentially the building up of a supranational legal system. The judicial integration moved powerfully ahead and is often referred to as a constitutional revolution.³⁷ Contrary to the legal integration that moved towards supranationalism, the political and procedural integration, took a step towards intergovernmentalism. Professor Weiler illustrate this with the hypothesis that if you were to ask a lawyer and a political scientist to compare the development of the Community with the American experience during the foundational stage, they would come up with two different answers. Lawyers would confer to this period as a development towards an increasingly federal-like state, while the political scientists would say that the two systems are growing more and more apart.³⁸ Four major ECJ landmark decisions that established the doctrines of direct effect, supremacy, implied powers and human rights illustrate the constitutional transformation of this era. These principles are an extremely important factor in the progress of the constitutionalization of the Community.

³³ See referral to Stone, Alec, in Weiler, J.H.H, *The Reformation of European Constitutionalism*, JCMS, Vol. 35, No. 1, March 1997, p. 97-131.

³⁴ Weiler, J.H.H, 1991, p. 2405.

³⁵ Similar divisions can be found in the literature, see for example McKay, D., *Rush to Union*, Weiler, J.H.H., 1991, Joerges, Christian, *The law in the process of constitutionalizing Europe*, 2002/4, <http://www.iue.it/PUB/law02-4.pdf>, 3/13/2003, 4:56 PM.

³⁶ Compare with Weiler, J.H.H, 1991, p. 2407.

³⁷ Weiler, J.H.H, 1991, p. 2453.

³⁸ Weiler, J.H.H, 1991, p. 2409.

Hereby, the relationship between the Member States and Community law was set and gave rise to the comparison with constitutional federal states.³⁹

The political and legal opinions of the cooperation varied during this time. Functionalist and Neo-functionalist theories emerged to explain the developing integration process.⁴⁰ Former French President Charles de Gaulle represented an intergovernmental view on how the European cooperation should proceed. On the contrary, the Commission held an active federative approach by calling for majority votes instead of unanimous voting in certain areas. This consequently created a tension between France and the Commission. The so-called “empty-chair” policy of the French reached a solution with the Luxembourg Accords, which were to have significant effect on the course and pace of Community evolution over the next two decades. The possibility to plead for a “very important interest” in order to disagree over the voting methods in the Council led to that qualified majority votes was limited and affected the forcefulness of the decision-making in the following years. Despite the internal crises the European project started to win international recognition as an entity with a common goal, rather than six Member States as such.⁴¹

2.3.3 Early 1970’s to 1992

The European integration project advanced when new Member States entered in the 1970’s and the 1980’s. On one hand, this period is generally regarded as a political stagnant time and a phase of decisional malaise. This was primarily a result of the noncompliance of the acceding countries of Great Britain, Ireland and Denmark. Concurrently, the oil crises in 1973 rendered more difficulties. Various commissions at that time were occupied with different proposals to new reforms.⁴² On the other hand, this phase of political inactivity bred a most vital constitutionalization of the European integration in form of the division of competences between the Community and the Member States. Professor Weiler states that the Member States’ control of the limitation on Community jurisdiction to a large extent eroded and in practice disappeared.⁴³ Moreover, the area of the Community competences grew larger through the application of Article 308 EC Treaty (formerly Article 235) regarding implied powers by the ECJ.⁴⁴ The doctrine of direct effect that was introduced in the foundational period was later in the 1970’s used to carry through Community policies provided for in the treaties when the Member States and the EC institutions failed to implement it.⁴⁵

³⁹ Weiler, J.H.H., *The Constitution of Europe- “Do the new clothes have an emperor? And other essays on European integration*, Cambridge University Press, Cambridge, 1999, p. 19.

⁴⁰ Craig, Paul, De Burca, Grainne, *EU-law- text, cases and materials*, 2nd ed., Oxford University Press, 1998, p. 5.

⁴¹ Craig, P. and De Burca, G., 1998, p. 13f.

⁴² Craig, P. and De Burca, G., 1998, p. 15ff.

⁴³ Weiler, J.H.H., 1991, p. 2431ff.

⁴⁴ Weiler, J.H.H., 1991, p. 2443ff.

⁴⁵ Craig, P. and De Burca, G., 1998, p. 17.

The 1970's has been described as an intergovernmental phase where the liberal intergovernmentalist theories challenged the functionalist and neofunctionalist views on the project. The supranational political institutions seemed to lose their influence while under the same period individual Member States challenged the Community's principle course. The practice of the Luxembourg-veto, a result from the defiant de Gaulle approach, illustrates the uneasy situation. Later, with the preparations and implementation of the reforms of SEA, a new dynamic and strengthened integration followed in the 1980's into the early 1990's.⁴⁶ The defeat of the communism in 1989 and the German Unification definitely created an authentic will to intensify the cooperation in Europe.⁴⁷ The SEA in 1986 and the IGC's that advanced to what later became the founding of the Union in Maastricht, are evidence of the new power to act.⁴⁸ It was also during this time that the current balance of power given through the Amsterdam Treaty was shaped, both judicially and politically.⁴⁹ The SEA was a formal commitment to the White paper on the completion of the Internal market,⁵⁰ and constituted an important reform of the treaties. New legislative procedures were introduced, areas of competences were extended for the Community and the role of the EP was strengthened. Unanimous decisions were replaced by qualified majority voting on certain areas.⁵¹ Moreover, the enforcement and progress on the field of the internal market clearly created a political consciousness. The Community, however, was at the same time faced with the problem on how the completion of the internal market should be solved in practice.⁵² Overall, the criticism of the reforms on achieving an internal market was mixed. Regardless of the responses to the new revisions the Community decision-making clearly moved towards supranationalism.⁵³

In the 1970's the cooperation started to include political matters. The European Council was establishment in 1974 in order to regularize summits for the Heads of Governments of the Member States. However, as an institution it remained outside the EC Treaty structure, even until after the EU Treaty amendments.⁵⁴ The European Council was established as an intergovernmental instrument, but unlike traditional confederal systems, the European Council comes to important policy decisions by majority votes. By means of this, the common tradition in international organizations with unanimous decision has been eroded.⁵⁵

⁴⁶ Craig, P. and De Burca, G., 1998, p. 6.

⁴⁷ Nergelius, J., 1998, p. 23.

⁴⁸ Craig, P. and De Burca, G., 1998, p. 6.

⁴⁹ Nergelius, J., 1998, p. 23.

⁵⁰ COM (85) 310.

⁵¹ Craig, P. and De Burca, G., 1998, p. 21ff.

⁵² Joerges, C., p. 4.

⁵³ Craig, P. and De Burca, G., 1998, p. 21ff.

⁵⁴ Craig, P. and De Burca, G., 1998, p. 15.

⁵⁵ Wessels, Wolfgang, Rometsch, Dietrich (Eds.), *The European Union and Member States- towards institutional fusion?* Manchester University Press, 1996, p. 21ff.

2.3.4 Maastricht to Nice

The most significant novelty of the 1993 Maastricht Treaty, except the commitment to an economic and monetary union, was the institutional establishment of the European Union. Three legal frameworks, or the so-called three pillars, merged under the overarching Union. The European Communities including the EEC, Euratom and ECSC constitute the first pillar. The treaties and case law has provided the European Communities with supranational features through the EC law, whereas the two other pillars that concerns the Common Foreign and Security Policy and Justice and Home Affairs, are mainly intergovernmental.⁵⁶ Despite the apparent provisional reforms, the Maastricht Treaty did not define what form of Union it would set out. Instead the Treaty can be seen as a political compromise between the Member States because of the difference of opinion on to what extent and to what depth the cooperation should proceed.⁵⁷

As a common provision for the Union, Article A (now Article 1) EU Treaty states the aim of an “ever closer union” and that the Union is based on principles of freedom, democracy and respect for human rights in the Article F (now Article 6). The amendments of the EC Treaties were mainly of institutional and legal character. Also, the timetable for EMU was set and the Community further extended their areas of competence as well.⁵⁸

A further enlargement of three new Member States took place during the 1990’s. Soon after the long ratification process of the Maastricht Treaty, the Amsterdam IGC in 1996 dealt with questions on how to improve and enhance the Community processes. Most importantly, the reforms of the Amsterdam Treaty were a preparation for the upcoming enlargement eastwards. A large area, originally belonging to the third pillar of Justice and Home Affairs, was incorporated in the Community pillar. That concerned for example the area of visas, asylum and immigration.⁵⁹ Moreover, the Amsterdam Treaty further strengthened the protection of fundamental rights by amending Article 6 (former F) EU Treaty. It also introduced the new Article 7 EU Treaty providing the Council with the competence to suspend Member State’s rights under the Treaty, if they seriously and persistently violate the principles in Article 6. New Articles 11 and 13 EC Treaty provide for a “closer cooperation” between Member States and a non-discrimination clause respectively.⁶⁰

After the setbacks to carry through institutional reforms in Amsterdam, there were many questions to deal with in Nice. The Nice Treaty, which entered into force 1 February 2003, has come to represent a great foundation for the future enlargement. The much needed institutional reforms will enter

⁵⁶ Craig, P. and De Burca, G., 1998, p. 24ff.

⁵⁷ Nergelius, J., 1998, p. 23f.

⁵⁸ Craig, P. and De Burca, G., 1998, p. 21ff.

⁵⁹ See Title IV, Articles 61-69 EC Treaty.

⁶⁰ Craig, P. and De Burca, G., 1998, p. 36ff.

into force under 2004-2005.⁶¹ Overall, the Nice Treaty has clearly extended the areas of qualified majority voting.⁶² For example, the area of co-decision between the EP and the Council was extended. Most of the jointly decisions will be adopted with qualified majority voting. In order to facilitate the legal system before the upcoming enlargement, the Nice Treaty introduced new rules on flexible integration, which does not require a unanimous decision within the EC Treaty. Member States that want to develop a certain area on its own or in a coalition may do so.⁶³ A protocol on the enlargement of the EU settle the rules on how many votes the Member States shall have as new countries accede to the Union. From this point of view, the Nice Treaty is a challenging and constructive base for the enlargement.⁶⁴ Regarding institutional changes the major amendment concerns the CFI that now has been provided with more areas of responsibility. The Treaty also makes it possible to establish internal chambers for particular topics. The CFI becomes the main common law judge through the Nice Treaty for all direct actions.⁶⁵ Other novelties is the increased power of the President of the Commission⁶⁶ and the adoption of the Presidency's report on the European security and defense policy. The Presidency's report aim to develop a military capacity within the Union as well as a creation of a permanent political and military structure.⁶⁷

There is however questions that were not resolved in Nice and which are expressed in a declaration annexed to the Treaty. The declaration called for a debate on how the EU shall advance in the future. The IGC decided that four main questions should be addressed, namely a more precise delimitation of powers between the Union and the Member States, the status of the Charter of Fundamental Rights, the simplification of the treaties, and the role of the national Parliaments in the European system.⁶⁸

The resignation of the Commission in March 1999, due to allegations of fraud and mismanagement, resulted in a lively debate in the press. This defeat was, contrary to what might be expected, met by positive responses because it symbolized a step forward for the democracy in the EU. Some even made a parallel with the constitutional Convention that created the USA in 1789.⁶⁹

⁶¹ Nergelius, J. in Karlson, N. and Nergelius, J., p. 57-59.

⁶² Factsheet- the codecision procedure, http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet13/index_en.htm, 03-03-17 11:39.

⁶³ Factsheet- Results of Nice, http://europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet16/index_en.htm, 3/17/2003 11:10 AM.

⁶⁴ Nergelius, J. in Karlson, N. and Nergelius, J., 2001, p. 57-59.

⁶⁵ See Articles 230, 232, and 235 Nice Treaty. Yet, the ECJ or specialized chambers will alone be qualified to rule in certain actions specifically provided for.

⁶⁶ See Article 217 Nice Treaty, SEC (2001) 99, Summary of the Nice Treaty, Title I, D., Brussels 18 Jan. 2001, http://www.europa.eu.int/comm/nice_treaty/summary_en.pdf, 3/17/2003 2:13:22 PM.

⁶⁷ SEC (2001) 99, Summary of the Nice Treaty, Title III, B. Security and Defense.

⁶⁸ Factsheet- Results of Nice.

⁶⁹ Piris, J-C, p. 569f.

During the most part of the 1990's, there was an increasing skepticism towards the EU among the European citizens. The work in the EU corridors seemed to be taken place behind the scenes, far from the EU citizens. A decisive factor was the concurrent recession of economy and the increasing unemployment. The support for the biggest project in the 1990's, the EMU, has not been strong. All together, this has affected the standing of the EU and forced the parties in the Union to reflect on the situation. Reforms that, for example, have increased the public access to the EU institutions has been carried through.⁷⁰

2.3.5 Post-Nice

2.3.5.1 Laeken and General Trends

Since the Maastricht IGC in 1992, the foundations in the treaties have developed at a high speed.⁷¹ The meeting in Amsterdam in 1997 and in Nice in 2000 was soon followed up with the Laeken Conference in December 2001. Here the European Council adopted the Laeken Declaration on the future of the EU and the European Convention was established.⁷² For many, is the post-Nice process the lead up to a constitutional restructuring to come to terms with the democratic deficit, efficiency, transparency and legitimacy problems. The post-Nice debate very much focuses on the four key topics mentioned above, which was introduced in Nice. This dialogue will serve as a foundation for the reforms in 2004.

Corresponding discussions are taking place on the finality of the EU. What is the ultimate aim of the integration process? The traditional models of governance in nation states have been an object of comparison, while the special consideration to the distinctive nature of the EU has launched new concepts. Although academics have discussed this subject for a long time, it is not until recently that authentic opinions and arguments have been conveyed with credibility. Overall, the European elite agrees on a further enhanced cooperation for the EU, but not through a creation of a European super state. The Member States still want to keep its authoritarian role in the Union as the masters of the treaties. Many European leaders like the French President Jacques Chirac, German Foreign Minister Joschka Fischer, British Prime Minister Tony Blair and the President for the Commission Romano Prodi, stand in the front of an enhanced cooperation towards an even more federal-like Union, each however to a varied extent.

The German Foreign Minister Joschka Fischer expressed in his famous speech at the Humboldt University in Berlin May 2000,⁷³ his visions on the future and finality of the Union. Fischer addressed the importance of defining the competences between the EU and the Member States and

⁷⁰ Nergelius, J., 1998, p. 24f.

