

THE EUROPEANISATION OF NATIONAL CONSTITUTIONS IN THE CONSTITUTIONALISATION OF EUROPE: SOME OBSERVATIONS AGAINST THE BACKGROUND OF THE CONSTITUTIONAL EXPERIENCE OF THE EU-15

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Summary: In the process of European integration, national constitutional law remains crucial, in several respects. The EU Constitution, in its broadest sense, builds on the common constitutional traditions and principles of the Member States, and EU law refers back to national constitutional law in many ways. National constitutional law contributes to constitutionalising the EU, to give it legitimacy, and to ensure that the EU and the Member States as its agents continue to comply with fundamental constitutional requirements, such as the rule of law, democracy and accountability, and the protection of fundamental rights. Also, from the national perspective, national constitutional law remains essential, since it provides the foundation of membership of the EU, it is decisive for the procedures to be followed when powers are transferred at times of accession and Treaty amendment, and it serves to provide the connection between the national and the EU legal orders. Participation in the EU requires adaptation of the national constitutional arrangements, and national constitutions should not be neglected in the process of the constitutionalisation of Europe. This paper looks into the national constitutional experience of the EU-15 with the EU and asks whether lessons can be learned for candidate countries.

Constitutions¹ are, in all Member States, considered to be the highest norm in the hierarchy of legal norms. They are the source of public power, constitute the polity and its organs, they organise and prescribe the exercise of state power, as well as its limits. Membership of the European Union does not, in most Member States, change that dogma: the Constitution continues to apply as the highest norm, even when powers

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¹ Constitutions come in many guises, as does the meaning of the concept 'Constitution'. In this article I will use the term Constitution (capital 'c') for the constitutional document, and constitution (small 'c') for the broader concept of fundamental norms, rules and practices which are considered constitutional.

are transferred to the European level or when sovereignty is limited. The Constitution may be re-interpreted, it may be amended, and its implementation or concretisation may be adapted, but in the end the Constitution remains at the apex of the hierarchy of norms. Even more, the Constitution is from the national perspective the source of EU membership, and it is only because, and insofar as, the Constitution allows it to, that European law can be operative in the national legal order. In other words, national constitutional supremacy continues to be the leading starting point in most Member States.² Nevertheless, it would be erroneous and misleading to maintain that membership of the EU does not affect the national Constitution and its functioning. It is hard to pretend that the Constitution continues to apply as it did before membership, and that the constitutional norms and arrangements remain unaffected. National constitutional supremacy is nowhere absolute, and all national Constitutions and constitutional arrangements undergo some change. The real question, then, is *how* those responsible for the national Constitution and its interpretation (the Constitution-maker or the constitutional legislature, the constitutional courts, the people in a referendum, and all actors contributing to the functioning of the Constitution) have reacted to the incoming tide of European law. In some Member States, the text of the national Constitution has been amended in order to allow for the transfer of powers to the European Union, to comply with the requirements of membership, or in order to adjust the concrete constitutional arrangements to the new circumstances. Other Constitutions have not been amended as such, but their interpretation has been adjusted, or the rules relating to the functioning of the Constitution have been amended, and constitutional practice has changed.

To a certain extent, the EU is indifferent to national Constitutions. Given the international law origins of the EU, Member States are, to some extent, black boxes, and the constitutional veil is often not pierced. Thus,

² This may be different in the Netherlands, where European law, as all international treaties which are binding, take precedence over all national law, including the Constitution. This is a precedence of application, rather than validity. It is the Constitution itself, which awards such precedence (through the combined application of Article 94 which awards precedence to provisions of international treaties which are binding, and Article 120 which precludes judges from reviewing the constitutionality of statutes and treaties). Nevertheless, scholars disagree on the issue of hierarchy of norms, and of ultimate authority. According to some, EC law ranks above the Constitution and all national law, not because of Article 94 of the Constitution, but because of the nature of Community law. Article 94 accordingly does not apply to Community law, and EC law outranks the Constitution. Others claim that ultimate authority lies with the Constitution, which is accordingly the highest norm of the land, but which, under Article 94 of the Constitution, allows for the application, with priority, of Community law. Most authors would agree that in the end, the question of which ranks higher, the Constitution or Community law, does not matter for practical purposes, because either way the result is the precedence of Community law.

it does not matter to EU law whether a State is centralised or federal; it does not matter whether it opts for majority or proportional representation in parliamentary elections; it does not matter whether a Member State has a parliamentary or (semi-) presidential system of government. To a certain extent, EU law does not look 'inside' the State, and obligations are imposed on 'the State' as such. This does not mean that national Constitutions are irrelevant to the EU and EU law. Quite the contrary: national Constitutions continue to matter, and matter a great deal, from a European perspective, too. The national Constitutions provide the very foundation of the Treaties, which must be ratified in accordance with the national constitutional requirements (Article 48 EU). As such, they supply legitimacy to the EU Treaties and to the EU. The EU treaties and EU law in several instances link in with the national Constitutions, and refer back to them, often explicitly, sometimes implicitly. Sometimes EU law refers back to common constitutional traditions or principles, and sometimes to the Constitution of each of the Member States taken on its own.

National Constitutions are highly relevant to the EU, and have an important role to give legitimacy and constitutional values in the European Union. National Constitutions are key in increasing constitutionalism in the context of the EU, at both national and European level. The European Constitution can best be described as a composite constitution, in which national Constitutions must be considered elements of the EU Constitution. In this paper, I will make some observations on the role of national Constitutions in European integration, and on the relationship between national and European Constitutions and constitutionalism, in the light of the experience of the EU-15, ie the 'old' Member States. The restriction to the 'old' Member States has nothing to do with a hierarchy in terms of importance or influence. The reasons are far more banal, and have to do mainly with my own limitations as a researcher, due to restrictions of time, space and linguistic knowledge.

Before embarking upon the exercise, some remarks are in place concerning the relationship between the national Constitutions and the EU Constitution in general (1). Indeed, thinking about the European Constitution, which is a composite constitution, requires reflection on the relationship between the national Constitutions and the EU Constitution in its broadest sense. That is a balancing act, like walking a tight rope. The art is to find the correct balance between taking Europe seriously in the national Constitution and taking the Constitution seriously in participating in the European project. Then (2) I will offer a bird's-eye view of the constitutional approach to Europe in the EU-15, and indicate which type of constitutional provisions have been adopted over the years in the constitutional texts (3).

1. Some preliminary remarks

'Primacy' will not do

Now, the development of European constitutional law raises the question of the relationship between the European Constitution and the national Constitutions of the Member States.³ This relationship can be looked at from the national perspective, from the European perspective, or by adopting an outside view. The national and orthodox European perspectives often get stuck in fairly straightforward and simple stances based on some version of supremacy. *From the European perspective*, European law is considered to take precedence over all national law, including the national Constitution, which must always give way to the supreme provisions of European law, however framed.⁴ Supremacy, then, is absolute and unconditional; it is ruthless and pays no respect to national constitutional law. *From the national perspective*, it is the national Constitution which remains at the apex of the legal hierarchy, and which retains its supremacy in the land, also over European law. Consequently, the latter cannot be applied when it conflicts with the core principles of the national Constitution. In reality, neither of these uni-dimensional approaches is as strict or ruthless as just presented. The primacy of Community law over national law, also from the perspective of the ECJ, goes hand in hand with the development of general principles, which perform the protective functions of the national Constitutions, translated and lifted to a European level. Likewise, even in Member States where it is claimed that Community law does not enjoy unconditional supremacy, it is applied mostly with precedence over primary legislation and also mostly over the national Constitution, while only the core principles are exempted from the primacy of European law.⁵ In addition, primacy in the case of conflict is only one aspect of a much wider interaction between national constitutional and European law. Primacy sets in only once the treaties or the law deriving from them have entered into force. It only concerns the priority of the application of one norm where two collide. In other words, 'primacy' is in many cases merely a rule of collision. Primacy of one over the other cannot answer many of the much more intricate questions about the relationship between Europe and the national Con-

³ For a particularly negative response to the question, suggesting that the planned use of constitutional language has a destructive effect on the Member States and their Constitutions, see P Kirchhof, 'The Legal Structure of the European Union as a Union of States' in A von Bogdandy and J Bast, *Principles of European Constitutional Law* (Hart Publishing, Oxford 2005) 765.

⁴ The landmark case here is Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁵ For an overview and analysis of the case law in eight Member States, see Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2006).

stitution and about the adaptation of constitutional arrangements in the context of the EU.

Constitutional Pluralism

The more modern accounts of the nature of the European legal order, of European constitutionalism and its relationship with national Constitutions, are phrased in terms of some form of pluralism. These pluralist conceptions have been formulated as a response to the unsettled dilemma which arises if one stands by a uni-dimensional view (national or European), based on primacy of one over the other. Indeed, the national and European perspectives, based on some form of ultimate authority and unconditional supremacy, seem inevitably to lead to conflict or revolution.⁶ One of the two orders claiming ultimate authority must, when it comes to collision, give way; if both stick to their claim for unconditional supremacy, conflict is unavoidable. The alternative view of the current constitutional settlement is known under different guises: legal pluralism (Walker),⁷ multilevel constitutionalism (Pernice),⁸ contrapunctual law (Maduro),⁹ constitutional tolerance (Weiler).¹⁰ What these authors have in common is that they have given up the search for the final answer to the question of ultimate authority, and with it, the quest for a final arbiter. Both orders, the national constitutional order and the European constitutional order, are acknowledged and respected; no formal hierarchy exists among the applicable legal orders, and collisions are avoided through various forms of mutual tolerance or mutual respect. Conflict is thus avoided and the daily routine can continue while the exceptional case of constitutional conflict is left undecided and the issue of final authority remains contested.

These approaches have the advantages of giving a much more nuanced view, empirically and normatively. Nevertheless, the downside of these new approaches may be that while they aim to achieve a harmonious view of co-existing constitutions by avoiding the question of ultimate authority, they still tend to overstress the autonomy and separateness of the constitutional orders, national and European respectively. The ensuing question of the relationship between these autonomous legal orders

⁶ See Diarmuid Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell, Dublin 1997).

⁷ Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 59 MLR 517.

⁸ Ingolf Pernice, 'Multi-level Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?' (1999) 36 CML Rev 703-750.

⁹ Miguel Poyares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker, *Sovereignty in Transition* (Hart Publishing, Oxford 2003) 501-537.

¹⁰ JHH Weiler, 'In Defence of the Status Quo: Europe's Sonderweg' in Marlene Wind and JHH Weiler, *European Constitutionalism Beyond the State* (University Press, Cambridge) 7-26.

is ultimately left unresolved. Accordingly, these views should be further refined, and the emphasis should be less on separateness and autonomy of constitutional orders. Instead, the focus should be on the deep intertwinement and mutual dependency of legal orders. Under the view of the mixed or composite Constitution,¹¹ the European and national Constitutions are truly intertwined and interrelated. The European Constitution is made up of arrangements, rules and principles at the European level, completed with national arrangements, rules and values. The other way round, the national Constitution is to be regarded as a composite constitution as well, made up of national and European building blocks. The focus is not on levels, but on elements of a composite constitution, in which national and European systems partake. Lines between national and European blocks are crossed, levels are shifted. Admittedly, this is not a radical shift of paradigm. It is a correction and perhaps a sophistication of the pluralist views of European constitutionalism. Traces of it can be found in European constitutional principles and provisions in the Treaty, as well as in the case law of the Court of Justice, and in the more recent constitutional practice.¹² Institutionally also, the pluralist dimension is reflected in a 'thick pattern of "bridging mechanisms" linking the legal and political organs, procedures and tasks of the European site to national sites'.¹³ For instance, in the absence of decentralised European courts, the national courts operate as common European courts; national parliaments participate in monitoring law-making at the European level and by holding to account the national representatives in the European institutions, and indeed these very institutions themselves; national governments, administrations and independent agencies are interlocked in formal and informal ways and networks. The consequence of such a view is that national Constitutions are crucial not only for each Member State taken on its own, but for the enhancement of constitutionalism at the European level as well. Full compliance with constitutional norms and the principles of constitutionalism can only be achieved through interaction and mutual reinforcement. It also means that it can be argued that the Member States and national constitutional legal systems have a responsibility not only towards their own legal order, but towards the EU legal order as well.

¹¹ See eg Leonard Besselink, 'National Parliaments in the EU's Composite Constitution. A Plea for a Shift of Paradigm' in Ph Kiever (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa Law Publishing, Groningen 2006) 115-131. For a similar view, see Jacques Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 *EuConst* 247-271 and 452-480.

¹² This is developed further below.

¹³ See also Neil Walker, 'Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU' in S Choudhry, *The Migration of Constitutional Ideas* (CUP, Cambridge 2006) 216, 319-320.

The European Union and national Constitutions from a European perspective

Before embarking on an analysis of the prevailing national constitutional approach to Europe in the EU-15, some remarks must be made about the European perspective on national constitutional law. As previously said, the orthodox and ruthless version of unconditional and absolute EU law supremacy over the national Constitution, as well as the view that national Constitutions are in a sense irrelevant to the EU, does not do justice to the much more nuanced current stance of European law with regard to the national Constitutions. European law does, in fact, take account of those Constitutions, and of national constitutional diversity.

First, the European Treaties refer back to the national constitutional provisions on the occasion of Treaty amendment (Article 48 EU) and the accession of new Member States (Article 49). Such Treaties require ratification by all Member States 'in accordance with their respective constitutional requirements'. Given its international law origins and in the absence of a *pouvoir constituant européen* or a European constitutional legislature, the European Union is based on international treaties concluded among States, and the EU remains dependent, for the adoption of its constitutional documents, on the ratification procedure in accordance with the constitutional provisions of the Member States. As a consequence, formal Constitution-making, at the stage of ratification, is decentralised, and no European rules apply to this phase of European Constitution-making. The only European requirement at this stage is that the Member States must ratify 'in accordance with their constitutional requirements'. This is first and foremost a procedural requirement, stating that Member States must follow the procedures as provided for by their respective constitutions. Yet, could it not be argued that these provisions contain a substantive element as well? Could it not also be taken to mean that the Member States are under a treaty obligation to ensure harmony between the national Constitution and the treaties to be ratified, and to ensure that their constitutional system is adapted if necessary? Once the treaty has entered into force, national law cannot be invoked as justification for failure to perform a treaty, as is also the case under international law on treaties.¹⁴ This is the traditional principle of the primacy of international treaties in international law, at the international level. And before the Treaty enters into force, EU law cannot impose any obligations on a Member State (or a candidate) to conduct specific constitutional amendments. It is, in fact, for each Member State to ascertain whether it is constitutionally possible to ratify a particular treaty, or to join a particular international organisation, or to decide that such ratification or

¹⁴ See also Article 27 of the Vienna Convention on the Law of Treaties.

accession must be preceded by constitutional amendment. At this stage, Member States, acting through their constitutional courts or otherwise, are allowed to review the constitutionality of the treaties to be signed and ratified.¹⁵ The better option obviously is to ensure, before ratification or accession, that any incompatibilities between the Constitution and Treaty are removed. Yet, in principle, EU law does not legally preclude a Member State from concluding a treaty which does not comply with its constitutional provisions.¹⁶ On the other hand, the existing Treaties do contain certain constitutional standards (Article 6 EU, Article 49 EU) which must be met before the treaties can be signed and ratified. In this sense, constitutional reform may become part of the negotiations, even if the concrete implementation remains national.