⁷¹ Joerges, C., p.3.

⁷² Laeken Declaration on the future of the European Union, 15 Dec. 2001, <http://european-convention.eu.int/pdf/LKNEN.pdf> 3/17/2003 10:42 AM.

⁷³ Speech by Joschka Fischer, From Confederacy to Federation, 2000.

revising the Union both in an institutional and a democratical sense in order to prepare for the upcoming enlargement. Furthermore, Fischer looked beyond the ever-evolving integration and expressed the desire to reach the finality of the integration by establishing a European Federation. The current goal of a closer cooperation will not by itself lead to a completion of the integration. The accomplishment of the finality will only be successful with the establishment of a constitution. Fischer means that we will be faced with the issue of a completion of the Union sooner or later. These somewhat radical visions have produced a lively response in the literature.

Partly as a reply to the speech by Fischer, the French President Jacques Chirac delivered his views on the fate of the Union in the German Bundestag a month later. They both support a stronger integration and imagine a more federal-like cooperation with a full-fledged constitution. British Prime Minister Tony Blair also calls for a whole-hearted strengthening of the European project. He believes that a stronger Britain is a stronger Europe and the sharing of sovereignty is of good means.⁷⁴ In 2001, the Commission presented a White paper on how the European governance could be improved in the future⁷⁵ and one year later the Commission specified its future visions in a communication on the European Project. Here, the Commission proposed that a Constitutional Treaty should be established and that the Union's structure has to become more democratic and effective.⁷⁶

Recently, the enlargement eastwards with the admission of ten new Member States, became reality. It was the summit in Copenhagen in December 2002 that came to this historical conclusion. The candidate states will accede in May 2004 if their citizens and parliaments approve of the conditions.⁷⁷

2.3.5.2 The European Convention

After over two successive IGC's have failed to resolve all necessary issues for the enlargement, the Convention is a new innovation for carrying through such a needed reform. The IGC's has become less able to deliver effective reforms and the Nice Treaty was the proof that another way was required. The new approach of the EU to establish an open forum for negotiations, is an effort to anchor the European project to the citizens. In Laeken, the Heads of Government set out a large number of questions, which they felt that the Convention should be addressing. Those questions motivate the Convention's work. The broad issues are difficult to summarize, but it mainly evolves around that the structure, process, and purposes of the EU need to be defined. It is necessary to ensure that the

⁷⁴ See speech by Jacques Chirac, "Our Europe", 27 June 2000, <http://www.info-france-usa.org/news/statmnts/2000/EU2000/bundesta.asp>, and speech given by Tony Blair, 23 November 2001, "Britain's future is inextricably linked with Europe", http://www.britishembassy.at/speeches/0111pm_european_research_Birm.doc.4/20/03 12:34 AM

⁷⁵ COM(2001) 428 final, Brussels 25.7.2001, Commission's White Paper on Governance.

⁷⁶ COM(2002) 247 final, Brussels 22.5.2002, Commission's paper "A project for the European Union".

⁷⁷ "EU samlar Europa", EU-rapport, Regeringskansliet- UD info, extranummer jan. 2003.

Union can react effectively to the challenges that it will be facing in the future.⁷⁸

The Convention differs from the traditional IGC's in some fundamental senses. In contrast to the IGC, the Convention is an open process. It is also a wider process than the traditional IGC because it involves not only representatives from the national governments, but also representatives from the EU institutions and national parliaments. Unlike the IGC, the Convention also includes representatives of the candidate countries, which give them an opportunity to influence the discussion on the future of the EU.⁷⁹ The 105 parliamentarians or government representatives in the Convention bring a strong political substance to the debate. The work of the European Convention seems to be fairly dynamic and has to a certain extent also received a reasonable amount of attention by the media.

One issue that has been subject to a debate in the Convention is the Franco-German proposal about establishing an EU-president in the European Council. The Member States' governments should choose the EU-president, who will represent the EU in external relations and be chosen for 2,5 years or more. This proposal has been relatively well received among the Member States. Moreover, the duo suggests that a foreign minister from the Council of the European Union should be introduced.⁸⁰

The Convention will put forward their proposal to a Constitutional Treaty for the Heads of Government in June 2003. The date for next IGC in 2004 will then be set at the IGC in Thessaloniki later in June 2003. Formally, it is the IGC that has the power to adopt the EU Constitution and the adoption-process is normally drawn out in time. In this case however, the key political representatives from each Member States have attended the Convention and together put forward a draft to a Constitutional Treaty. The draft will therefore probably form the backbones of a feasible Constitutional Treaty and the adoption process is likely to be quick.⁸¹

2.3.5.3 Draft of a Constitutional Treaty

The president of the Convention Valéry Giscard d'Estaing presented the draft to a Constitutional Treaty on 28 October 2002.⁸² The expressed purpose of the draft was to illustrate a possible structure for such a Treaty. Most of the spectators were impressed by how the complex legal order had been simplified to a comprehensive version of a Constitutional Treaty. Even though the first draft was a huge victory for the continued work for the

⁷⁸ Speech by Jean- Luc Dehaene, "Towards a Constitutional Treaty for the European Union", at Kings College London- Centre of European Law, 11 Feb. 2003, p. 3ff, <http://european-convention.eu.int/docs/speeches/7149.pdf>, 4/7/2003 11:11 AM.

⁷⁹ Dehaene, J-L., p. 3f.

⁸⁰ "Konventet i en ny fas", EU- rapport, Regeringskansliet- UD info, Nr 1, januari 2003. The Swedish Prime Minister Göran Persson has also found the proposal good.

⁸¹ Anderson, Christian, "Historiens vingslag över Framtidskonventet", Europa- posten Nr 1 2003, p. 8.

⁸² CONV 369/02.

Convention, there are still fundamental issues facing the Union that will be a great challenge to resolve.⁸³

The outline of the Constitutional Treaty consists of three parts. The first part presents the basic constitutional structure of the Union and settles the common and fundamental principles of the legal order. Here, the core constitutional elements of the Union like the Union's protection of fundamental rights, Union citizenship, the Union's competences and the categories for competences are declared. The second part stipulates the policies and the implementation of the constitutional structure. This part covers the provisions of the internal market, financial provisions and the legal basis for policies in other areas like competition and environment. The division of the two first parts creates a possibility to fix the fundamental constitutional principles in the first part, while the second part would be able to revise in event of future reforms. The third and last part of the Constitutional Treaty concerns the general and final provisions.⁸⁴ Article A in part three concludes that the Rome Treaty, the SEA, EU Treaty, Amsterdam Treaty, Nice Treaty and other treaties that has amended them will be repealed and replaced by the Constitutional Treaty when it enters into force. Furthermore, the procedures of adoption and revision of the Constitutional Treaty is laid down in this part.⁸⁵

The Convention has different working groups designated to discuss specific issues like for example the defense, subsidiarity, and the role of the national parliaments. One important proposal from the working group on legal personality suggests that the EU should be provided with legal personality and become one single entity replacing the whole pillar structure. The EU founding Treaty did not provide the Union with such a legal status, instead each of the original communities had legal personality.⁸⁶ The elimination of the distinction between the Union and the EC will consequently lead to that the entities of the EEC, ECSC and the EURATOM cease to exist. Giving the EU a legal personality would also make it possible to accede to the ECHR. Regardless of that possibility though, the Convention also supports an incorporation of the Charter of Fundamental Rights into the Constitutional Treaty in some form.⁸⁷ The opinions of working group II, which is responsible for the issue of the Charter of Fundamental Rights and the ECHR, will be presented below in chapter 2.5.4.3.

⁸³ Gustavsson, Rolf, Reformen har börjat, SvD 11/11 2002.

⁸⁴ Dehaene, J- L, p. 5ff and Gustavsson, R., Reformen har börjat, 2002.

⁸⁵ CONV 647/03, Part Three: General and final provisions, Brussels 2 April 2003.

⁸⁶ See Article 281 Rome Treaty (former Article 210), Art. 184 f Euratom Treaty, Art. 6 ECSC Treaty, compare with second and third pillar Art. 24 (former J14) and Art. 38 (former K10) EU Treaty.

⁸⁷ Dehaene, J- L, p. 5ff and Ströman, Lars, "Det blir ett enklare fördrag", Europa- posten, Nr 1 2003, p. 5. Lena Hjelm-Wallén, the Swedish government representative in the European Convention, prefers both an accession to the ECHR and a binding Charter incorporated in the Constitutional Treaty. Nevertheless, the accession to the ECHR is the most reliable choice.

2.4 The Union's Legal Structure

Regarding the Union's legal order, it is primarily the European Community that has the legislative power. The European legal architecture is very extensive and complex and for that reason it is not in place in this thesis to give a comprehensive coverage on the subject. Instead, the focus lies on the role of the ECJ and how they have constitutionalized the legal order through their judicial review and on parts of the primary EU law that is of constitutional character. Other important legal elements like the Union's legal sources, enforcement actions, the relationship between the Member States and the EU, and legal protection are mentioned only briefly in the following chapter 2.4.1.

2.4.1 General

The Community was established by treaties and is therefore based on a legal foundation. The Community has then developed its own legal system that is subject to the rule of law. The EC legal order adopts legislative measures and generates legally binding decisions, which are subject to judicial review in national and Community courts.⁸⁸ The Union of today has experienced integration primarily through law and the strong legal system is a feature that makes the Union to a distinctive entity in comparison to traditional international organizations.⁸⁹

The sources of law of the Union are generally divided in primary and secondary law. The primary law consists of the basic treaties and general principles of law. Regulations and directives, which derive from the primary law, constitute a part of the secondary law.⁹⁰ All Community actions have to meet the conditions of legality. The Community can only act within its framework of power and does that by basing its decision on a treaty article and by taking the principle of subsidiarity into consideration. Article 5 EC Treaty provides for the subsidiarity principle, which provisions is rather unclear. The principle of subsidiarity does, however, not apply on the EC's exclusive power. Areas such as the common agricultural policy and the free movements of goods, persons, services and capital are exclusive competences for the Community.⁹¹

The Community law, particularly the principles of direct effect and supremacy, would not have as strong impact in the Member States if it was not for instruments of enforcement and control. One important enforcement instrument for the Union is the preliminary ruling procedure. In this multi-level governance system, it is important that the Member States apply and interpret the EC rules equally and correctly. Article 234 EC Treaty, which

⁸⁸ Laffan, B. (Ed), *Constitution-building in the European Union*, Institute of European Affairs, Brunswick Press, Dublin, 1996, p.125.

⁸⁹ Bernitz, Ulf, Kjellgren, Anders, *Europarättens grunder*, Stockholm, 1999, p. 3.

⁹⁰ See Article 249 EC Treaty for secondary sources of law.

⁹¹ Craig, P. and De Burca, G., 1998, p. 110-128.

provide for preliminary rulings, has hereby filled the purpose of designing the Community law as well as the relationship between the EC and national legal systems. It is worth pointing out that the Member States' executive role in implementing EU legislation, alone, is of great significance in the judicial process.⁹²

The power of initiating enforcement actions is held by the Commission whereas the ECJ evidently is the institution of judicial review. Article 226 EC Treaty give the Commission the competence to ex officio or by information from a Member State bring enforcement procedures against Member States, if they are in breach of the Community law. If the Member State does not comply with the opinion of the Commission, the ECJ may fine the Member State according to Article 228 EC Treaty. The ECJ also has the power, like that of a constitutional court, to review the legality of Community norms. The EC Treaty contains some different ways to review a Community act, but the most essential procedure is settled in Article 230 EC Treaty. The provision enumerates some conditions that have to be fulfilled before an act can be reviewed. First of all, it is only certain acts that are reviewable, the challenging institution or person must have a standing, the act must concern a procedural or substantive illegality and the challenge must be brought before the ECJ within a specific time limit. Other articles in the EC Treaty such as Article 232 regarding the failure to act and Article 242 concerning the plea of illegality are other ways to review a Community act.

2.4.2 Jurisprudence of the European Court of Justice

*“Tucked away in the fairyland of Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework of a federal-type structure in Europe”.*⁹³

These words by Eric Stein illustrate the crucial role the ECJ has had in the constitutionalization process in the EU. It was in stagnant periods of the integration and in lack of Community provisions to empower the outset goals that the activist role of the ECJ emerged.⁹⁴ The judicial activism in the foundational period was not subject to much reaction by the Member States and has later been labeled the quiet revolution. The legislative power of the Community was limited at this time and the role of the ECJ was mainly considered as an organ for administrative control.⁹⁵ In hindsight, the judicial activism by the ECJ has been subject to much critic. Some have

⁹² Craig, P. and De Burca, G., 1998, p. 406ff.

⁹³ Stein, Eric, Thoughts from a bridge- a retrospective of writings on New Europe and American Federalism, The University of Michigan Press, 2000, p. 15 (my italic).

⁹⁴ Weatherill, Stephen, Is constitutional finality feasible or desirable? On the cases for European constitutionalism and European Constitution, Constitutionalism Web- papers, ConWEB No. 7/2002, <http://les1.man.ac.uk/conweb>, 3/6/2003 4:14 PM, p. 6.

⁹⁵ Nergelius, J., 1998, p. 182ff.

even called the acting by the ECJ for a “revolting judicial behaviour”.⁹⁶ Regardless of the opinion on judicial activism, the ECJ created the four fundamental principles presented in the following, without clear grounds in the treaties. Together, the four doctrines have had a decisive impact in the constitutionalization of the European legal order. The Member States are hereby out of loyalty obliged to follow or implement the treaty provisions or secondary legislation derived from the treaties.⁹⁷

2.4.2.1 Direct Effect

The doctrine of direct effect was first announced by the ECJ in 1963 in the *Van Gend en Loos* decision.⁹⁸ The revolutionary part in this doctrine is that it takes one step away from the original international foundation that the Community is founded on. The doctrine generates a legal obligation upon the Member States’ governments, which enable individuals to challenge a question on the subject of direct effect before the national courts. An EU norm has to be clear, precise and self-sufficient to become directly effective in the Member States. The ECJ justified the obligations of the new principle by expressing that it “implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states”. It then concluded that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights”.⁹⁹ The judge-made integration instrument of direct effect has been very effective in a practical sense since it has provided individuals with the right to bring the case before the national court. Consequently, the individuals in the EU have become the guardians of the legal integration in the Community, similar to the people in the US.¹⁰⁰

2.4.2.2 Supremacy

One year after the new concept of direct effect was launched, the ECJ introduced the doctrine of supremacy in the path-breaking case of *Costa v. ENEL*.¹⁰¹ The decision marked that the doctrine of direct effect was taken to a deeper phase, by even endowing the Community norms with a status of higher law of the Member States. The principle of supremacy that means that Community law is supreme and must prevail in event of conflict with national law, has a great impact on national legal orders. The combination of the principles of direct effect and supremacy constitutes a strong constitutional feature similar to that of a federal state.¹⁰² Moreover, the ECJ has confirmed and strengthened the principle from the *Costa v. ENEL* case

⁹⁶ Rasmussen, Hjalte, *On Law and Policy in the European Court of Justice*, Martinus Nijhoff, Dordrecht, 1986, p. 12.

⁹⁷ See Article 226 and 227 (former 169 and 170) EC Treaty for action of the ECJ against a Member States’ breach of obligations.

⁹⁸ Case 26/62, *Van Gend en Loos* [1963], ECR 1.

⁹⁹ Case 26/62.

¹⁰⁰ Weiler, J.H.H, 1991, p. 2413f.

¹⁰¹ Case 6/64, *Costa v. ENEL* [1964] ECR 585.

¹⁰² Weiler, J.H.H, 1991, p. 2415.

with numerous cases.¹⁰³ Among all, the ECJ stated that Community law even overrides national constitutional rights.¹⁰⁴ The doctrine of supremacy has functioned as a tool for the constitutionalization of the Community legal order and it has to a great extent been carried through by the Courts.¹⁰⁵

As mentioned earlier, the implementation of the EU law including the case law depends on the reception by the constitutional courts in the Member States. The doctrine of supremacy was the principle that received the most skepticism, because the new concept would mean that Community law would override any national rule regardless of its status. Italy and Germany in particular, where human rights enjoy constitutional protection, were clearly concerned that the insufficient protection of fundamental rights in the Community should be supreme over better protected national fundamental rights. In *Solange I*,¹⁰⁶ the German Bundesverfassungsgericht examined the case's compatibility with the German fundamental rights catalogue. The Bundesverfassungsgericht stated that as long as the EU lacks an institution that is democratically elected and lacks a codified fundamental rights catalogue, the ECJ has to rule the validity of the Community act with consideration of the German protection of rights.¹⁰⁷ At last, the Bundesverfassungsgericht accepted the primacy of EC law by stating in *Solange II*¹⁰⁸ that as long as the EC protection of fundamental rights is at least equivalent to the German catalogue of rights, the court will not review the EC acts compatibility with German fundamental rights.¹⁰⁹

The defiance of national courts towards the ECJ's doctrine of supremacy did not end with the Solange cases. With the ratification-process of the Maastricht Treaty, the issue about the relationship between the Member States and the Union was resumed. The developed doctrine of supremacy asserts that the EU law shall prevail national law despite its constitutional status. Few Member States, however, approve to that their constitutions would have to yield for EU rules.¹¹⁰ The German Bundesverfassungsgericht investigated the possibilities for Germany to ratify the Maastricht Treaty in the so-called *Maastricht-judgment*¹¹¹ from 1993. After a complaint by German citizens, who challenged an amendment that would enable a ratification to the Maastricht Treaty, the Court examined the conformity of the Union's supremacy with the German Constitution. The Court concluded that the transition of sovereignty to the European cooperation, which they

¹⁰³ See for example Case 106/77, *Simmmenthal* [1978], ECR 629 and Case C-213/89, *Factortame* [1990], ECR I-2433.

¹⁰⁴ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] ECR 1125, [1972] CMLR 255.

¹⁰⁵ Weatherill, p. 7.

¹⁰⁶ BverfGE 37, 271, "*Solange I*", *Internationale Handelsgesellschaft*, Judgment of 29 May 1974, Case 2 BvG 54/71 [1974] 2 CMLR 540, 549-50.

¹⁰⁷ Melin, Mats, Schäder, Göran, EU:s konstitution, 5th ed., Stockholm, 2001, p.113.

¹⁰⁸ BverfGE 73, 339, "*Solange II*", *Wiinsche Handelsgesellschaft*, 22 Oct 1986 [1987] 3 CMLR 225, 25.

¹⁰⁹ Melin, M. and Schäder, G., 2001, p.116.

¹¹⁰ Nergelius, J., 1998, p. 202f.

¹¹¹ BverfGE 89, 155.

defined as a “Staatenverbund”, was not in breach with the German principle of democracy. The Court even implied, in the final part of the ruling, that the Union required an improved democratic foundation as the integration further develops.

Other national supreme courts like the Danish Højesteret has also carried out a similar judicial control in relation to the ratification of the Maastricht Treaty.¹¹² The Danish Højesteret came to review the issue of European supremacy after a claim from Danish citizens to investigate the conformity with the Danish constitution to accede to the EU in 1973. The § 20 Danish Constitution approved a transition of sovereignty to international organizations to a certain and specific extent (nærmere bestemt). The Højesteret here concluded that the relation to the European cooperation from the Danish accession in 1973 and beyond was in accordance with § 20 Danish Constitution. The Court supported its decision by stating that the cooperation was founded on enumerated powers from the national states and that the EU had no Kompetenz-Kompetenz. Union decisions ultra vires would therefore be considered void in Denmark. Despite the supranational nature of the Union, the attributed power functions as a limitation on the competence of the EU.

2.4.2.3 Implied Powers

The establishment of the doctrine of direct effect and supremacy would not be successful without necessary Community instruments for implementation. On grounds that the basic treaties do not provide the Community with general power to achieve the common objectives, the judiciary power invented the doctrine of implied power that first covered the internal field of law. Parallel to the Community’s internal power, the ECJ found in the *ERTA*¹¹³ decision in the early 1970’s that the implied powers applied to the field of external relations as well. The result of this case was that the Community may grant implied powers, to conclude international agreements, in preference for the Community, when it is deemed necessary and legitimate. Article 308 EC Treaty is a codification of the case law. The ECJ then went on to develop their case law on the area of competences between the Community and Member States and founded the concept of exclusive and preemptive powers. Those two doctrines have strongly effected the Community decision-making and been an influential element in constitutionalization process.¹¹⁴

2.4.2.4 Human Rights

The original EC Treaties did not contain a list of fundamental rights and contained no explicit provision on judicial review of an assumed infringement of human rights. Therefore, the ECJ was initially reluctant to rule in such cases. In the *Stauder*¹¹⁵ decision in 1969, however, the ECJ

¹¹² Judgment from the 6 April 1998, I 361/1997, UfR 1998, p. 800.

¹¹³ Case 22/70, *Commission v. Council (ERTA)* 1971, ECR 263.

¹¹⁴ Weiler, J.H.H, 1991, p.2415ff.

¹¹⁵ Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419 [1970] CMLR 112.

changed the approach and acknowledged the protection of human rights. From that time on the ECJ has showed that they review Community actions if they violate human rights common to the constitutional traditions of the Member States. The ECJ even declared in a judgment that the CFI had committed a breach against the ECHR when the duration of an anti-trust procedure had been unreasonable long.¹¹⁶ The progress of a strengthened protection of the rights is a symbolic implication in the constitution-building.¹¹⁷ The treaties have successively been provided with articles concerning fundamental rights. Article 6.2 EU Treaty, for example, is a codification of the ECJ case law that respects the rights as the ECHR and the common constitutional traditions of the Member States guarantee them.¹¹⁸ Also, the Charter of Fundamental Rights of 2000 illustrates the aim of a further strengthened protection in the EU. Chapter 2.5 make a closer examination of the development and status of the human rights protection in the EU.

2.4.3 Legal Provisions

2.4.3.1 General

It is today generally accepted that the founding treaties of the EC and the EU are more than just traditional international treaties. The founding treaties contain many elements that remind us of a constitution like that of a state.¹¹⁹ Already in the early 1960's the *acquis* of the EU was categorized as "a new legal order" for which the Member States had limited their sovereign rights to a certain extent.¹²⁰ Several years later the ECJ took a step further and referred to the Treaty as a "constitutional charter" in the *Les Verts v. European Parliament*¹²¹ case. The ECJ motivated this statement by expressing that the Community was based on the rule of law. This conclusion was based on the fact that founding treaties regulate and draw the limits of the Community power, provides for legal remedies and judicial review. The ECJ also held in Opinion 1/91¹²² that the constitutional charter not only embodies the Member States but also to their citizens. Despite this declaration it is still the Member States that are the master of the treaties in their power to bring forward new treaty amendments.¹²³

The relevant provisions in the basic treaties from a constitutional perspective are primary rules concerning the legislative process and the competences of the institutions.¹²⁴ It is however relatively difficult to make a material distinction between primary EC law of constitutional character

¹¹⁶ C-185/95 P, *Baustahlgewebe GmbH v. Commission*, 17 Dec. 1998, Celex No. 695J0185, Piris, J-C, p. 563.

¹¹⁷ Weiler, J.H.H, 1991, p. 2417.

¹¹⁸ Piris, J-C, p. 563.

¹¹⁹ Piris, J-C, p. 559.

¹²⁰ Case 26/62.

¹²¹ Case 294/83.

¹²² Opinion 1/91 of December 14, 1991 [1991] ECR 6102.

¹²³ Piris, J.C, p. 569.

¹²⁴ Nergelius, J., 1998, p. 20.

and other primary EC law. The probable reason for that such a distinction is not usually made is that it would lead to thoughts of nation-building. The following will be a summary examination of the essential articles of constitutional character in the basic treaties.

2.4.3.2 EU Treaty

The treaty establishing the EU contains several fundamental provisions that illustrate the transition from an international organization to an organization also containing constitutional features. The opening Articles 1-7 (former A-F) EU Treaty set out the objectives of the Union, its limits to adopt rules and the principles of the protection of fundamental rights. Article 1 states the will of the Member States to create an “ever closer union among the peoples of Europe” where decisions shall be taken as openly and as closely possible to the citizens.

Article 6 is a codification of the ECJ case law that expresses the respect for the fundamental principles of fundamental rights, democracy and freedom. This article mainly addresses the EU institutions and the Member States. Importantly, Article 1 and 6 constitute a type of control for the Member States and its people towards the partly supranational EU. In order to achieve the goals, the Union shall cooperate under one single European institutional framework.¹²⁵ Further, Articles 46-53 (former L-S) deals with the procedure of amendments of the basic treaties. Article 49 (Article O), in particular, settles the conditions for the application to become a Member of the Union.¹²⁶

2.4.3.3 EC Treaty

Like Article 1 EU Treaty, both the Preamble to the Rome Treaty and the Amsterdam Treaty states that the purpose of the integration is to form an “ever closer union”. Moreover, the EC Treaty prescribes that the cooperation between the Community and the Member States is based on the principles of subsidiarity, proportionality, limits of competences, and loyalty.¹²⁷ Together with the goals of the Community stated in Articles 2 and 3 EC Treaty the Union has been provided with power to carry through them within its enumerated competence. If necessary and under the conditions laid down in Article 308 (former 235), the Community may extend its power or so-called implied powers. To fulfill the goal of an internal market, stated in Article 3, the four freedoms of capital, services, goods, and persons together with the prohibition of discrimination comprise a foundation of the Community project.

Other provisions like the legislative procedure by the EP in Article 189 and the possibility to appeal to the ECJ illustrate the constitutional character of the Community. The same regards the institutional provisions of the tasks

¹²⁵ See Article 3 EU Treaty.

¹²⁶ Nergelius, J., 1998, p. 46f and Kapteyn, P.J.G., Verloren van Themaat, P. Introduction to the Law of the European Communities, 3rd ed., Reading, Berkshire, 1998, p. 45ff.

¹²⁷ Articles 3, 4, and 5 EC Treaty.

and competences of the EU institutions. Unlike international organizations, the establishment and cooperation of the EMU also show a federal side of the Union. The EU also provides for a Union citizenship stipulated in Article 17-22 (8a-e) EC Treaty. The citizenship exists parallel to the national citizenship and does not replace it. The final articles of the EC Treaty regards the third country relations of the Community, which shows its legal personality to enter agreements with other states or organizations.
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2.5 Human Rights in the EU

2.5.1 Background

Most of the Member States have constitutionally guaranteed fundamental rights, which main purpose is to draw the limits for the powers of the government.¹²⁹ The protection of human rights commonly constitutes a core element in a constitution like it does for example in the US and Germany. The foundational treaties did initially hardly contain any fundamental rights.¹³⁰ The fast enhancing integration resulted already in the 1960's in decisive decisions by the ECJ, stating direct effect and supremacy of the EC law. With the strong day-to-day impact on the European citizens' lives, the need for a better protection of human rights in the EU has grown strong. In lack of sufficient treaty provisions, the ECJ has had the main role in developing the protection of human rights through its case law.¹³¹ The ECJ's human rights case law constitutes one of the basic doctrines and fundamental principles of the EC law. The Charter of Fundamental Rights,¹³² which was solemnly declared in Nice 2000, is one step towards the goal of an ever closer union. The status of the Charter is, however, only politically binding, but there is an ongoing discussion on whether to make it binding and incorporate it in the Constitutional Treaty. Another solution, under discussion, to strengthen the protection of fundamental rights is to enable the EU to accede to the ECHR. But as of now, the Union yet lacks a written catalogue of rights.

2.5.2 Rights derived from the Treaties

This chapter is a summary examination of the written provisions of human rights. As pointed out above, the founding treaties of the EU and EC did only contain a few rules on fundamental rights, but these were more of an economic character, rather than personally protected rights. The famous four

¹²⁸ Nergelius, J., 1998, p. 46f and Kapteyn, P.J.G, Verloren van Themaat, P., p. 45ff.

¹²⁹ Melin, M. and Schäder, G., p.111.

¹³⁰ The four freedoms, the principles of non-discrimination and equal pay for men and women was originally put down, but mainly from an economic viewpoint.

¹³¹ Lenaerts, Koen, De Smijter, Eddy, A "Bill of rights" for the European Union, CMLRev 2001, Vol. 38, p. 274ff.