Second, compliance with certain fundamental constitutional principles is a condition for membership of the EU. Under Article 49 EU, 'Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union'. Under Article 6 EU, 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law principles which are common to the Member States.' This condition does not fade away upon accession, but continued compliance with these principles is required. If a Member State should fail to comply with some of the constitutional requirements of membership, more particularly those mentioned in Article 6 (1), sanctions can be imposed under Article 7 EU. But there is more. The EU Treaties and EU law start from a number of broader *presumptions* with respect to the national constitutional arrangements, rules and principles prevailing in the Member States, some explicit, some implicit. The EU presumes that the Member States are liberal democracies, based on the rule of law; it presumes that fundamental rights are protected; it assumes that there are national parliaments, and that there are independent judiciaries. The EU's own system of government is based on the assumption that the national governments are accountable for their European actions and inaction at the national level and before the national parliaments, which adduce elements of democratic accountability of the European Union¹⁷ in addition to that provided by the European Parliament at the European level.

¹⁵ On such an a priori or preventive review of the constitutionality of the EU Treaties, see Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2006) chapter 15.

¹⁶ It will be pointed out below that the ratification of the founding treaties by Belgium may well have been unconstitutional.

¹⁷ This is laid down very clearly in Article I-46 of the TECE: 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'.

Third, and contrary to what has just been said, to some extent the European Union is *indifferent* to the national constitutional arrangements prevailing in each Member State, as long as the European requirements are met and European law is complied with. This again has to do with the international law origins of the European Union as an international organisation based on an international treaty under the rules of international treaty law. The EU is an organisation of States which to a certain extent remain black boxes. To the extent that the veil is not pierced, what happens within the State is for the constitutional law of the Member States to resolve. So, national constitutional law decides who approves and ratifies the treaties and how; national law governs the distribution of labour between the federation and the federated entities in a federal state, and hence also which entity will transpose which directive. European law will review only that the end result is achieved, and that the European standards are met.

A fourth element in the complex interrelationship between European and national constitutional law is the *common constitutional traditions* of the Member States. These are recognised as a source of Community general principles under Article 6 EU and in the case law of the ECJ. According to the common perception, the ECJ developed this case law partly to alleviate the consequences of this absolute primacy of European law even over national constitutional principles and nationally protected fundamental rights.¹⁸ From these common constitutional traditions, together with the ECHR, the general principles of Community law are drawn, more specifically, the fundamental rights which the Union must respect. These general principles of Community law, in turn, are binding also on the Member States when acting within the scope of Community law. They can, under certain circumstances, be relied on as a matter of Community law, by a Member State, in order to justify measures which would otherwise constitute a violation of Community law. This was the case, for instance, in *Schmidberger*,¹⁹ where the Court held that since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods. Fundamental rights are thus drawn into the analysis of the rules on free movement, and can operate as a justification for restrictions. Accordingly, the Austrian authorities were allowed to rely on the need to respect fundamental rights guaranteed by both the

¹⁸ On this case law, see for instance Bruno De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Ph Alston (ed), *The EU and Human Rights* (OUP, Oxford 1999) 859.

¹⁹ Case C-112/00 *Schmidberger* [2003] ECR I-0000.

ECHR and the Austrian Constitution²⁰ in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty. *Schmidberger* concerned the right to freedom of expression and freedom of assembly, which is clearly common to the Member States, and laid down also in Articles 10 and 11 of the ECHR.

Yet, and this brings us to a fifth element, European law does accept and condone constitutional diversity, to a certain extent, and as a matter of Community law.²¹ European law does, in some circumstances, accept the specific national constitutional provisions or arrangements of a particular Member State, and this transpires in the case law of the ECJ. Cases in point are *Omega*²² and *Gibraltar*.²³ In the *Omega* case, the Court allowed the German *Länder* to let the right to human dignity outweigh the freedoms of the internal market.²⁴ The question which arose before the German courts was whether the power of a Member State to restrict fundamental freedoms for reasons of public interests - in this case the protection of fundamental values, more particularly human dignity - was conditioned by the existence of a legal conception common to all Member States. 'Human dignity' is widely recognised as a fundamental constitutional principle forming the basis of human rights, and as a general principle of Community law,²⁵ but not as a separate justiciable fundamental right under the ECHR or in most Member States. It is, however, under

²⁰ This reference by the ECJ to the Constitution of one Member State is remarkable, since it could also have referred to the usual 'common constitutional traditions of the Member States'. Nevertheless, in its analysis the ECJ balanced the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty, and apparently treated the fundamental right invoked as a common principle.

²¹ See more generally on fundamental rights and fundamental freedoms C. Kombos, 'Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity' (2006) 12 *European Public Law* 433; V. Skouris, 'Fundamental Rights and Fundamental Freedoms: The Challenge of Striking the Rights Balance' (2006) *European Business Law Rev* 225.

²² See, among many others, J Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 *ELJ* 15; FB Search Term Begin Ronkes Agerbeek, Search Term End 'Freedom of Expression and Free Movement in the Brenner Corridor, the Schmidberger Case' (2004) 29 *EL Rev* 255; MK Bulterman, HR Kranenborg, 'Case Comment: What If Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: the Omega Case' (2006) 31 *EL Rev* 93.

²³ Case C-145/04 *Spain v United Kingdom (Gibraltar)* [2006] ECR I-0000.

²⁴ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-0000; The *Schmidberger* case is less clear in this respect. The Austrian government had argued that it had allowed the blockade inspired by considerations linked to respect of fundamental rights enshrined in the ECHR and the Austrian Constitution. The Court proceeded on the basis of the ECHR alone, without reference to the Austrian Constitution, see Case C-112/00 *Schmidberger* [2003] ECR I-0000.

²⁵ Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-0000.

the German Basic Law. The Court held that, as a matter of principle, the objective of protecting human dignity was compatible with Community law, since it was to be considered a general principle of law also under Community law, drawing from the principles common to the Member States and the ECHR. The fact that the principle of respect for human dignity has a particular status as an independent fundamental right under the German Basic Law was immaterial in this respect. The protection of fundamental rights was considered to be a legitimate interest which may justify a restriction of a fundamental freedom guaranteed by the EC Treaty, such as the freedom to provide services. Nevertheless, it was not indispensable for the restrictive measure to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question was to be protected. In the case at hand, the prohibition corresponded to the level of protection which the German Basic Law aimed to guarantee for Germany. The Court concluded that the measure was considered to be justified under the Community provisions on free movement. The Court's judgment hinges on two thoughts: one is the finding that the principle of human dignity is a *common* principle and hence was to be considered a legitimate interest which may justify restrictions to fundamental freedoms: commonality of the principle thus seemed to be crucial. Nevertheless, the Court then allowed great leeway to each Member State as regards the precise way in which this principle was to be protected, and left the substantial test for the national court. The Court did not test whether the prohibition was really necessary under the German Constitution: it simply referred to the opinion of the referring judge. Yet, even then, the Court retains a supervisory function in controlling whether a fair balance was struck between competing interests.

In both cases, *Omega* and *Schmidberger*, the referring courts had signalled to the ECJ that a *national* constitutional fundamental right was at stake, and diametrically opposed European fundamental freedoms. In both cases, albeit in a somewhat different manner, the Court translated these national rights into *Community* principles, and hence re-phrased the issues from a conflict between *European* freedom and *national* constitutional rights, into a balancing of competing principles within the context of *European* law. At the same time, the ECJ explicitly allowed for national diversity, albeit under the control of the ECJ.²⁶ In *Omega*, the ECJ then left the actual balancing for the national court. As a consequence, the Court has the final say in deciding whether a particular principle or right is to be considered a Community right, but it then allows a wide

²⁶ The Court did not make its test very specific: it did not exactly clarify whether it was applying a European test, or whether it was merely marginally appraising the application of the national test.

margin of appreciation to the national courts for the actual balancing in the concrete case.

In the recent *Gibraltar* case,²⁷ the ECJ allowed the UK to grant electoral rights in European elections to non-nationals and hence to non-EU citizens. Spain had brought an enforcement action against the UK under Article 227 EC, claiming, among other things, that by extending voting rights to non-EU-citizens, the UK had infringed the EC Treaty, since voting rights were conditional on citizenship of the Union. The ECJ rejected the Spanish claims, and held that the UK was entitled to extend voting rights in European elections. In the judgment, the ECJ paid particular attention to the fact that the UK also did so in national elections, and that the extension was firmly embedded in the UK's constitutional traditions.

Another element in this trend of paying regard to national constitutional principles can be found in several pieces of secondary legislation, both directives and framework decisions. Several recent directives and framework decisions contain references to national constitutional rules in their recitals, stating that the relevant European legislation 'does not prevent a Member State from applying [certain] constitutional rules.'²⁸ It is not entirely clear what the meaning of these recitals is, and how they relate to the principle of primacy and the general principles of Community law. Indeed, all of the principles and freedoms mentioned ('due process, freedom of association, freedom of the press and freedom of expression in other media') are, at least at first sight, common to all the Member States, and qualify as general principles of Community law. The need to refer to national constitutional rules thus seems obsolete. Also, it is not clear how such references to national constitutional rules can have a practical effect: can they, for instance, be invoked before the ECJ, or before national courts, in order to escape the application of the directives or the implementing legislation? Do they create exceptions to the general principle of primacy? There may be some interesting cases ahead in this context.

²⁷ Case C-145/04 *Spain v United Kingdom (Gibraltar)* [2006] ECR I-0000.

²⁸ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, recital 12: 'This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media'; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, recital 14: 'This Framework Decision does not prevent any Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media'; Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, recital 80: 'this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media'.

To sum up, the relationship between European law and national constitutional law is much more complex than is often suggested by reference to a principle of primacy.²⁹ National Constitutions do not disappear in the presence of European law. Quite the contrary, they are vital in as much as the European Constitution is an incremental and partial constitution, which operates concomitantly with the national Constitutions. National constitutional law and constitutional law at the European level together form the composite constitution of the European Union. The complex relationship between the national and European elements of this composite constitution cannot be captured in terms of primacy or of the supremacy of one over the other. Nevertheless, European law does pose requirements to national Constitutions, which must sometimes be adapted to membership.

2. What role for national Constitutions in the EU? A bird's-eye view³⁰

What, then, is the role of national Constitutions and national constitutional law in the context of the EU? What are they for? And what can be learned from the experience of the EU-15? The difficulty in answering the last question is that each Member State, of course, has its own particular constitutional law, not only in terms of substance, history and context, but with regard to its own style and traditions (What is considered to be constitutional? How and in what form should it be formalised, if at all?). Each Member State has its own rules and traditions with respect to the role of the respective constitutional actors (Who makes and develops the Constitution? Who is responsible for its content and change?), and its own constitutional discourse. Consequently, *the* answer to the questions just asked (what is the Constitution for in the context of the EU, and what is best practice?) cannot be given. Thinking about the relationship between national constitutional law and EU law is distinctly national, and coloured by the specific national context, the legal doctrines, practices, sensitivities and traditions, by scholarship and sometimes coincidence. Some Member States have considered it necessary to adopt special constitutional provisions dealing with the constitutional conditions and national constitutional consequences of membership. Others

²⁹ J Wouters, 'National Constitutions and the European Union' (2000) 1 *Legal Issues of European Integration* 25, if not recent, offers a thorough account of the various elements of the wider issue of the relationship between national Constitutions and the European Union.

³⁰ This section draws on Monica Claes, 'Constitutionalizing Europe at its Source: The "European Clauses" in the National Constitutions: Evolution and Typology' (2005) *Yearbook of European Law* 81; see also Christoph Grabenwarter, 'National Constitutional Law Relating to the European Union' in A von Bogdandy and J Bast, *Principles of European Constitutional Law* (Hart Publishing, Oxford 2005) 95; Alfred Kellerman, Jaap W de Zwaan and J Czuczaj (eds), *EU Enlargement. The Constitutional Impact at EU and National Level* (TMC Asser Press, The Hague 2001); National Reports from the XXth FIDE Congress, London, on Topic I: European Law and National Constitutions (BIICL, London 2002).

assume that membership does not require specific Europe provisions, as it can be fitted into the prevailing constitutional rules and principles. Nevertheless, some trends can be detected when analysing the national constitutional reaction to EU membership. Also, this is an area in which constitutional ideas seem to migrate easily among Member States.³¹ Yet, especially as concerns the constitutional texts, there remains a large variety of approaches.

In what follows, I will look into the constitutional approach to the EU in the 'old Europe', and see whether lessons can be drawn from it for the candidate countries. There are three issues involved when approaching the question, and I will touch upon all of them. First, there is the question of *constitutional texts* and constitutional drafting: is EU membership mentioned in the text of the Constitution and has the Constitution been adapted to participation in the European Union? Second, whether or not a Member State has thought it necessary to adapt the constitutional texts to membership of the Union and, irrespective of the manner chosen, it is important to take note of the actual *constitutional practice*. In some Member States, the constitutional texts have been amended to introduce constitutional change, but practice does not follow. On the other hand, it may well be that the constitutional texts make no reference whatsoever to the EU, but constitutional practice has adapted to the new realities. Constitutional change is sometimes also attained by amendment of the Rules of Procedure, the Committee structure in Parliament, etc. Third, in many Member States, especially those with strong legally and socially embedded constitutional courts, (constitutional) *case law* has played an important role in conceptualising the relationship between the national constitutional order and the European Union. The constitutional consequences of membership have to a large extent been a matter for the courts rather than for the constitutional legislature. This is not necessarily a bad thing and it is how constitutional law develops and operates. Nevertheless, one may wonder whether these types of fundamental questions are first and foremost for the courts to answer. Guaranteeing respect for the constitution and for the values underlying it is not the sole responsibility of the courts: they cooperate with the political actors. In particular, the constitutional legislature has the duty to ensure that national constitutionalism can be achieved upon joining the EU.³²

³¹ On the migration of constitutional ideas from the Member States to the EU, see N Walker, 'The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: the Case of the EU' in S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP, Cambridge 2006) 316. I am here looking at the *horizontal* migration of national constitutional approaches to the EU.

³² See Monica Claes, *The European Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2006) 650; Anneli Albi, 'Supremacy of EC Law in the New Member States. Bringing Parliaments into the Equation of "Co-operative Constitutionalism"' (2007) 3 *EuConst* 25.

a. An unprincipled beginning

*The six founding Member States*³³

In five of the six founding Member States, the Constitution explicitly provided for the possibility to transfer certain sovereign powers to international organisations, or to limit sovereignty. Yet none of the Constitutions of these founding Member States were amended with a view specifically to ratify the European treaties. The French Constitution of 1946,³⁴ and the Italian³⁵ and German³⁶ post-War Constitutions, all included commitments to international cooperation and integration. The Constitution of the Netherlands was amended to include a transfer of powers provision in 1953, because the constitutional legislature was of the opinion that there would be frequent recourse to this type of transfer in the future.³⁷ The Belgian Constitution was the odd one out. The original treaties were ratified by Belgium without a constitutional provision allowing a transfer to international organisations. However, given the article stating that 'All powers stem from the Nation and are to be exercised in accordance with this Constitution', Belgian membership of the European Communities was considered to be unconstitutional. Given the wide political support for membership and the absence of a constitutional court, this never gave rise to legal and constitutional problems, and the situation was mended when a transfer of powers provision was introduced in 1970, twelve years into membership.³⁸

³³ See eg Bruno De Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?' in Alfred Kellerman, Jaap W de Zwaan and J Czuczai (eds), *EU Enlargement. The Constitutional Impact at EU and National Level* (TMC Asser Press, The Hague 2001) 65.

³⁴ S. 15 of the Preamble to the 1946 Constitution: 'Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace'.

³⁵ Article 11 of the Italian Constitution: 'Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends'.

³⁶ Article 24(1) of the 1949 Basic Law: '(1) The Federation may, by legislation, transfer sovereign powers ("*Hoheitsrechte*") to international institutions'.