¹³² OJ 2000 C 364/01.

freedoms, freedom of goods, services, capital and persons has been prescribed in the Rome Treaty from the start as well as the prohibition against discrimination due to nationality or sex.¹³³ Also, Article 141 (former 119) Rome Treaty that concerns the right to equal salary for men and women has originally been protected by the Community. The main objective with the protection of these rights was to remove potential trade barriers and thereby create a closer cooperation.¹³⁴

In the 1970's and onwards, the ECJ actively strengthened the human rights protection in their case law. It was therefore an evident need to mirror this in the treaties. The Maastricht Treaty in the early 1990's then introduced Article F.2 (now 6.2) EU Treaty. This article is a codification of the ECJ case law that recognized the protection of fundamental rights as it is guaranteed by the ECHR and as they are represented in constitutional traditions common to the Member States. Article 6.2 hereby forms the base for the general legal principle of respect for human rights that is developed in the case law. Furthermore, the Article 6.2 obliges the EU institutions to respect fundamental rights.

The Amsterdam Treaty strengthened the protection somewhat further by introducing an amendment to Article 6 and Article 7 (former F.1) EU Treaty. Article 7 enables the Council to take actions against Member States that have infringed the principles laid down in Article 6.2 EU Treaty. Article 46 EU Treaty extended the ECJ's protection of human rights, particularly in the field of visas, asylum and immigration¹³⁵ and Article 286 (former 213 b) EC Treaty strengthened the protection of personal integrity in the processing of personal data at EU institutions.

The Nice Treaty, a few years later, left Article 6 unchanged. Instead the Charter of Fundamental Rights and the declaration on the future of the Union were adopted. Nonetheless, Article 7 was amended with rules that will aim to prevent infringements of human rights. The Council may, under certain conditions, decide that there is a clear risk of a serious breach by a Member State according to the Article and may send recommendations to that state.¹³⁶ To summarize, the constitutional provisions in the treaties are clearly scattered and characterized with successive improvements through amendments.

¹³³ Articles 28 (goods), 39 (persons), 49 (services), and 56 (capital), Articles 12, 13 (discrimination).

¹³⁴ Nergelius, J., 1996, p. 486f. See Preamble to the Rome Treaty second sec. and Article 2 Rome Treaty.

¹³⁵ See Title IV, Article 61 (former 73 i).

¹³⁶ Factsheet- Results of Nice-Democratic values, http://www.europa.eu.int/comm/archives/igc2000/geninfo/fact-sheets/fact-sheet10/index_en.htm, 03/03/17 01:57.

2.5.3 Rights derived from Case Law

Apart from the written provisions on fundamental rights, the protection of fundamental rights provided by the EU is mainly judge-made law.¹³⁷ The developed case law is recognized as a fundamental principle and is thereby also considered primary legislation in the Community. In an early stage of the European integration the ECJ was resistant to apply fundamental rights in their judgments with the motive that they were only applying Community law.¹³⁸ It was first in the *Stauder*¹³⁹ decision in the late 1960's that the ECJ confirmed that they protected fundamental rights. The *Stauder* ruling was the first case dealing with infringement of a non-economic fundamental right. This rather short judgment established a foundation of constitutionally guaranteed fundamental rights. The ECJ then steadily extended the protection in for instance the *Internationale Handelsgesellschaft*¹⁴⁰ case. The ECJ here confirmed the implication in the *Stauder* case that a Community rule may never in event of a conflict, due to its nature, yield for a national rule regardless of its status.¹⁴¹ The ECJ also stated that the protection of fundamental rights was a part of Community law and that it was amounted on the Court to safeguard that within the objectives and structure of the Community by seeking inspiration in the common constitutional traditions in the Member States.

The *Internationale Handelsgesellschaft* decision, which stated that Community law even overrides national constitutional law, created a tension between the ECJ and the national supreme courts. As mentioned in chapter 2.4.2.2, the German Bundesverfassungsgericht initially questioned, but later accepted the ECJ case law under certain conditions, in the *Solange I*¹⁴² and *Solange II*¹⁴³ cases respectively.

In 1974 the ECJ further confirmed its case law in the *Nold*¹⁴⁴ case and declared that international conventions on protection of human rights signed by the Member States can give guidance in the ruling within the scope of the EC. The *Liselotte Hauer*¹⁴⁵ decision showed that the ECJ take the common constitutional traditions in the Member States into consideration in their judgment by clearly referring to some countries' constitutional set of laws in this matter.¹⁴⁶ Moreover, the ECJ did in 1989 express in the *Hoechst*¹⁴⁷ case that it did not protect every fundamental right that was protected by the national constitutions.

¹³⁷ Nergelius, J., 1996, p. 493.

¹³⁸ See Case 1/58, *Stork v. High Authority* [1959] ECR 17.

¹³⁹ Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419, [1970] CMLR 112.

¹⁴⁰ Case 11/70.

¹⁴¹ Rasmussen, H., p. 393ff.

¹⁴² BverfGE 37, 271.

¹⁴³ BverfGE 73, 339.

¹⁴⁴ Case, 4/73, *Nold v. Commission* [1974] ECR 491, [1974] 2 CMLR 338.

¹⁴⁵ Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] WCR 3727, [1980] 3 CMLR 42

¹⁴⁶ Melin, M. and Schäder, G., p.114.

¹⁴⁷ Cases 46/87 and 227/88, *Hoeschst AG v. Commission*, [1989] ECR 2859, [1991] 4 CMLR 410.

Principally, it is only the EC institutions that are committed to respect the fundamental rights within their area of competence. The Member States are only required to comply with the minimum standards of the rights when implementing EC law. The ECJ has expressed this in several cases, for example in the decisions of *Cinéthèque*¹⁴⁸ and *Demirel*,¹⁴⁹ by clarifying that the Community law does not impose that the national legislation shall be compatible with the fundamental rights of the Union. The ECJ can not rule in questions concerning fundamental rights that fall outside the scope of the Community law.¹⁵⁰

To conclude, the most groundbreaking development on the fundamental rights case law took place mainly in the 1970's. The result of the case law is that the EC law is supreme, regardless of the status of the national rule.¹⁵¹ Furthermore, is the ECJ not only inspired by the common constitutional traditions of the Member States, but also the fundamental rights in the ECHR.

2.5.4 The Charter of Fundamental Rights¹⁵²

2.5.4.1 Background and Objectives

The protection of human rights in the EU has for a long time been insufficient and the idea of establishing a catalogue of fundamental rights is not new.¹⁵³ The establishment of the Charter of Fundamental Rights, which was solemnly declared in Nice 2000, aim to codify rights that the EU already respects through treaty provisions and case law. The hope is that the codification will strengthen the protection of human rights by making it more visible for the European citizens.¹⁵⁴ The founding fathers of the Charter created the catalogue with the intention to make it legally binding.¹⁵⁵ With the inclusion of social and economical rights, however, the Member States found it hard to agree upon a binding status. Consequently, the status of the Charter was left open and resulted only in a political declaration. The debate regarding a legally binding Charter, however, lives on and is particularly current in times of a major constitutional reform in 2004, where this issue among others will be addressed.¹⁵⁶

¹⁴⁸ Case 60-61/84, *Cinéthèque SA v, Fédération Nationale des Cinémas Francais* [1985] ECR 2605.

¹⁴⁹ Case 12/86, *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719.

¹⁵⁰ Melin, M. and Schäder, G., p.116.

¹⁵¹ Melin, M. and Schäder, G., p.115.

¹⁵² OJ 2000 C 364/01.

¹⁵³ Bernitz, U., p. 472 and see OJ C120/51, Declaration on Fundamental rights of 1989 adopted by the EP, [1989] and part of OJ C61/155, Draft Constitution to European Union, [1994].

¹⁵⁴ Gunvén, Louise, EU:s stadga om de grundläggande rättigheterna- arbetet med att ge EU en "själ", ERT 2001:13-27, p. 18.

¹⁵⁵ Gunvén, p. 21.

¹⁵⁶ Melin, M. and Schäder, G., p.111f.

Regardless of the status of the Charter, it now forms a part of the *acquis communautaire*.¹⁵⁷ With a Charter included in the EU framework, the protection of human rights is mainly intended to address the EC institutions. The Charter is nevertheless binding upon the Member States to the extent that they apply EU law.¹⁵⁸ National legislation outside the area of the Community's competence is evidently not effected. This fact makes the Union the first international organization that applies fundamental rights on their own field of governance, which shall perform as a control of the Community legal acts.¹⁵⁹

2.5.4.2 Contents

The Charter contains not only the traditional political and civil rights, but also social and economical rights. The freedom of thought, religion, expression and assembly is protected along with guarantees of social security, health care and consumer protection. Most of the social and economic rights are nevertheless made conditional to be applicable in accordance to national law and case law.¹⁶⁰ The broad variety of rights laid down in the Charter is already represented in the basic treaties or in the common constitutional traditions in the Member States. Some rights that are protected in the Charter, however, even go beyond the fundamental rights recognized so far by the ECJ. Those rights are for example equal treatment, fair hearing, and effective judicial control.¹⁶¹

The last part of the Charter stipulates the addressees of the Charter and point out that no transition of new power to the Community has taken place through the establishment of the Charter.¹⁶² The consequences of the latter provision implies that it is still the general articles in the EU Treaty, particularly Article 6.2, and above all the ECJ case law that image the position of the EU protection of human rights yet today.¹⁶³

2.5.4.3 A Binding Charter?

The status of the Charter is a charged and complicated question since it evokes many other issues of great concern. As already is mentioned, the intention by creating the Charter was to make it legally binding and possibly an integral part of the basic treaties, at least within a reachable future. Of the same reasons that the binding status was turned down in Nice, the renewed topic faces the same challenges.¹⁶⁴ In this phase, one way is to keep the politically declared Charter as it is, another way is to make it binding. Both alternatives may be complemented with other solutions to strengthen the protection.

¹⁵⁷ Lenaerts, K. and De Smijter, E., p. 299.

¹⁵⁸ See Article 52 of the Charter.

¹⁵⁹ Gunvén, L., p. 18.

¹⁶⁰ Gunvén, L., p. 20.

¹⁶¹ Lenaerts, K. and De Smijter, E., p.281.

¹⁶² See Article 51 and 52 of the Charter.

¹⁶³ Melin, M. and Schäder, G., p.112.

¹⁶⁴ Gunvén, p. 21.

The Charter shall constitute a protection for the European citizens towards the executive Community institutions. The effect of the Charter very much depends on how the EU institutions and the ECJ, in particular, receive it. The politically declared Charter as it stands today may either be seen as a non binding declaration without legal significance or be considered as a fundamental principle that the ECJ should take into account in their judgments. The two cases *Max Mobil*¹⁶⁵ and *Jégo-Quééré*,¹⁶⁶ ruled by the CFI, shows that this Court considers the Charter as something more than a political declaration by referring to it as a confirmation of the already existing fundamental rights principles. The ECJ has not yet, what I am aware of, referred to the Charter in their rulings. If the ECJ would follow the approach by the CFI, this could mean that the need for a binding Charter would decrease.¹⁶⁷ The fact that political declarations can enjoy as much respect as a binding declaration, depending on the court, is an important argument against a binding catalogue. The British people, who live in a working unwritten constitution, are often doubtful towards a binding Charter. For them would a non-binding Charter, as any other political declaration, be sufficient.¹⁶⁸ A written catalogue of rights is often seen as a core element in a constitution of a state. To give the Charter a legal status would, on one hand, mean that the Member States would give up some of its sovereignty. Therefore is a binding Charter often feared by many as a first step towards a federal United States of Europe.¹⁶⁹

On the other hand, could a binding Charter be of importance for the national governments since the Community law is supreme. The uncertainty for the Member States that national constitutional rights by no means bind the EU has been questioned in for example the Solange cases.¹⁷⁰ Since the Charter has such a large coverage, the Member States could feel secure that their constitutional rights would be protected and a possible tension between the ECJ and national courts could be reduced.¹⁷¹

The main advantage of a binding Charter would be the increased visibility of the already existing human rights protection for the citizens. This might result in an improved awareness of citizens' rights. In times of skepticism by the European citizens towards the EU machinery, a catalogue of rights would be a symbolic move that could strengthen the legitimacy for the EU.

¹⁶⁵ Case T-54/99, *Max mobil Telekommunikation Service v. Commission*, judgment 30 January 2002 at 48, 57.

¹⁶⁶ Case T-177/01, *Jégo-Quééré et Cie v. Commission*, Judgment 3 May 2002, at 42, 47.

¹⁶⁷ Bernitz, U., p. 476f.

¹⁶⁸ See for example Goldsmith, Lord, A Charter of Rights, Freedoms and principles, CMLRev Vol. 38, 2001, p. 1201ff.

¹⁶⁹ De Witte, Bruno, The past and future role of the ECJ in the protection of human rights in Alton, Philip (Ed.), *The EU and Human Rights*, Oxford University Press, Oxford, 1999, p. 891f.

¹⁷⁰ It can here be noted that the Swedish government laid down conditions for a satisfactory protection of human rights in the accession agreement with the EU, RF 10:5, sec 1.¹⁷⁰

¹⁷¹ Cameron, Ian, EU- stadgan om de grundläggande rättigheterna- för vem och varför?, ERT 2001: 143-150, p.144ff.

It would, moreover, serve as an important guideline for the legislator and as an interpretive tool for the ECJ.

It is easy to speak of a binding Charter incorporated in a Constitutional Treaty as such. But another dimension of the question is how to bind it. There are several ways to bind the Charter or parts of it to the treaties. One alternative, and the one most people vision, is to make the complete Charter binding. This option is, however, difficult to carry through due to the diverse character of the rights. It might not be easy for the EU institutions and Member States to guarantee for example the right to education (Article 14) or the right to family and professional life (Article 33). Another solution might be to make it only partly binding and exclude rights on the social area that might be hard to protect. It is also possible to refer to the Charter in one of the fundamental and introductory articles of the Constitution, even though the clarity for the citizen would not be as sufficient.¹⁷²

A special working group in the European Convention has the task to examine the possibilities of an incorporation of the Charter in a Constitutional Treaty and an accession to the ECHR. Regarding the incorporation of the Charter the group considers it crucial that fundamental rights shall be enshrined in the Constitutional Treaty. Although there are different ways to incorporate the Charter, the majority of the Group finds that an insertion of a legally binding Charter in the beginning of the Constitutional Treaty is the most preferable alternative. They further stresses that there will be no new competences conferred on the EU, the Charter will not be substantially changed, and in case of a binding Charter the Member State courts will essentially have jurisdiction. The group emphasizes the importance of making a distinction between rights and principles in the Charter. General principles like in the field of social law could as a suggestion be observed by the Member States and the EU institutions, rather than be binding like the rights.¹⁷³

2.5.5 Relation to the European Convention of Human Rights

2.5.5.1 Consequences of a Binding Charter

If the Charter of Fundamental Rights becomes binding in the future there will be two courts that can rule binding decisions in the same question. This of course, put the possibility at risk that the courts can come up with two completely different decisions. Even though the Charter cover most of the rights set down in the ECHR, the Charter has a larger scope of protection. The fear is then that this could lead to an A and B-team of rights. Overall, could these conflicting issues lead to legal uncertainty and may even undermine the authority of the European Court of Human rights.¹⁷⁴

¹⁷² Bernitz, U, p. 479.

¹⁷³ CONV 354/02, Final report of Working Group II "Incorporation of the Charter/accession the ECHR", Brussels 22 Oct 2002.

<http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>, 02.16.03, 12.32 PM.

¹⁷⁴ Gunvén, L., p. 24.

2.5.5.2 Accession to the ECHR

The ECHR from 1950 launched a system of protection of fundamental rights that should be guarded by the European Court of Human Rights. All EU Member States are contracting parties to the ECHR, but not the Union itself. With the present system, the European Court of Human Rights can not review Community acts and opposite is the ECJ not bound by the Human Rights Court's decisions in its rulings. Since the ECJ respects the provisions in the ECHR in their rulings, it is possible that the provisions in the ECHR will be interpreted differently by the two courts.¹⁷⁵ This was the case in the *Matthews v. United Kingdom*¹⁷⁶ decision, where the European Court of Human Rights ruled that a Community act was incompatible with Protocol No. 1 to the ECHR. The countries that are members of the Convention are responsible for that national laws as well as norms deriving from the EU are not in breach of the ECHR. Because the EU was not a contracting party to the ECHR, the Court of Human Rights had to make the Member State responsible for the incompatible EU norm.

The alternative for the EU to accede to the ECHR has been discussed for a long time. In 1994, however, the ECJ declared in opinion 2/94¹⁷⁷ that an accession of the EU to the ECHR was not possible on the basis of the existing treaty provisions. The final decision about an accession lies in the hands of the Member States, who can carry out a treaty amendment.¹⁷⁸ The special working group, examining the question of an accession, in the European Convention has also expressed that it is a question for the Council of Ministers of the EU to decide. The necessary legal basis of such an accession, they stated, ought to be created.¹⁷⁹

An accession to ECHR could in a beneficial way establish an equal level of protection of rights in the Union as in the Member States. It would enable an external control of the EU and how it complies with the protection for the European citizens.¹⁸⁰ Furthermore is an accession a very reliable alternative to enhance the legal protection of fundamental rights, because all the Member States are already contracting parties to the ECHR.¹⁸¹ There are some concerns raised for the fact that the European Court of Human Rights would be able to review the validity of Community acts and that this could create a tension between the two courts.¹⁸² To meet general concerns towards an accession, the working group has stated that an accession does not mean that the EU becomes a member of the Council of Europe or that individual steps taken by Member States in respect of the ECHR are

¹⁷⁵ Lenaerts, K. and De Smijter, E., p. 290ff.

¹⁷⁶ Case 24833/94, Judgment of European Human Rights Court of February 18 1999, *Matthews v. United Kingdom*, Eur. Ct. HR, 1999, Vol 28, 361,.

¹⁷⁷ Opinion 2/94, Accession by the Community to the ECHR, [1996] ECR I-1759, para 35.

¹⁷⁸ Lenaerts, K and de Smijter, E., p. 298.

¹⁷⁹ See CONV 354/ 02.

¹⁸⁰ Gunvén, L., p. 25.

¹⁸¹ De Witte, B., p. 859ff.

¹⁸² Gunvén, L., p. 25.

threatened. Like the Charter, an accession will neither provide the EU with any new competences nor affect nothing more than the EU law.¹⁸³

2.5.6 Conclusion

Despite the respect for the ECHR and the common constitutional traditions of the Member States, the current protection of fundamental rights in the EU is not satisfactory. European judgments concerning rights provided by the ECHR can not be appealed to the European Court of Human Rights and the ECJ is not obliged to follow the judgments of the European Court of Justice. With this situation at hand, it is possible that the two courts, independently from each other, may land divergent interpreted decisions.¹⁸⁴ The current protection make up a mixture of scattered provisions in the treaties and an extensive and unwritten case law of the ECJ. It is a complicated system even for people well acquainted with EU law.

¹⁸³ See CONV 354/ 02

¹⁸⁴ Bernitz, U., p. 472.

3 USA - a Model of a Constitutional Federation

3.1 Introduction

The founding fathers of the European Community, Jean Monnet and Robert Schuman, partly saw the US federal governance, with its non-tariff barriers and free commerce within the States, as a model in shaping the European Communities.¹⁸⁵ The Constitution of 1787 introduced a new set of federal government and thereby invented the modern federalism. As a new type of political system, it has become a model of inspiration for many countries and organizations.¹⁸⁶

The best way to understand the American constitution and the American constitutional tradition is to look through the glasses of constitutionalism. The core idea of American constitutionalism is an administrative government that is legitimized by fundamental law. Specific enumerated powers are given to the US federal government, while the remainder of the power is left to the states.¹⁸⁷ That the attributed powers in the constitution are declared supreme in Article VI US Constitution, is a main characteristic in the American constitutionalism. Some of the most important decisions for the integration taken by the US Supreme Court have evolved around the interpretation of the scope of the Congress' enumerated powers.¹⁸⁸ The general wording of the constitutional provisions is supposed to lead the state over many generations. This leaves a room for interpretations of the political bodies, to which the Constitution has given specific powers in concerns of the higher law. The Constitution of 1787 is still, after more than two hundred years, the basic charter of the US federal and state governments.¹⁸⁹

The constitutional theory on how to explain, organize or even justify the US Constitution and the constitutional decision-making is expressed in various ways by scholars. The interpretation of the American constitutional theory, liberal or conservative, has evolved through time, but focus to a large extent on the system of judicial review of the federal court. The emergence of constitutional theory as a distinct field of academic research foremost occurred in the aftermath of landmark decisions like *Brown v. Board of*

¹⁸⁵ See Monnet, Jean, *Erinnerungen eines Europäer*, 1ed., Baden- Baden, Nomos, 1988.

¹⁸⁶ Wright, Benjamin Flitscher (Ed.), *The Federalist*-by Alexander Hamilton, James Madison and John Jay, Metrobooks, New York, 2002, p. 42.

¹⁸⁷ Amendment X, Bill of Rights, U.S. Constitution.

¹⁸⁸ Cappelletti, M., Golay, D., *The judicial branch in the federal and transnational union: it's impact on integration* in Cappelletti, M., Seccombe, M., Weiler, J. (Eds.), *Integration through law, Europe and the American federal experience*, Vol. 1, Book 2, Walter de Gruyter & Co, Berlin/ New York, 1986, p. 280.

¹⁸⁹ Griffin, Stephen, M., *American Constitutionalism*, Princeton University Press, Princeton, New Jersey, 1996, p.5ff.

*Education*¹⁹⁰ and *Roe v. Wade*¹⁹¹.¹⁹² These cases will be covered more in depth below.

3.2 Origins of the US Constitution

3.2.1 From Confederation to Federation

When the British Empire imposed tax on their North American colonies, the American liberation process took its start in the 1770's. On the 4th of July 1776 the American colonies proclaimed their independence through the Declaration of Independence. The Declaration of Independence contained completely new principles of democracy, sovereignty and human rights and laid the foundation for the establishment of a confederation between thirteen free and independent states.¹⁹³ In 1778, the Constitution of the Confederation or the Articles of Confederation, entered into force. Only a couple of years later, however, the lack of competence of the weak centralist power led to the calling for the Constitutional Convent in Philadelphia. It was the relatively independent local governments, which unrestrained could enact legislation, that held up the free commerce within the states and the goal of achieving a single market. The main focus on the Convent's agenda was to tackle the problem with the balance of power and try to solve the institutional issues.¹⁹⁴ Moreover, the Constitutional Convention had two main responsibilities. The first task was to create a government that would stay stable through time. Building a constitution on the basis of existing provisions, although with some improvements due to negative experience, was the second mission.¹⁹⁵

Unlike the human rights provisions that were guaranteed in the Confederation articles, the federal Constitution did not equally provide any protection of human rights. The absence of a catalogue of fundamental rights was highly debated between Federalist and Anti-federalists and that debate will be further explained in the following chapter. As a result of the institutional discussion the Constitution with Article I-VII was adopted in 1787 while the civil rights formerly protected in the Confederation was ignored. The lack of a catalogue of rights was immediately debated after the ratification of the Constitution.¹⁹⁶

¹⁹⁰ *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873 (1954) supplemented by *Brown v. Board of Education*, 349 U.S. 294, 99 L.Ed. 1083 (1955).

¹⁹¹ *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973).

¹⁹² Gerhardt, Michael, J., Rowe, Jr. Thomas D., Brown, Rebecca L., Spann, Girardeau A., *Constitutional Theory: arguments and perspective*, 2nd ed., Lexis Publishing, New York/ San Francisco/ Charlottesville, 2000, preface and p.1ff.

¹⁹³ Article II, Articles of Confederation.

¹⁹⁴ Nergelius, J., 1996, p. 65ff.

¹⁹⁵ Pole, J.R. (Ed.), *The American Constitution- for and against*, Hill and Wang, New York, 1987, p. 15.

¹⁹⁶ Nergelius, J., 1996, p. 67ff.

3.2.2 The Federalist and Anti-Federalist Constitutional Debate

Facing a proposal to a Constitution, the Federalists and Anti-federalists argued about how the future government should be structured. The discussion is illustrated in speeches, letters and news articles mainly by the Anti-federalist whereas the Federalists' arguments for the proposed Constitution were primarily revealed in the Federalist, a newspaper with eighty-five essays. The latter is a classic commentary in defense of the proposed Constitution during the ratification controversy. It consists of political arguments based on the need for a stronger central government. This need was also the major motive for calling the Federal Convention. The central motive for forming a closer and more perfect union, expressed by Alexander Hamilton, was to create a strength essential "to suppress faction and to guard the internal tranquility" of the states. Such a union would lead to peace and liberty of the states. Hamilton advocated for a centralized authority to prevent groups from turning into revolution.¹⁹⁷ A union would moreover provide the people with safety and freedom.¹⁹⁸ Regarding judicial supremacy, Alexander Hamilton declared that the constitution is the highest man-made law, created by the will of the people of which the courts are the true guardians. By settling the Constitution as a fundamental law he further stated that the courts must declare any legislative act contrary to it void.¹⁹⁹ This expression of thought has come to be used in arguments by Chief Justice Marshall in *Marbury v. Madison*²⁰⁰ in 1803 when the doctrine of supremacy was introduced.

The Anti-federalists, however, argued that creating one large union would lead to destruction and despotism. Such a large entity, containing a broad diversity of people and with following colliding interests, would become a complex system. In a confederation, the central governments should only have the delegated power required to maintain the Union and not be able to act directly to the people. The remainder of the power would fall on the local governments.²⁰¹ The Anti-federalists insisted on keeping their sovereignty in the states and saw a Constitution, which would aim directly at the individual citizens of the United States, as a threat of that sovereignty.²⁰²

Nevertheless, the main arguments by the Anti-federalists toward the proposed Constitution were its absence of a bill of rights. The question whether the Constitution should contain a bill of rights was probably the

¹⁹⁷ The Federalist No. 9 (Alexander Hamilton), in Wright, B. F., p. 124-129.

¹⁹⁸ The Federalist, No. 3(John Jay), in Wright, B.F, p. 9.

¹⁹⁹ The Federalist, No. 78 (Alexander Hamilton), in Wright, B.J, p. 489-496.

²⁰⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at 178.

²⁰¹ See articles by "Brutus I", New York Journal, 18 Oct 1787 and "An Old Whig IV", Philadelphia Independent Gazetteer, 27 Oct 1787 in Kaminski, John P., Leffler, Richard (Eds.), Federalists and Anti-federalists- the debate over the ratification of the Constitution, Madison House Publishers Inc., Madison, Wisconsin, 1989, p. 4-19

²⁰² Pole, J.R, p.17.

most important issue discussed during the ratification debate. A written catalogue of rights would function as a restraint on the federal power. Furthermore, a bill of rights would protect the people from unjustified interference by the government since the Constitution is declared as supreme.²⁰³ On the contrary, the Federalists were of the opinion that a bill of rights was unnecessary and could even be dangerous for and weaken the federal government. The delegated powers to the government should not enclose the competence to regulate individual rights. Protection of individual rights, the Federalists pointed out, was a matter for the state government only.²⁰⁴ A proposal for such a catalogue of rights was made in the Constitutional Convention but was, as generally known, defeated at this time.

Regarding a federal judiciary, the Federalists claimed that it would function as an intermediary between the people and the Congress. With judicial review, the federal court should safeguard the people from any attempt of the Congress to extend its power.²⁰⁵ Opposite, the Anti-federalists were afraid that the federal jurisdiction would come to be too extensive, at least it was almost expected that they should extend its own area of competence. The state courts would then lose much of their importance.²⁰⁶

3.3 An Overview of the US Constitution

3.3.1 Constitutional Provisions

The power of the executive organs, i.e. the President and the Congress, are deriving from the people's consent. Here, the main purpose of the executive organs is to protect the rights of the people. Through the system of checks and balances, it is possible for the Congress to initiate an impeachment of the President. Not only the system of checks and balances, but also the division of two chambers in the legislative body, i.e. the Senate and the House of Representatives, illustrates the clear division of powers.²⁰⁷

The Constitution vested the Congress with lawmaking powers that made it possible to carry through legislation that was binding for individuals in the state. The federal government, that independently could enact declarations without initiative from the states, was soon accepted as the national government. Just like in the EU, this progress of the national government

²⁰³ See these Anti-federalist arguments in letters by Richard Henry Lee to Governor Edmund Randolph, New York, 16 Oct 1787 and "An Old Whig I", Philadelphia Independent Gazetteer, 27 Oct 1787 in Kaminski, J.P. and Leffler, R., p. 151-159.

²⁰⁴ Pole, J.R, p.17ff. Despite the Anti-federalists' powerful arguments that a bill of rights should be included in the Constitution, there are not many responses to that in the Federalist Papers, see however Federalist Papers No. 84 (Alexander Hamilton), p. 172-177.