³⁷ The Dutch provision was inserted with a view to the European Defence Community (which ultimately did not pass the vote in the French *Assemblée*). The provision, now numbered Article 92, reads: 'Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3'. See, on the history of the Dutch provision, Monica Claes and Bruno De Witte, 'Report on the Netherlands' in JHH Weiler, Anne Marie Slaughter and Alec Stone Sweet (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford 1998).

³⁸ Article 25bis (following the provision that 'All powers stem from the Nation') provides: 'The exercising of determined power can be attributed by a treaty or by a law to international public institutions'.

Out of the six founding Member States, only one, Luxembourg, did not ratify in accordance with the usual constitutional provisions on the ratification of ordinary international treaties. In Luxembourg, the parliamentary act approving the treaties and allowing their ratification were adopted by a two-thirds majority as required by Article 37(2) of the Luxembourg Constitution.³⁹ The other five Member States ratified the founding treaties by an ordinary act adopted by simple majority in parliament, under the constitutional provision requiring such a majority for the conclusion of 'normal' treaties.

Denmark, the UK and Ireland

When Denmark, Ireland and the United Kingdom joined the European Communities, the issue appeared in an entirely different light. The ECJ had in the meantime proclaimed the autonomy of the European legal order, distinguished it from 'ordinary' international treaties, introduced the concept of direct effect, and pronounced the principle of primacy on the grounds of the very nature of the Community. In other words, while doubts may still have existed in the late 1950s and early 1960s that the Communities were a new type of international organisation, and that Community law was different from classic international law, it was now clear 'what these States were getting into'. Consequently, in all three States, there was a legal constitutional debate as to whether accession was constitutionally allowed under the prevailing Constitution (Ireland), which procedure had to be followed (Denmark), and whether the prevailing rules in the country were such that the requirements of membership could be met in respect of the effectiveness of European law in the land (United Kingdom). *Ireland* was the only one to alter its Constitution before accession: membership was considered to infringe certain constitutional provisions, in particular those on Irish sovereignty, democracy and the legislative function. Accordingly, a new provision was introduced in the Constitution, by referendum,⁴⁰ allowing for Irish membership. In addition, and given the dualist traditions, an EC Act was enacted to make European law effective in the Irish legal order. In *Denmark*, the debate centred on the question as to whether section 20 of the Danish Constitution, allowing for the 'delegation' of powers to international organisa-

³⁹ Article 49bis of the Luxembourg Constitution provides that: 'The exercise of the powers reserved by the Constitution to the legislature, executive, and judiciary may be temporarily vested by treaty in institutions governed by international law'. The procedure is prescribed in Article 37(2): '[Such treaties] are sanctioned by a law voted under the conditions laid down in Article 114(5)'. The latter provision on constitutional amendment requires that 'the Chamber shall not proceed to the vote unless at least three-quarters of its members are present, and no amendment may be adopted unless it is backed by at least two-thirds of the votes'.

⁴⁰ A referendum is the constitutionally prescribed procedure for constitutional amendment.

tions, offered sufficient grounds to approve the Treaty. Under Section 20, 'Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other States for the promotion of international rules of law and co-operation.' To that end, the provision further prescribes a majority of five-sixths of the Members of Parliament. If that majority cannot be obtained, the Bill has to be submitted to the electorate in a referendum. The provision was adopted in 1953, with a view specifically to allow Denmark to participate in supra-national organisations. Nevertheless, when Denmark did decide to join, there was much debate as to whether the provision could provide a sufficient basis for a transfer of the kind effected by the Accession treaty. A private individual sought to block the parliamentary adoption of the Bill, claiming that the procedure was unconstitutional: he claimed that accession entailed not a *delegation of powers* but rather a *surrender of sovereignty*, and therefore necessitated constitutional amendment under Section 88.⁴¹ The case was declared inadmissible, and Denmark joined without constitutional amendment, but after a referendum held under Section 20 of the Constitution. Nevertheless, the question as to whether a constitutional amendment was in fact necessary would continue to linger, and would resurface when the Maastricht Treaty had to be ratified. It is still debated today, in the context of the TECE and the Reform Treaty. Finally, the *United Kingdom*, of course, is a special case, given the peculiarities of its own constitution. There, too, it was debated whether the United Kingdom could join, and whether it would be able to comply with all the requirements of membership. It was argued that membership was irreconcilable with the principle of parliamentary sovereignty: parliament cannot transfer powers to an international organisation since this would amount to restricting its own sovereignty as well as that of any future parliament - and no parliament can bind itself or its successor. Likewise, there was debate as to whether European law could be given primacy over parliamentary legislation - again, this was thought to be inconceivable on grounds of the principle of parliamentary sovereignty.⁴² Wade argued that it would be quite unreasonable to leave it to the courts to decide under

⁴¹ Article 88 provides: 'When the Parliament passes a Bill for the purposes of a new constitutional provision, and the Government wishes to proceed with the matter, writs shall be issued for the election of Members of a new Parliament. If the Bill is passed unamended by the Parliament assembling after the election, the Bill shall within six months after its final passing be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 per cent of the Electorate has voted in favour of the Bill as passed by the Parliament, and if the Bill receives the Royal Assent it shall form an integral part of the Constitution Act'.

⁴² See eg JDB Mitchell, SA Kuipers and B Gall, 'Constitutional Aspects of the Treaty and Legislation relating to British membership' (1972) CML Rev 134; HRW Wade, 'Sovereignty and the European Communities' (1972) LQR 1.

'some re-interpretation of the principle of parliamentary sovereignty' or 'by some constitutional volte-face of their own'. Nevertheless, the adopted solution, the EC Act 1972, while being probably the only option in the absence of a formally entrenched constitutional legislation, left much uncertainty as to whether or not the courts would give priority to parliamentary statutes conflicting with European law, especially if parliament were to legislate contrary to European law intentionally and explicitly. In the end, the stumbling block appeared not to be there, for Lord Bridge in his famous speech in the House of Lords *Factortame* judgment simply stated that 'If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty, it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in anyway novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy'.⁴³ This did not end the debate on the exact nature of Community law and the relationship between parliamentary sovereignty, but it did now seem that parliament had succeeded in guaranteeing that Community law would be effective in the UK legal order, even against parliament.

Greece, Portugal and Spain

The next accessions of Greece, Spain and Portugal took place on the basis of general transfer of powers provisions, in both cases following a special procedure. In *Greece*, the act approving accession was adopted with a special majority in Parliament. The Greek situation was highly peculiar, since the Constitution provided both for transfer of powers to international organisations and for limitations of sovereignty. Neverthe-

⁴³ House of Lords, *R v Secretary of State for Transport, ex p. Factortame Ltd (No 1)* [1989] UKHL 1 (18 May 1989).

less, both require different parliamentary majorities and substantive conditions. A transfer of powers can, under Article 28 (2), be approved by a three-fifths majority of the Members of Parliament,⁴⁴ while a limitation of the exercise of national sovereignty requires only a majority of its members under Article 28 (3).⁴⁵ However, paragraph 3 in addition contains explicit substantive conditions for such limitations to be constitutional, relating to the national interest, fundamental rights protection and democracy. Now, did accession to the Communities amount to a transfer of sovereign powers or a limitation of sovereignty? When parliament submitted the Bill in parliament, it argued that in its view a simple majority would suffice, but that it would consent to the application of the stricter criteria, without accepting a precedent to that effect. In practical effect, the issue became moot, since in parliament a comfortable majority was obtained. It has now become the majority opinion in Greece that both paragraphs apply simultaneously in the context of participation in the European Union, and hence that both the substantive and the strictest procedural requirements have to be complied with. *Portugal* joined without a constitutional authorisation, a lacuna that was repaired only in 1992 on the occasion of the Treaty of Maastricht. In *Spain*, an organic act was adopted, on the basis of Article 93 of the Constitution.

b. The Single European Act

Ratification of the Single European Act caused constitutional upheaval in Ireland. Mr Crotty, a private individual, challenged Ireland's participation in the Single European Act, claiming that the Constitution, as it stood, could not serve as the basis for ratification. The Supreme Court held that any amendment of the Treaties altering 'the essential scope or objectives of the Communities' would require further constitutional amendment via a referendum.⁴⁶ Since *Crotty*, every treaty amendment has been ratified through constitutional amendment, even if, in the

⁴⁴ 'Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law sanctioning the treaty or agreement'.