²⁰⁵ See for example The Federalist No. 78 (Alexander Hamilton), Kaminski, J.P and Leffler, R., p.121 and 136-142.

²⁰⁶ Kaminski, J.P and Leffler, R., p.120f.

²⁰⁷ Nergelius, J., 1996, p. 67 and 378ff.

with a federal court, very much depended on the Unions liberation from the state governments.²⁰⁸

Article VI of the US Constitution states that the constitutions and other laws and treaties made thereof and under the US authority is the “supreme law of the land”.²⁰⁹ The supremacy clause of Article VI US Constitution gives the authority to the Congress to adopt laws of general effect in all states.²¹⁰

3.3.2 The Bill of Rights

As so often has been noted in the literature, the US Constitution at the time of adoption in 1787 did not contain any bill of rights. The Anti-federalists, with Thomas Jefferson as a front figure, advocated that the people were entitled to a catalogue of rights. The few words of response by the Federalists through the Federalist Paper shortly dispatched the idea as unnecessary.²¹¹ Soon, however, in 1791 the first ten amendments constituting the original Bill of Rights were adopted. The specific provisions were amended to protect individual rights from interference by the federal and state government. In short, the first eight amendments regard some of the most fundamental individual rights. These provisions cover the right to free speech, press and assembly as well as the personal freedom and protection against unreasonable searches, seizures and takings.²¹² The later amendments 11-27 also concern some individual rights such as prohibition of slavery and the right to vote regardless of race and sex.²¹³ The fourteenth amendment or the “due process-clause” provides for a protection of the citizens’ rights and immunities, without due process of law. This particular amendment, that also guarantees the equal protection of the laws, has been subject to many interpretations by the US Supreme Court.²¹⁴

The ten original amendments from 1791 do not give us any guidance on how they should be interpreted. It was first in the early period of the twentieth century that the US Supreme Court actively started to implement the Bill of Rights against the federal government.²¹⁵ The landmark cases of *Brown v. Board of Education*²¹⁶ and *Roe v. Wade*²¹⁷ illustrate the Supreme Court’s judicial activism. In *Brown v. Board of Education* the question of equal educational opportunities for colored people was raised. The Court declared that the “separate but equal” doctrine did not apply on segregation of colored children in the field of public education, even though other

²⁰⁸ Rasmussen, H., p. 121f.

²⁰⁹ Article VI U.S. Constitution, §2 – the Supremacy Clause.

²¹⁰ Cappelletti and Golay, p. 279.

²¹¹ Mason, Alpheus Thomas, Stephenson, Jr. Donald Grier, American Constitutional Law-introductory essays and selected cases, 9th ed., Prentice Hall, New Jersey, 1990, p. 302ff.

²¹² Amendments I and IV, Bill of Rights, U.S. Constitution.

²¹³ Amendments XIII, XV, and XIX of Bill of Rights, U.S. Constitution.

²¹⁴ Amendment XIV, sec. 1, Bill of Rights, U.S. Constitution.

²¹⁵ Cappelletti and Golay, p. 298.

²¹⁶ *Brown v. Board of Education*, 347 U.S. 483, (1954).

²¹⁷ *Roe v. Wade*, 410 U.S. 113, (1973).

decisive factors were equally provided. It was with this decision that the modern time of American constitutional law began. Ever since, the US Supreme Court has played a key role in the formulation of human rights. The Court's ruling in *Roe v. Wade* involved the question of personal liberty and held that the decision of abortion was a right of personal privacy according to the fourteenth amendment. State laws prohibiting abortion had to yield for the constitutional rights. The two rulings represents the US Supreme Court's own value judgments, and not a value judgment as a result of the founders' intention of the Constitution. It is, hereby, debated whether the US Supreme Court was authorized or not to rule in these questions. Still, the *Roe v. Wade* decision is regarded as a controversial judgment and is for many illustrating the worst side of the Court's activist ruling. On the contrary, the *Brown v. Board of Education* case often characterizes the Court's ruling at its best. However, these cases are not unique, rather typical for the decisions by the US Supreme Court in modern constitutional time.²¹⁸

Two central problems common for a federal union is firstly the conflicts between federal law and local guarantees of fundamental rights. The US has experienced no major problems with that situation because of its supremacy clause. Secondly, difficulties might arise if federal guarantees shall be applied on state actions. That dilemma has, however, troubled the US Supreme Court. The most profound contribution by the American judiciary in the American integration is made in this area.²¹⁹

The application of a common standard of fundamental rights protection might only be accomplished after a hard and drawn out process of legal and historical integration. For example, the freedom of speech was not until 1919 addressed by the US Supreme Court in the important decision of *Schenck v. United States*.²²⁰ Yet some years later, and more than sixty years after the adoption of the fourteenth amendment, the new standards were applied to the states. In the early jurisprudence of the US Supreme Court, the first ten amendments did not apply to the states like they equally bind federal and state bodies today. The interpretation of the Bill of Rights has continuously changed over the two hundred years it has been in force. The progress of judicial law-making has been lined with disputes about legal activism and legal restraint of the US Supreme Court.²²¹ Overall, the history of the United States and for example Germany is showing that the constitutional protection of fundamental rights can be an important instrument in the integration.²²²

²¹⁸ Perry, Michael J., *The Constitution, the Courts, and Human Rights*, Yale University Press, New Haven/London, 1982, p.1-2.

²¹⁹ Cappelletti and Golay, p. 297f.

²²⁰ *Schenck v. United States*, 249 U.S. 47, (1919).

²²¹ Frowein, Jochen, Schulhofer, Stephen, Shapiro, Martin, *The Protection of Fundamental rights as a vehicle of Integration*, in Cappelletti, Seccombe, Weiler, *Integration through law*, Vol 1, Book 3, Walter de Gruyter, Berlin/ New York, 1986, p.231ff.

²²² Frowein, Schulhofer and Shapiro, p. 244.

3.3.3 The Judicial Power of the US Supreme Court

The US Supreme Court has played a crucial role in the interpretation of the American Constitution. The Constitution established the three branches of federal government, i.e. the executive, legislature, judiciary and enumerates their powers. Article III US Constitution covers the role of the US Supreme Court and the rest of the judicial branch of the federal government. Article III states that the “judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish”.²²³ It is clear that the doctrines of supremacy and the institution of judicial review did not exist during the founding period in the late eighteenth century. Nevertheless, as was briefly mentioned above, Hamilton expressed in the Federalist that it is the duty of the courts to declare all acts contrary to the constitution void.²²⁴ In 1803, the US Supreme Court established the principle of judicial review and supremacy of the US Constitution in the landmark case of *Marbury v. Madison*.²²⁵ Similar to Hamilton, Chief Justice Marshall expressed in *Marbury v. Madison* that the superior status of the Constitution implicated that the judicial authority may claim a legislation to be void. Any other result would allow the legislature to “what is expressly forbidden”.²²⁶ The Court did however not guarantee the supremacy of the Supreme Courts interpretations. As a result, the first half of the nineteenth century witnessed repeated challenges to the Court’s view of its own pre-eminence.²²⁷

Overall, the judicial activism has been an important instrument in the legal integration. In a federal system like in the US, it is the principle of supremacy that set out the legal hierarchy of norms. If the judiciary were not to review the rule of supremacy, the principle would only be theoretical. Hereby, the federal court has the function as the uniform and final interpreter of the higher law, which also prevents legal uncertainty.²²⁸

In another case, *McCulloch v. Maryland*,²²⁹ Chief Justice Marshall again presented a new doctrine, i.e. the principle of implied powers. The US Supreme Court interpreted the “necessary and proper clause”²³⁰ in a very broad meaning by declaring their power to invalidate any state actions contrary to the Constitution or the laws and treaties passed hereunder. The US Supreme Court has both supported the extension of the federal competence as well as allowed the creation of the administrative government capability to utilize the expanded federal powers.²³¹

²²³ Article III U.S. Constitution, sec. 1.

²²⁴ The Federalist No. 78, (Alexander Hamilton) in Wright, B.J, p. 489-496.

²²⁵ *Marbury v. Madison*, at 176-178.

²²⁶ *Marbury v. Madison*, at 178.

²²⁷ Cappelletti and Golay, p. 267-288.

²²⁸ Cappelletti and Golay, p. 261ff.

²²⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

²³⁰ U.S. Constitution Article I, §8, cl. 18.

²³¹ Cappelletti and Golay, p. 282.

4 The Constitutional Future of the EU

4.1 Introduction

The previous presentation has illustrated the main features in the transformation of the European cooperational order along with the development of human rights protection in the Union. Together with the constitutional overview of the US federal model, this forms a basic ground for the discussion about the constitutional future of the EU. The Union with fifteen Member States is growing and will in a first stage embrace ten new Member States. That is the largest expansion in EU history and more candidate countries are knocking on the door.

With a history of diplomatic treaty amendments to update the legal framework with the fast advancing integration, we have now reached a phase of constitutional reflection. Europe is facing a major constitutional reform, which will give a new dimension to the European cooperation in the 21st century. The current *acquis* of the EU is a complex system to grasp, which does not improve the acknowledged lack of support by the European citizens. Overall, there is a great need to strengthen the democratic legitimacy and to revise the complicated European order in favor of simplicity, efficiency and transparency. The Union needs to overcome the trust by the people and be able to shoulder an organization of twenty-five Member States. The establishment and work of the European Convention is a proof of the initiative to engage people outside the political arena and open up the debate on the future of the EU. At stake is a major reform at the IGC 2004, which is likely to set the course for the future of the Union. First of all the basic treaties will merge into one simplified version. Apart from that, the Constitutional Treaty will most certainly lead to a more federal cooperation. The draft Constitution suggests a phrase acknowledging the “federal basis” of certain areas of cooperation.²³² There is also a strong voice for refining the common foreign policy and the common defense for the Union.²³³ The assumption of a more federal cooperation is not necessarily my opinion, but a strong accent of arguments in favor of an enhanced federative cooperation can be recognized in the recent debates. Despite the advanced proposals and discussion in the European Convention, the direction that the EU will take is still not evident or set.

Discussing the future of the Union might be speculative. I will however seek to examine what future path that might be the most desirable for the EU in

²³² CONV 528/03 Art. 1, sec. 1.

²³³ See speech Deheane, L. and joint declaration on defense by France, Germany, Belgium and Luxembourg, 29 April 2003, http://www.info-france-usa.org/news/statmnts/2003/defense_europe042903.asp, 2003/05/09 17:14.

light of historical and comparative experiences. It is often said that the Union, in this stage, is on the point of either only continue the project with a common market or develop into an accomplished political system.²³⁴

4.2 EU as a New Concept of Governance

4.2.1 Historical and Comparative Experiences - The US Analogue

Like the fears and hopes of the American people before the ratification of the US Constitution, illustrated by the Federalist and Anti-federalist debate, the Europeans now similarly stand in a crossroad of a constitutional destiny for the EU.²³⁵ The early US constitutional experience is probably the most interesting phase of comparison to the European progress today. Generally, there are several significant parallels between the European integration and the making of the American Constitution as well as the structure of both systems. At the same time, there are of course great and evident dissimilarities between the two systems, which need not to be mentioned. The similarities ought therefore not to be overestimated. The drawn analogues with the US will mainly serve as a reference point that may help us understand the distinctiveness of the Union. This chapter will evolve around five main points of comparative interest: origin, sources of authority, organizational structure, judicial power and fundamental rights.

Similar to the purpose of the European Community to establish a stable and peaceful Europe by creating a common market, the US objective was also to achieve a closer Union through economic cooperation. The USA however, was founded by a constitution between new states after an uprising against the British Empire. The establishment of the fixed and short constitution was a clear step in a conscious nation-building. After over two hundred years, the deeply rooted constitution is still intact and used. The reason for the strong support the constitution receives in the American society might depend on the clear statement in the constitution that it is the American people that empower the federal authority.²³⁶ It is the united people of the US that has the control of the supreme power and whose rights are directly guaranteed by the government.

Unlike the US, the European project arose from international treaties between long time established sovereign nations. Each Member State has its own history, culture, legal system and language. The initial economic and international cooperation has famously transformed into an entity holding a unique blend of confederal and federal features. With that, this supranational organization signifies an organization sui generis. The scattered legal order

²³⁴ Verhoeven, A., p. 365.

²³⁵ See parallels drawn by Reslow, Patrick, in Reslow, Patrick (Ed.) *Från Schlyters lustgård-rättshistoriska uppsatser*, Corpus Iuris Förlag, Lund, 2002, p. 47-54.

²³⁶ See preamble of U.S. Constitution that begin with "We the People of the United States".

comprises something alike a constitution. Even though we might be able to talk about a de facto constitution, at least a soon possible creation of one, it is clear that it is not the people of Europe that authorize the Union's exercise of power. In fact, it is primarily the Member States that are the masters of the treaties, although the European citizens are addressed by the constitutional charter to a great extent. The Member State has the incentive to affect the decision-making and direction of the common development through the Council of the EU, the EP and the European Council. It is finally the Member States that has the competence to adopt new treaty amendments or a constitution. Unlike the American Declaration of Independence that spoke about "one people", the preamble of the Rome Treaty refers to "an ever closer union among the peoples of Europe".²³⁷ It is rather a recognition that the EU is not replacing the national statehood and that the European diversity is respected. In comparison with the US, the European cooperation is not as rooted in the European society and that constitutes a great leap of democratic legitimacy for the EU. As a result, the European Union lacks the authority as a federal state do.²³⁸

The system of government in the US and in the EU is very complex and balanced. Here, the institutional and functional analogy is generally recognized.²³⁹ Both are systems consisting of divided power between central and local authorities. Hereby, common challenges and questions occur and experiences thereof can be exchanged.²⁴⁰ The early structure and problems in the beginning of the US polity very much resembles the complex, non-parliamentary nature and functioning of the governmental structure in the EU. The EU is however, popularly called, a multi-level governance. The sovereignty is shared between the Member States and the EU and the fundamental rights for the European citizens are protected on several levels. The Union structure is broadly characterized by federalism but is by no means a federation like the US. The US is a true federation with a strong division of powers according to the Montesquieu scheme.²⁴¹

Common to the two systems is the legal steering of the integration. The ECJ has features that clearly resemble the US constitutional court. One may say that the ECJ, although it is founded on international treaties, has taken on the role as a constitutional court. Both courts have played a major role in the legal integration by their active application and establishment of new principles and interpretative techniques.²⁴² The EU has particularly made use of the procedure of preliminary rulings and the doctrine of direct effect. Both systems have accepted and rely upon the highest court to solve problems that a system of allocation of powers can face. The courts hereby have the function of manifesting where the limit should be drawn between

²³⁷ See also Article 1 draft to Constitutional Treaty (CONV 528/03) that stipulate that the Constitution is reflecting the "will of the peoples and the States of Europe".