⁴⁵ 'Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity'.

⁴⁶ Irish Supreme Court, decision of 18 February and 9 April 1987, *Crotty v An Taoiseach* [1987] ILRM 400; A Oppenheimer, *The Relationship between European Community Law and National Law: The Cases*, Vol 1 (CUP, Cambridge 1994) 594. For an overview of the Irish constitutional position to European law until Nice, see Gerard Hogan, 'The Nice Treaty and the Irish Constitution' (2001) 7 *European Public Law* 565.

case of Nice, it could have been argued that the treaty did not alter the 'essential scope or objectives' of the Union. Nevertheless, also for Nice, a constitutional amendment was considered called for, if only because the treaties are mentioned in so many words in the Constitution. Gradually, a referendum has come to be regarded as the Irish people's right to vote on European Treaties, and a referendum seems inescapable for all future amendments.⁴⁷

It is remarkable, though, that none of the other Member States used the occasion to set the constitutional record straight. Indeed, in constitutional terms, a lot had changed since these states entered into the Communities. First, the ECJ had constitutionalised the Treaties, transforming them from international treaties into the constitutional charter of a Community based on the rule of law,⁴⁸ developing the concept of direct effect, and introducing an absolute and unconditional principle of primacy.⁴⁹ Secondly, in several Member States, the constitutional courts had developed a position vis-à-vis European law which was not consonant with the ECJ's case law, and had developed limits to the application and reach of Community law in the form of core principles of the Constitution (*Solange* and *controlimiti*). In short,⁵⁰ the German *Bundesverfassungsgericht* held that as long as the EC Treaty did not have a codified catalogue of fundamental rights, it could not claim to have unconditional primacy over the entire German Basic Law. The Court retained the power to control German implementing legislation, and indirectly EC secondary law itself, in the light of the fundamental principles of the German Constitution. The Italian *Corte costituzionale* claimed authority to review whether Community law infringed the core principles of the Italian Constitution and the inalienable rights of man included therein. Accordingly, it was clear that the claims of the ECJ were not agreed to by the guardians of the national Constitutions, and that there was a problem of congruity between the national Constitutions and the European Treaties. Third, in some Member States, like France, the national judicial debate on the issue of the relationship between national and European law had

⁴⁷ See G Hogan, 'Ratification of the European Constitution - Implications for Ireland' in A Albi and J Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer Law International, 2007) 137.

⁴⁸ Case 294/83 *Parti Écologiste Les Verts v European Parliament* [1986] ECR 1339.

⁴⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft* [1971] ECR 1125.

⁵⁰ 37 BVerfGE 271 English translation [1974] 2 CMLR 540 - *Internationale Handelsgesellschaft (Solange I)*. The *Solange* case law has been analysed in depth. For an overview of the development of the German case law, see Monica Claes, *The National Courts Mandate in the European Constitution*, (Hart Publishing, Oxford, 2006) chapter 18; Norbert Reich, 'Judge-made "Europe à la carte": Some Remarks on Recent Conflicts between European and German Constitutional Law provoked by the Banana Litigation' (1996) 7 (1) *European Journal of International Law*.

not been settled.⁵¹ Finally, in several Member States the shaky constitutional foundations of the state's participation in European integration had been objected to before the courts. The Italian, German and Danish courts had been confronted with the challenges, which they all rejected, but the discomfort of these courts was obvious in their judgments. And yet none of these Member States adjusted the constitutional scheme followed for the initial treaties.

c. The turning point: Maastricht

The Treaty of Maastricht would prove to be a turning point. Several Member States, among which most conspicuously Germany and France, amended their Constitutions and introduced Europe provisions. Spain and Portugal proceeded to constitutional amendment before ratification, in order to amend provisions in the Constitution which conflicted with the obligations contained in the Treaty. Several constitutional courts also became involved before or during the ratification procedure, in particular the French *Conseil constitutionnel*, the German *Bundesverfassungsgericht* and the Spanish *Tribunal constitucional*. In Germany, Article 23 was inserted, preceding the general provision of Article 24 which was no longer considered sufficient, and since that place in the Constitution had become vacant upon German reunification. The new Article 23 is a special Europe provision, dealing specifically with European integration. It confirms to some extent the *Solange* case law by introducing substantive conditions to German participation in the EU, and indicating the limits thereof, by reference to the *Ewigkeitsklausel* of Article 79 of the Basic Law. In addition, the provision now prescribes a special majority in the *Bundestag* and *Bundesrat* for all Treaty amendments encompassing an amendment or supplement to the Basic Law. Finally, the provision deals with the domestic implications of membership, and participation in and division of responsibilities between the German parliament and government, and between the *Bund* and the *Länder*.⁵² France also introduced a Europe provision in Articles 88-1 through 88-4 of the Constitution.⁵³ The

⁵¹ While the *Cour de cassation* had accepted the primacy case law of the ECJ, the *Conseil d'état* rejected it, and did not accept jurisdiction to review national legislation in the light of Community law. It held that it had no jurisdiction to do so under the French constitution.

⁵² In addition, Article 45 of the Basic Law was introduced, stating that 'The *Bundestag* shall appoint a Committee on European Union Affairs. It may authorize the committee to exercise the rights of the *Bundestag* under Article 23 vis-à-vis the Federal Government'.

⁵³ Art 88-1: 'The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common'; Art 88-2: 'Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to the transfer of powers necessary for the establishment of European economic and monetary union and for the determination of rules relating to the crossing of

Conseil constitutionnel had found that several provisions of the Treaty of Maastricht conflicted with specific provisions of the French Constitution and/or 'the essential conditions for the exercise of national sovereignty'. But instead of amending each provision separately, the French constitutional legislature took recourse to a Europe provision, and placed it in a separate Title, immediately after the provision on association agreements.⁵⁴ *Spain* adopted a different approach and amended the Constitution only with respect to the provisions which the *Tribunal constitucional* had declared to conflict with the Treaty, ie those on the right to stand as a candidate in municipal elections. It was a very limited amendment, and did not mention the EU specifically. The *Portuguese* amendment was more extensive, and aimed to constitutionalise Portuguese membership, as well as remove some inconsistencies and increase the powers of the Portuguese parliament in the context of EU decision-making. Finally, the *Irish* Constitution was amended in the usual manner, through referendum, and by introducing a reference to the Treaty and providing for constitutional immunity for EU law adopted under the new Treaty.

Nevertheless, other Member States, Belgium, the Netherlands, Luxembourg, Italy and Denmark, approved and ratified the Treaty of Maastricht on the basis of the old constitutional provisions, and, with the exception of Denmark, on the basis of an Act of Parliament passed by a simple majority. In Denmark, the Treaty was adopted after a referendum on the basis of the transfer of powers provision in Section 20 of the Constitution. Yet, the Act authorising ratification was later challenged before the courts, on the grounds that Section 20 could not support the Treaty. The *Højesteret* rejected the claim finally in 1996, several years after the entry into force of the Treaty of Maastricht, while conceding that constitutional issues may arise. Also, the Court looked at the Treaty and European law as interpreted by the ECJ before the Treaty of Maastricht very carefully in the light of the Danish Constitution. They passed the Danish constitutional test, but only under certain conditions and with caveats attached: the Danish courts would have to check whether fundamental

the external borders of the Member States of the European Community'; Art 88-3: 'Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither exercise the office of mayor or deputy mayor nor participate in the designation of Senate electors or in the election of senators. An institutional Act passed in identical terms by the two assemblies shall determine the manner of implementation of this article'; Art 88-4: 'The Government shall lay before the National Assembly and the Senate any proposals for Community instruments which contain provisions which are matters for statute as soon as they have been transmitted to the Council of the Communities. Whether Parliament is in session or not, resolutions may be passed under this article in the manner laid down by the rules of procedure of each assembly'.

⁵⁴ Article 88 reads: 'The Republic may conclude agreements with States that wish to associate themselves with it in order to develop their civilizations'.

rights were protected, and that the European institutions would keep within the limits of their powers. The *Højesteret* thus put its name on the list of national courts taking up the battle on final authority with the ECJ. In *the Netherlands*, there was some debate as to whether the procedure of Article 91(3) had to be followed to ratify this Treaty. That provision requires a two-thirds majority in parliament for the ratification of unconstitutional treaties. Nevertheless, the government, parliament and the majority of academia maintained that the situation of Article 91 did not arise, and the Treaty was approved on the basis of the usual ordinary statute adopted with a simple majority. In Italy, too, there was some debate, but the Treaty was approved on the basis of the old Article 11 with an ordinary Act of Parliament. In *Belgium*, the Council of State, advising on the Act of approval submitted to it, warned that the provisions on voting rights for EU citizens would conflict with the Belgian Constitution, and urged for constitutional amendment. Yet, the Prime Minister stated that in any case, should there be a conflict between the Constitution and the Treaty, the latter would prevail, and that hence there was no urgency to proceed to constitutional revision! The constitutional amendment was effected only well after ratification in 1998. This left the constitutional court in a very awkward position, when, after ratification, the constitutionality of the Act of approval was challenged on precisely these grounds. Conflict was manifest and had been pointed out, but a declaration of unconstitutionality could hardly be said to make any sense since it would not carry effects on the international field and Belgium would continue to be bound by the Treaty. Moreover, the court, given the vast support for the Treaty, would have a hard time having the decision enforced. It chose to hold the claim inadmissible.

Why, then, did the Maastricht Treaty constitute the turning point, when the Single European Act did not? First, the Maastricht Treaty constituted a quantum leap in European integration, and it was perceived to do so. This was preceded by a steep rise in legislative activity by the Community institutions under the Single European Act, and, consequently, by an increased awareness of the political institutions within the Member States, especially parliaments, of the impact of European law on the domestic scene. Secondly, there may have been an overspill from one country to another, and from one court to another. In Germany, which was first to amend its Basic Law, the amendment was instigated at the request of the *Länder* who feared erosion of their powers through further transfer to Europe. In France, the revision was required by the *Conseil constitutionnel*, which it would also request for the Treaty of Amsterdam.⁵⁵ In Germany, however, neither Amsterdam nor Nice prompted

⁵⁵ Nice was not put before the *Conseil*, while the Treaty establishing a Constitution for Europe was.

constitutional amendment. Likewise, in the other old Member States, as always, with the exception of Ireland, Amsterdam and Nice would cause no constitutional upheaval.

Sweden, Finland and Austria

For the new Member States joining after the entry into force of Maastricht, the constitutional legal issue became much more prominent, and constitutional amendment was considered necessary. When Sweden, Finland and Austria joined, the *acquis* had again changed dramatically. They were the first to join the EU rather than the EC, with the prospect of the next Intergovernmental Conference (IGC) coming up only one year into membership, concerning issues which could have repercussions on the national Constitution, including fundamental rights, citizenship, institutional reform, etc. In all three countries, the general transfer of powers provisions were considered too slim to support the massive transfer implicated in membership. In *Austria*, membership was considered to bring about a fundamental change to fundamental constitutional principles, especially democracy, separation of powers and the rule of law. Consequently, Austria proceeded to a *Gesamtänderung* of the Constitution. A new chapter was introduced in the first part of the Constitution, entitled 'On the European Union', re-arranging the division of powers and competences among Austrian authorities in the context of EU membership. In addition, a special Constitutional Act was adopted to facilitate accession. Since then, all Treaty amendments have been considered to require such a Constitutional Act. In all, Austria probably possesses the most extensive constitutional Europe provisions in the entire EU. In *Sweden*, a specific Europe provision was added to the general transfer of powers provision. The provision allows for a transfer of powers to the EC (sic), under the condition of equal protection of fundamental rights, and requiring a three-fourths majority of those present and voting in the *Riksdag*. In 2002, the constitutional provision was amended, and it now states the EU as the beneficiary of the transfer. An additional limitation is that any transfer should not relate to competences 'affecting the principles of the form of government'. The *Finnish* Constitution did not contain a transfer of powers provision, but accession was achieved by way of an exceptive enactment. Such an enactment is considered to 'make a hole in the Constitution', and to allow for indirect derogation from the Constitution, without full-fledged constitutional amendment, on the condition that such laws are approved by a two-thirds majority in parliament (Section 95 (2) of the Constitution). Finland adopted a new Constitution in 2000, but it did not adapt its constitutional stance on the EU, and membership continues to be based on the same exceptive enactment.

d. The Constitutional Treaty

In the Member States under review, constitutional amendment was considered warranted only in *France*, again upon a decision of the *Conseil constitutionnel*, and in *Portugal*. In all other Member States that had ratified the Treaty establishing a Constitution for Europe (TECE), the prevailing constitutional provisions were considered sufficient to support ratification, and the TECE was considered not to warrant further constitutional adjustment. In *Spain* and *France*, the question of the constitutionality of the Constitutional Treaty was put before the constitutional courts.⁵⁶ The French *Conseil constitutionnel* entered into some of the most fundamental constitutional questions on the nature of the Constitutional Treaty, the relationship between the Constitutional Treaty and the French Constitution, and the position of France in the EU. The *Conseil* stressed that the French Constitution recognises France's participation in the EU in Article 88-1 of the Constitution. It also pointed out that the Constitutional Treaty remains essentially just that, a Treaty, and does not as such endanger the French Constitution. It stated that the primacy clause of Article I-6 did not alter the prevailing status quo as expressed in its case law. Finally, it held that there were no contradictions between the EU Charter of Fundamental Rights and the French Constitution, albeit upon certain 'clarifications' adduced by the *Conseil* itself. Then, once all potential hurdles of a fundamental nature had been cleared, the *Conseil* analysed the substantive provisions of the Constitutional Treaty and pointed out which amendments were called for. These related to: the provisions pertaining to 'matters of Statehood' (in the Area and CFSP), the new powers conferred upon national parliaments to oppose a 'simplified revision' of the Treaty (Art IV-444) or to ensure compliance with the principle of subsidiarity. The constitutional amendment took place through an assembly of the *Assemblée* and *Sénat* in the *Congrès*, with the intention of changing the Constitution in two steps. One set of amendments (a reference to the Constitutional Treaty in Article 88-1 and the introduction of a referendum for any future accessions after Bulgaria, Romania and Croatia in Article 88-5) entered into force immediately. The other amendments - in Articles 88-4 through 88-6 - relating mostly to the powers of the French parliament, were to become effective upon the entry into force of the Constitutional Treaty.

⁵⁶ See M Claes, 'The European Constitution and the Role of National Constitutional Courts' in A Albi and J Ziller, *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer Law International, 2007) 235; Loïc Azoulay and Felix Ronkes Agerbeek, 'Conseil constitutionnel (French Constitutional Court) Decision No 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe' (2005) 42 CML Rev 871-886; C Schutte, 'Tribunal Constitucional on the European Constitution. Declaration of 13 December 2004' (2005) 1 EuConst 281.

In *Spain*, the Government asked the *Tribunal constitucional* to pronounce itself on the question (1) whether the primacy provision in the TECE was compatible with the Spanish Constitution; (2) whether there was a contradiction between the Spanish Constitution and Article II-111 and II-112 of the EU Charter; (3) whether Article 93 of the Spanish Constitution, which had served as the basis for Spanish membership thus far, was still sufficient to ratify the TECE and (4) if required, which procedure should be followed for constitutional amendment to comply with the TECE. The Constitutional Court did not find any unconstitutionality in the primacy provision, or in Articles II-111 and II-112. Article 93 was sufficient to be used as the constitutional basis and, hence, there was no need for constitutional amendment. After the positive outcome of the referendum, which was, by the way, not constitutionally mandatory or binding, ratification was approved by way of an organic act⁵⁷ on the basis of the long-standing Article 93 of the Constitution. In *Portugal*, the Constitution was amended at an early stage, in April 2004, to include a provision stating that ‘Subject to reciprocity and to respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union’s institutions, of the powers needed to construct and deepen the European Union’. In addition, Article 8 (4) was introduced with a view to ratifying the Constitutional Treaty.⁵⁸ It had been argued that without such a provision, Portugal could not ratify the Constitutional Treaty containing Article I-6 TECE. That provision was considered to be at odds with the prevailing understanding of the Constitution. In order to remove all doubts, the constitutional amendments were included.