²³⁸ Weiler, J.H.H, *Federalism and Constitutionalism: Europe's sonderweg*, No. 10/2000, p. 2ff, <http://www.jeanmonnetprogam.org/papers/index.html>, 3/24/2003, 6:41 PM.

²³⁹ Rasmussen, H., p. 70.

²⁴⁰ Stein, E., p.116

²⁴¹ Rasmussen, H., p. 115.

²⁴² Stein, Eric, p.116.

the parallel systems of powers and find an effective way of enforcing it. In the American case, the US constitution does not explicitly provide the federal court with the competence to determine the constitutionality of the legislation. However, the US Supreme Court asserted the power in the landmark case of *Marbury v. Madison*²⁴³ in 1803. The analogous pattern of the judicial review by the US Supreme Court and the ECJ is clear, but contrary to the US Constitution there is a considerable difference of how the EC Treaty regard judicial review.²⁴⁴ The EC Treaty provides the ECJ with a broad competence to review the conformity of Community legislation in the treaty. In event of a conflict of laws, the lower norm shall be declared void and necessary measures to comply with the judgment of the ECJ have to be taken.²⁴⁵ Common for the two system is that the judicial review has been an outstanding instrument control on Member State's actions.²⁴⁶

Just like the inclusion of a fundamental rights catalogue was a vital question in the pre-constitutional debate in the US, the EU is now along with the all-embracing question of a constitution, faced with the same question. Similarly, neither of the two entities' foundational texts included a catalogue of rights. The argument of a fundamental rights catalogue is usually emphasized by parties that want to restrain and control the supreme power. In the US it was the intergovernmentalists or the Anti-federalists who argued for a bill of rights. In the European case, however, the arguments for an incorporation of the Charter in the Constitutional Treaty are generally advocated for, by the same party that is in favor of a constitution. Roughly speaking, it is the European federalists or those who would like to see a further enhanced cooperation that support a bill of rights included in the constitution. The confederal or intergovernmental party often considers the binding catalogue to be a preface to a constitution and thus a creation of an EU super state. Instead, the latter party, in particular, seems to look for other solutions to strengthen the protection such as an accession to ECHR.

4.2.2 EU and the Reassessment of Constitutional Theory

The introductional examination of the nature of constitutions and constitutionalism tells us that the terms are strongly linked to the understanding of nation states. Also, the latter chapter demonstrates the many parallels between the EU and the US federation. In a formal viewpoint the EU lack some elements that are necessary to be able to speak about a constitution like that of a state. The main points that need to be improved in that case is a clearer division of powers between the EU and the Member States, a clear EU government, full sovereignty in external relations and a constitution deriving from its citizens and no longer from its Member States.²⁴⁷ But must the question if the EU ought to have a constitution be

²⁴³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁴⁴ Stein, Eric, p.124.

²⁴⁵ See Articles 230- 233 EC Treaty.

²⁴⁶ Rasmussen, H., p. 117.

²⁴⁷ Piris, J-C, p.570-576.

explained in statal terms? Is it not possible to speak about constitutions in the context of a non-statal entity? Some experts find it difficult or even impossible to disconnect the constitution from the State.²⁴⁸ In my meaning, the EU neither has, needs nor ought to have a constitution like that of state, simply because it is an organization *sui generis* and not a state. Even though a formal definition does not fully fit the distinctive EU format, the functional view of constitutions is a great reference point for evaluating the rationale of a now very possible EU Constitution.²⁴⁹

The search for entities of comparison to explain the European integration and legal structure is intense in the literature. The nature of the EU is often explored in light of the traditional terms of governance, like I have done. As mentioned, looking at the history can be of great value, but I believe only to a certain extent. Since the complex European polity is growing larger it is important to look forward and reflect on how we will see the EU like in the future. Conventional statal theories can not fully give us that answer. It is in my meaning important not to persistently hold on to established statal definitions. One must then be flexible and interpret the distinctive organization of the EU outside the established framework. A formal view of constitutions for explaining the nature of entities like the EU will give a wrong picture and lead to misconceptions.²⁵⁰ Therefore, the definitions of constitutions and traditional governmental systems have to be redefined and adapted to the European situation. More importantly, a new comprehensive and non-statal constitutional theory that sees the EU on its own merits is needed.²⁵¹ A revision of the constitutional theory without any bonds to nation states is necessary in a modern society. We can not always refer to and compare with traditional governance systems, when the reality looks different. Today, conventional systems of governance exist parallel to new models of organizations. It is time that the European project, that already has experienced over fifty years of history, is seen and interpreted on its own merits.

4.3 A Constitution for Europe?

4.3.1 The Notion of a Constitutional Treaty

The EU is an international organization with clear constitutional features but is lacking of statehood. In light of traditional political theories, the EU clearly does not fulfill the preconditions for a formal constitution and creating one would not be democratically legitimate, since the people's

²⁴⁸ Grimm, D., p. 288.

²⁴⁹ For distinction between formal and functional constitutionalism see MacCormick, Neil, *On the very idea of a European Constitution: Jurisprudential reflections from the European Parliament*, JT 2001/02; 3; 529-541, p. 530 and Walker, Neil, *European Constitutionalism and European Integration*, Public Law, 1996:266- 290, p. 270.

²⁵⁰ Verhoeven, A., p. 361.

²⁵¹ See requests for new constitutional theories by Nergelius, J., 1998, p. 224ff., Verhoeven, A., and Burgess, M.

consent is lacking. The process of transforming the basic treaties into a European constitution has, however, already begun.²⁵² As a product of gradual constitutionalization, led by the ECJ case law and successive treaty amendments, the EU legal order to some extent already has a de facto constitution. It is mainly the fundamental principles, the doctrine of supremacy, treaty provisions on the judicial law-making and the enumeration of institutional powers that illustrate the constitutionalized legal order of the Union.

Today's legal system is a complex order that is hard to overview and that is certainly not ideal. For that reason, there is a high demand of clarification and simplification of the treaties by regards to the enlargement. The compiled treaty would then become more visible for the European citizens. Of the same reasons for which clarity is desired, a short constitution like that of the US would be of value.²⁵³ The IGC in Nice 2000 called for a deeper and wider debate on the future of the EU and set out four main topics that should be discussed. The simplification of the treaties made up one of the four questions that were addressed in Nice. Also, a clearer division of powers between Member States and the EU, the status of the Charter, and the role of the EP was called for.

One year later, the European Convention was established to particularly review the four main issues mentioned above and present a draft to a Constitutional Treaty. The skeleton of a Constitutional Treaty was presented in late October 2002 and is continuously amended. A final draft to a Constitutional Treaty will be ready in June 2003. Understandingly, the work on the shaping of the Constitutional Treaty is yet very changeable. If the final draft will be adopted on the whole or in the exact status of the draft we will have to wait and see. The main elements of the Constitutional Treaty as it is portrayed in this stage, are that the Union will receive legal personality and be the sole institution, embracing the entities of the EC. On the political arena, a strengthened common foreign policy and defense system is inquired. The Franco-German axis has presented a proposal on dual presidency. Besides the president of the Commission, a president representing the EU in external relations should be established in the European Council. This would create a better continuity of the work in the European Council compared to the current system with a rotating six-month's presidency of the Member States.²⁵⁴

²⁵² Da Cruz Vilaca, José Luis, in Europe's constitution: An unfinished task, in The Philip Morris Institute for public policy research, Does Europe need a Constitution? June 1996, p. 10-17.

²⁵³ Straw, Jack, A constitution for Europe, The Economist, Oct 10th 2002.

²⁵⁴ EU leaders split over Franco- German plan, BBC News, 16 Jan. 2003., http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/2665561.stm 2003/04/24 14:56.

4.3.2 Arguments in Favor of a Constitution

The rationale for a creation of a Constitution encompasses many dimensions. The starting point for the establishment of a Constitution is the need for a clear, more visible and simplified legal order in the EU. This argument pervades the other opinions in favor of a Constitution. I will divide the arguments in support of a Constitution in four main points.

The first point concerns the enlargement and the necessity of institutional reforms. The growing Union creates new demands on the institutions. The procedure of decision-making and institutional compositions, to name only a few areas, has to be revised so the Union can continue to work effectively. A short and simplified codification of the Union's fundamental values, a clear delimitation of powers between the Union and the Member States along with other important constitutional provisions would function as a form of fixed reference point for the Union.²⁵⁵ The Constitution would secure a homogeneous and equal enforcement and reception in the Member States. Most importantly, the Constitution would be a symbol for the values that the EU stands for, not only for the Member States, but also in external relations and for the candidate countries. A Constitution would clearly signify for the European candidate countries what conditions they have to fulfill before an accession is possible. Here, the protection of human rights, abolishment of planned economy and issues of democracy brings considerable pressure to bear. Furthermore, a Constitution would clarify the hierarchy of norms, which is a precondition for a large Union with Member States descending from different organizational cultures.

The existence of a Constitutional Treaty could as a second point come to terms with the recognized problem with the lack of democratic legitimacy in the Union. There is a large gap between the EU machinery and the European citizens. Due to the complexity and ever evolving cooperation it is practically impossible for people in general, who is not particularly familiar with the EU, to understand and by this means identify with the organization. A simplified Constitution would be more visible for the citizens and could in that case close the legitimacy gap between the EU and its citizens. For all parties involved, a stable Constitution would improve the legal certainty, the rule of law and the predictability. This is highly important, since the Union today has a great impact in the Member States' legal and administrative systems.²⁵⁶ Unlike traditional constitutions, the draft to a Constitutional Treaty for the EU mainly addresses the Member States as the source of authorization. This is due to the special nature of the Union as a supranational cooperation between states. Some expresses that the establishment of a constitution is needed so that it can be directed at the people of Europe, instead for the Member States as such.²⁵⁷ Other claim that it is not likely that the Member States will give up their sovereignty to the EU in this way.

²⁵⁵ Dehaene, J-L., p. 3ff. .

²⁵⁶ Weiler, J.H.H, 2000, p. 5.

²⁵⁷ A5-0289/2000, Committee on Constitutional Affairs of the EP, 12 Oct 2000.

The third point regards the improved possibility to control the EU with a stable Constitution. In recent years, the Union has improved the transparency and openness in the EU institutions and procedures. But more can be done. A political cooperation like the EU, that is supreme in relation to the Member States and its citizens, ought to act more in the open. Together with the problem with lack of democracy, it is important that the Union institutions and procedures are pervaded with openness. A Union with a behind-the-scenes approach will not enhance the democratic legitimacy. Moreover, a clear regulation of the division of powers and the scope of the Union power, would from a national point of view be a safeguard that the Union is not extending its power.²⁵⁸ A well-defined structure might also make the EU less bureaucratic.²⁵⁹

The fourth and last point delivers the argument that the impending Constitutional Treaty has resulted in a healthy debate about the future of the Union. The constitutional debate is particularly nourishing from a democratic viewpoint.²⁶⁰ Contrary to the conventional IGC's, the European Convention is a modern forum in this sense. Not only the 105 national and EU representatives have influenced the constitutional debate, but the word from the public opinion has also been open to a greater extent. A special youth Convention has been organized and a continuous public debate is held on the Convention's website.²⁶¹ The Constitution is a symbol of a major change of direction in the European project. Even though the Constitutional Treaty not will include any radical new provisions, only the simplification and replacement of the current treaties, mark out the new needs and requirements of a new and larger Europe. The upcoming Constitution has also fuelled the debate about the finality of the EU. German Foreign Minister Joschka Fischer is representing maybe one of the most far-reaching visions of the completion of Europe. For him, the goal is to finally reach the point of a complete European Federation. The Constitution is not only a step towards that goal, but also a pre-condition for its creation.

To conclude, a Constitution for Europe would simplify the Union legal order and thereby become more visible and clear for the European citizens as well as for the surrounding world. A short and comprehensive Constitution could serve the purpose of being of symbol of the European cooperation and what it stands for. That fact might enable the European people to identify themselves with the Union to a greater extent than is the case today. The national belonging might always be dominating, but it is important for a continued and enhanced European cooperation that the people support or at least not alienate themselves towards the Union. The democratic legitimacy could thereby be improved and the existence of a Constitution would furthermore strengthen the control of the EU institutions and the Member States when they practice Union law.

²⁵⁸ Weiler, J.H.H, 2000, p. 5.

²⁵⁹ MacCormick, N., p. 530.

²⁶⁰ Weiler, J.H.H, 2000, p. 5.

²⁶¹ See <http://european-convention.eu.int>.

4.3.3 Difficulties with a Constitution

Despite the intricate legal system, the EU in fact already has a European constitutional charter. Of this reason many argue why an establishment of a Constitutional Treaty is at all necessary. Many deliver the “If a thing ain’t broke, don’t fix it”-argument to emphasize that the current system is satisfactory and need not to be changed. If a country like Great Britain has managed without a written constitution, why couldn’t the EU? There is a fear that a constitution for the EU would turn it into a super state. A super state would deprive the individuals of the Member States their democratic sovereignty and power of self-government.²⁶² Those who fear a formal European constitution fear it because it would be a decisive step towards a federal Europe.

The EU is not a state, and constitutions are in traditional terms related to states. In that sense, it is impossible to provide the EU with a constitution, since it lacks several features that are typical for a constitution. Foremost, the EU lacks the legitimacy from the European people or a demos.²⁶³ Instead, it is the Member States that has the authority to ratify a new Constitutional Treaty, even though referendums might be held afterwards. A known problem for the EU has during the 1990’s been the lack of support and interest of the European citizens. The large gap between the EU and the will of its people create problems of legitimacy. Opposite to the position that a Constitution could build up a democratic support among the European people, one view address the concern that the establishment of a Constitution would be one step further in the European integration that lack justification of a demos. The legitimacy crisis for the EU became especially noticeable when the Danish people rejected the Euro in 2000 and when the Irish people said no to ratify the Nice Treaty in the first referendum in June 2001. To summarize, the core argument against a Constitution is that a lack of a European demos will never make the EU a democratic organization.²⁶⁴

Moreover, the EC law is dynamic, rather than stable. The Union might be risking to be trapped into matters concerning the relations between Member States and their regional bodies. The creation of an exact delimitation might lead to an obligation for the Member States to change internal and political arrangements.²⁶⁵

²⁶² MacCormick, N., p. 530.

²⁶³ Verhoeven, A., p. 90. In other words referred to as the “No Demos-thesis”.

²⁶⁴ Statement by Team- the European alliance on EU-critical movements, The EU state constitution a further erosion of democracy, 17 Dec. 2001, <http://www.teameurope.info/board/statement-constitution.htm>, 4/24/2003 8:22 PM.

²⁶⁵ Piris, J-C., p. 572f.

4.4 A European Bill of Rights?

The fundamental principles developed in the case law and the relatively few treaty based rights do not constitute a sufficient protection in the EU. The ECJ clearly refers to and respect the common constitutional values of the Member States as well as the ECHR in their case law. But the ECJ is not bound by its own decisions. An establishment of a written bill of rights for the EU has been discussed for a long time. Before the creation of the Charter of Fundamental Rights, the Union explored the possibility to strengthen the protection by acceding to the ECHR or incorporate the ECHR in a European Treaty. The ECJ was against this alternative.²⁶⁶ The idea was however not abandoned with this decision. Article 4 in the draft Constitutional Treaty²⁶⁷ stipulates that the EU shall have legal personality. Providing the Union with a legal personality would enable it to accede to the ECHR. Article 5.2 in the draft Constitutional Treaty²⁶⁸ explicitly states that the Union may accede to the ECHR and guarantees that it would not affect the Union competences. The establishment of the Charter of Fundamental Rights in 2000 was an effort to codify the unwritten protection of human rights. Generally known, the binding intention of the Charter was deserted and the Charter was only politically declared.

Today there are mainly two possibilities to strengthen the protection of fundamental rights in the EU. One possibility is to incorporate the Charter of Fundamental Rights in the Constitutional Treaty and another way is for the EU to accede to the ECHR. First, the main arguments concerning a legally binding catalogue of rights in general will be covered. Then, the two ways to strengthen the protection will be analyzed.

A binding catalogue of rights is important of the reason that it would create a genuine control of the EU institutions and the Member States when they are applying Union law. This would improve the legal certainty and strengthen the rule of law that the EU is founded on. Almost all Member States have a catalogue of rights and that has also been respected in the ECJ case law. The difference, however, with a binding catalogue on an EU level, would be that the EU institutions and particularly the ECJ are bound to protect human rights by a clear set of rules. A binding catalogue would mean that the fundamental rights would receive the highest constitutional status as a norm, which the EU and the Member States must comply with. Unlike a non-binding catalogue, individuals would be able to claim their rights before the court. Before, tensions between national courts and the ECJ have arisen. The German Bundesverfassungsgericht has for example challenged the ECJ in the Solange cases and encouraged a European catalogue of rights. In this viewpoint could a binding catalogue ease this possible tension and guarantee the Member States at least a minimum level of rights. From another viewpoint however, does a binding catalogue of

²⁶⁶ Opinion 2/94.

²⁶⁷ CONV 528/03.

²⁶⁸ CONV 528/03.

rights mean that the Member States has to give up parts of their sovereignty to extend the jurisdiction for the ECJ. The topic of transition of sovereignty to the Union has been reviewed in the *Maastricht judgment*²⁶⁹ and in the Danish Højesteret.²⁷⁰ The somewhat inconsistent statements by the Bundesverfassungsgericht to first support a binding catalogue of rights and later define the Union as a Staatenverbund with limited sovereignty show how complex the issue of a binding catalogue is.²⁷¹

Of the same reasons that the legal order needs to be simplified, the same applies for the protection of human rights. The case law and treaty provisions concerning human rights are scattered and are difficult to comprehend. A clear and binding catalogue would create clarity and visibility for the European citizens. The existence of a binding catalogue of rights could also improve the democratic legitimacy and become a symbol for the Union values. In times of enlargement, is a clear symbol of the Union values particularly important. A bill of rights would serve as a great motivation for the candidate states as well as the Member States to act in accordance with. This could be a very important way of connecting people to this “odd political animal”²⁷² that the EU is seen as by many.

In a comparative sense is a catalogue of rights normally directed at the citizens and constitutes an instrument of control towards the governmental power. In that regard, the people feel that they are respected when they possess that power towards the government. In the US, the Constitution including the Bill of Rights is directed towards the people. The US Bill of Rights has clearly been a decisive instrument in the integration. A European bill of rights could in the same way be valuable for the European development and improve the support by the European citizens.

When it concerns the first alternative of an incorporation of the Charter of Fundamental Rights, the idea has functioned as an incentive to the exchange of ideas in the post-Nice constitutional debate. The Charter is a perfect source of inspiration for the constitutional process since it reminds us of the basic values that are common to the Member States.²⁷³ Similar to the opinions in support of a Constitution, the arguments for an incorporation of the Charter in the European Constitution are justified by reasons of clarity and visibility.²⁷⁴ All the advantages with a binding catalogue of rights, described above, could be fulfilled with an incorporation of the Charter in a Constitutional Treaty. To give the protection of fundamental rights a more prominent position in the Union legal order would also demonstrate that the Union is more than an economic cooperation. Compared with the ECHR, the broader content of the Charter would also offer an added value.

²⁶⁹ BverfGE 89, 155.

²⁷⁰ Judgment from the 6 April 1998, I 361/1997.

²⁷¹ See the *Solange-cases*, BverfGE 37, 271, BverfGE 73, 339 and the *Maastricht-judgment*, BverfGE 89, 155, respectively.

²⁷² McKay, D., p.16.

²⁷³ Lenaerts, K. and De Smijter, E. p.299f.

²⁷⁴ Craig, P., 2001, p. 135.

The main problem with an incorporation of the Charter is the way how to bind it. The Charter stipulates a broad variety of rights, of which some might be difficult to comply with in practice. Social rights for example, are generally written in a broad context. Another challenge with an incorporation of the Charter is the risk of discrepancy in the interpretation between the ECJ and the European Court of Human Rights.

Regarding the second alternative for the EU to accede to the ECHR, it would mainly be motivated by the experience that it is a working and effective system of protection. The ECHR was established in 1950 and has through the years become a significant system of protection of human rights. Also, it is undeniably beneficial that all the EU Member States already are contracting parties to the ECHR. In this sense, this way of strengthening the protection of human rights would be a most reliable choice. An accession could furthermore strengthen the Union's legitimacy because they are accepting an external system of control. The EU would as a part, be bound by the decision of the European Court of Human Rights and possibly have ECJ rulings reviewed by the European Court of Human Rights. Even though this is an issue of concern for the ECJ, an accession may ensure a uniform interpretation by the two courts.

4.5 Concluding Words

German Foreign Minister Joschka Fischer stressed in a speech that the challenge of the Union of today needs to be approached by the same "visionary energy and pragmatic ability to assert ourselves as was shown by Jean Monnet and Robert Schuman after the end of the Second World War".²⁷⁵ At that time the US federation was partly a model in the creation of the European Communities. With the constitutional mutation of the Union, the cooperation has come to resemble a federation like the US to some extent. However, the disparity of the European ideas in the 1950's and the EU of today are the experience that tells us that the EU is a new and distinctive organization that has no counterpart elsewhere. This model of governance, with both confederal and federal features has replaced the classic American model of federation. The conventional term of federations is therefore inadequate and far too constricting to embrace and label the new polity models that have emerged in modern time.²⁷⁶ Of the same reasons, the traditional definition of constitutions has to be reinvented to also fit non-statal entities like the Union. A European Constitution must by no means necessarily reflect that of a nation state.²⁷⁷

The final draft to a Constitutional Treaty by the European Convention will be presented in June 2003 and be put on the agenda of the IGC in 2004. To name this basic document a Constitution has evoked many feelings around

²⁷⁵ Speech by Joschka Fischer, 2000, p.2.

²⁷⁶ Burgess, M., p.269.

²⁷⁷ Piris, J-C, p. 569.

Europe. Many fear an EU super state with the establishment of the Constitutional Treaty, since the label is associated with nation states. I believe, in this sense, that the labeling of a Constitution for Europe has to be defused since it is not a state. One has to focus more on the substance of the Constitution, not the label of a Constitution as such.²⁷⁸ The label of a Constitution is suitable, since this document alone will replace the other basic treaties in favor of simplicity. It can then serve as a clear and visible reference point in an enlarged Europe. The Constitution will also formally confirm the constitutionalized legal order of the Union. In event of a incorporation of the Charter of Fundamental Rights, the fundamental rights will be provided with the highest constitutional status. Furthermore, the establishment of a Constitutional Treaty marks out that the Union is entering a new phase of the cooperation. The Union leaves the old complex system behind and move on, ten Member States larger, in a cooperation that hopefully will be revolutionized so it can unite all twenty-five Member States and its citizens under one roof. Judging from the draft Constitution, the EU will not fundamentally extend the power of the Union and thereby not turn it into a super state.²⁷⁹ One can however not deny that the European cooperation will be further enhanced and continue in a federative direction, if the draft is adopted by the Member States in 2004.

I personally believe that the creation of a European Constitution is mainly of good means. However, as explored above, some points of concern should be borne in mind. The advantages with a Constitution is the shorter and simplified format that makes it more visible, primarily for the European citizens, but also for the EU institutions, Member States and the world. A fixation of the shared competences and other institutional and procedural rules could also create a better starting point for the control of the European and national institutions that exercises Union law. The Union is also better prepared and equipped for the enlargement with a clear and short Constitution. The issue of a Constitution has generated a most important and democratic constitutional debate. Fundamental problems have been addressed and have forced the European society or at least the European bureaucrats to reconsider the common cooperation. The constitutional consciousness has also bred the discussion about the finality of the Union. I am, however, not convinced that a completion of the integration necessarily is a desirable goal. Since the progress of the European cooperation is depending on the will of the Member States, the nature of the Union is very dynamic. A completion of the ever-changing Union will not be an easy task to carry through. If we will meet a phase of finality of the European integration it will probably not be in a soon future. Another reason in favor of a Constitution is the possibility to improve the democratic legitimacy for the Union. The legal order would become more visible for the citizens and symbolize the Union's common values.

²⁷⁸ Straw, Jack, *The Economist*, 2002.

²⁷⁹ Pernice, I. *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited*, 1999, 36 CMLR 703, 729.

It is however important not to overestimate the significance of the Constitution to solve the democratic issues for the Union. Even though the peoples of Europe are addressed by the European constitutional charter, it is still the Member States that undeniably has the main power in the Union. The Union is seen, by most national governments, as a forum for supranational cooperation but not to the extent that it should replace the nations that constitutes its foundation. Due to the unique nature of the EU and its shared governance, it is not likely, in practice, that the peoples of Europe should be authorizing the EU power directly. Nevertheless, as long as the EU is not deriving its power from the citizens, but rather from its Member States, the organization will have problem with democratic legitimacy. This constitutes a problem particularly on the field of fundamental rights. A constitution without the people's approval put the protection of human rights in danger. The ultimate safeguard of fundamental rights is the control by the people by providing them the rights directly. The US experience teaches us that a constitution that is deriving from its people is an important element in a "good" constitution. Giving the people this position can increase the acceptance and support of the Constitution in the society. If a constitution shall function in accordance with its outset goals it is crucial that the people support it, at least in the long run. Just like the US Bill of Rights has played a crucial role in the US integration and have become a symbol of common values, a European Bill of Rights could serve the same purpose.

The current protection of human rights in the EU is clearly insufficient. I believe that a parallel system of protection of rights, through both an incorporation of the Charter of Fundamental Rights and an accession to the ECHR, would give the best protection. Generally, I do not think that the composition of two systems would constitute any major concerns in regards to discrepancy of the rulings or competition between the two courts. First of all, the Charter of Fundamental Rights deliver an added value in comparison with the ECHR. Furthermore, is the Charter specifically designed to fit the EU organization. The Charter is only directed to the EU institutions, its Member States and citizens. Opposite, the ECHR is more universal and have a broader scale of members that is not limited to the EU arena. The fact that the ECHR have a more extensive range of members will secure its role in Europe and is not threatened to be undermined by the EU. An external control, as a result of an accession to the ECHR, would increase the Union's legitimacy.

Even though the Union is a multi-level governance where the people are enjoying protection on several levels, I believe it is important that the EU creates an own and independent system of protection through the Charter of Fundamental Rights. I do therefore not believe that an accession to the ECHR alone is a good solution, although the ECHR is a reliable and advantageous system. Instead of using a system from outside the Union to strengthen the human rights protection in the EU, the Charter of Fundamental Rights would constitute a natural source. Already at its creation, the intention was to make it binding. In this sense, it would be a

natural step to make the Charter binding. Even if a non-binding Charter could come to be explicitly respected in the ECJ judgments, like the CFI has done, a binding Charter would still be more legally certain and formally confirm its constitutional status. The individuals would also then be given the possibility to claim their rights before the court.

Difficulties arises, however, on how to incorporate the Charter in the Constitutional Treaty and foremost if the whole Charter as such should be made binding. From the citizen's point of view, would an incorporation of the whole text, and with equally binding status, in the Treaty or an annexed Charter be the most preferable alternatives. That is most legally certain and goes in line with the rule of law that the Union is based on. Even though I am not convinced that all rights could be effectively binding in practice, I still find it more desirable to not make a distinction between rights and principles. The ECJ and the Member State Courts would then have to shoulder the task to interpret the divergent rights. Most importantly, a binding Charter would serve as a source of values and norms that the judiciary and the legislator has to take into account in their decisions.

I will follow the proceedings of the constitutional debate with excitement. At stake, the alignment of today's constitutional issues will have a strong impact on the future of the EU. As the president of the Commission, Romano Prodi, said in the state of the Union 2003: "The work we accomplish together this year and next will to a great extent dictate the nature and role of tomorrow's Union in Europe and the world, the Union we will leave to future generations".²⁸⁰

280 Romano Prodi, President of the European Commission, The state of the Union in 2003 Plenary session of the European Parliament, Strasbourg, 11 March 2003, DN: Speech/03/120, 11/03/2003. http://europa.eu.int/comm/commissioners/prodi/index_en.htm, 12/04/2003, 8.37.

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