Again, in those other ‘old’ Member States which had ratified the TECE, constitutional amendments were not made. Belgium, Italy, and Luxembourg ratified the Constitutional Treaty on the basis of the old transfer of powers provisions, without any constitutional amendment. Belgium and Italy did so by recourse to an Act of Parliament passed by a simple majority, the procedure required for the conclusion of international treaties. In Germany, a two-thirds majority was required and obtained

⁵⁷ An organic act must be passed by both Houses, and adopted with an absolute majority in the House of Representatives.

⁵⁸ ‘The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law’.

in both the *Bundestag* and *Bundesrat*,⁵⁹ while Luxembourg organised a referendum before adopting the Act, which required, in accordance with the Luxembourg Constitution, two readings and a special two-thirds majority in Parliament. Finland ratified the TECE very late, in December 2006, without recourse to a referendum. It was agreed, however, that since the TECE contains provisions which are at odds with the Finnish Constitution, both the Act of approval and the incorporation enactment adopted by the Finnish Parliament should require a two-thirds majority.

In short, the TECE, which was considered to constitute a '*refondement constitutionnel*' of the EU, the formal constitutional charter of the refurbished European Union, was not considered to call for national constitutional adjustment. There are a number of reasons for this. In several Member States, such as Italy, constitutional reform was considered overly complex, and would have caused delays in the ratification process, which were considered unwarranted. In other Member States, the political situation argued against constitutional reform. Indeed, often a large majority in parliament, two readings or even referendums are required to amend the Constitution, and these conditions would have made ratification much more cumbersome, or would even have prevented it. Yet, there were other, more legal(istic) arguments: the TECE was thought of as a Treaty after all, at least in legal terms, and hence, it could be ratified as any other international treaty. Or, potential conflicts between the national Constitution and the TECE were brushed away or simply postponed until after its entry into force.⁶⁰ Because the TECE was not a Constitution, it did not threaten the supremacy of the national Constitution, and hence it could be ratified under the old and general transfer of powers provision and without constitutional reform. This is all the more remarkable because, in the societal debate, the very fact that the document claimed to be a constitution was one of the main arguments against it, precisely as it would threaten the national Constitution and the State's sovereignty.⁶¹

This should not be taken to imply that the TECE would not have left traces in national constitutional law. Indeed, while the text of the Constitution may, in most of the old Member States not have been amended, the TECE has directly or indirectly triggered constitutional change. For instance, in several countries, the TECE contributed to increased aware-

⁵⁹ In the end, the German president suspended ratification, until the Bundesverfassungsgericht decided on a constitutional complaint brought against the Act of approval.

⁶⁰ So, for instance, the thorny issue under Belgian constitutional law and in Belgian politics of how to divide the two votes attributed to each national parliament in the early warning mechanism, among three or sometimes five competent parliaments... See on this, for instance, W Pas, 'The Belgian "National Parliament" from the Perspective of the EU Constitutional Treaty' in Ph Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europe Law Publishing, Groningen 2006) 57.

⁶¹ This, in any case, was a commonly heard argument in the Netherlands.

ness of the responsibilities of national parliaments in the EU legislative process and modernisation of the rules and conventions on working relations between parliament and government in European affairs.⁶² In some Member States, the internal procedures for setting up their early warning system have already been put in place, and the mechanisms have started to operate, including in the Netherlands.⁶³ Yet, the constitutional texts are seldom updated for new developments. This is not in and of itself a bad thing: Constitutions never represent the full picture but must be seen in context and read in the light of implementing legislation, case law, conventions and political practice. Hardly ever do the constitutional texts fully correspond to reality. Nevertheless, there are limits - depending on the type of constitution and the national constitutional traditions - as to how far these texts can be incomplete and can deviate from constitutional reality.

Also, the absence of Europe in the national Constitution, and the failure to recognise the constitutional nature of the EU and express it in the national Constitution may have adverse effects. This, of course, is very difficult to measure. Yet, it can be argued that the lack of a constitutional tradition in the Netherlands of itself made many people wary and suspicious of a European Constitution. If the EU was to have a Constitution, this could only mean that it wanted to be a State, which would transform the Netherlands into a province of the European Super State. Admittedly, it is impossible to tell whether the outcome of the referendum would have been different if the Constitution of the Netherlands had been adapted to the reality of membership, and it is highly likely that there is no direct positive link. After all, the French Constitution contains Europe provisions. Nevertheless, the fact that Europe is missing from the text of the Constitution adds to more serious defects: European affairs are largely absent from national politics, are not or are hardly reported in the media, and, until recently, European affairs and European law have remained absent from national constitutional practice and European law. This is so despite, or possibly precisely because of, the fact that the Netherlands Constitution and Netherlands law has been very open and receptive to European law, and this is true also for the State as a member of the EU and for the Dutch population.⁶⁴ As a consequence, the Dutch attitude towards the EU on one hand, and Dutch constitutional law towards EU law on the other, have until recently not been very sophisticated. Because of

⁶² For Germany, see D Thym, 'Parliamentary Control of EU Decision-making in Germany. Supportive Federal Scrutiny and Restrictive Regional Action' in O Tans, C Zoethout and J Peters (eds), *National Parliaments and European Democracy. A Bottom-up Approach to European Constitutionalism* (Europa Law Publishing, Groningen 2007) 49.

⁶³ A regularly updated overview can be found at <www.cosac.eu>.

⁶⁴ See Claes and De Witte (n 37) 177.

the principles of the primacy of international treaties and of EU law, combined with a sober approach towards the Dutch Constitution itself, the relationship between the Dutch Constitution and Dutch law and politics on one side, and the EU and European law on the other, has remained uncontested. Both were considered separate legal orders, and as a consequence Europe was considered rather matter-of-factly as extraneous to Dutch politics and to the Dutch constitutional and legal order. This may well have ricocheted now. It is a fact, for instance, that the new provision of Article I-6 of the TECE caused great upheaval in the Netherlands, even though there was nothing new about it, and, more importantly, the Dutch Constitution contains a provision awarding primacy to all international treaties. There was a debate among academics whether Article I-6 constituted a novelty, and whether it had any consequences for the Dutch Constitution. In the brochure distributed to all Dutch households before the referendum, it was presented as a novelty, and in the debate running up to the referendum, the principle was picked up as a threat to the sovereignty of the Netherlands.

It is submitted that the better option, both from a practical and a theoretical perspective, is to mention the EU in the Constitution. To omit the EU from the Constitution can even be considered a devaluation of the State's own Constitution, and an expression of carelessness in the supposed fundamental norm constituting and regulating the polity.

4. Types of provisions

There is, thus, no *common* constitutional approach to Europe among the old Member States of the EU. And obviously, as long as the requirements of membership are complied with, as set out in the treaties and explained in the case law of the ECJ, Member States have great leeway in how to approach the EU from a national constitutional perspective. Despite the fact that there are great differences in the approach to the EU, from no mention at all in the constitutional texts (the Netherlands and Spain), to fairly detailed Europe provisions (Austria, Portugal), some trends are discernable. Looking at the practice of the EU-15, it is possible to categorise constitutional provisions relating to EU membership in two types of provisions. Given that most of these provisions concern the relationship between two separate, albeit intertwined, legal orders, there are two directions in the provisions on the EU, and it is possible to speak of '*aller*' provisions and '*retour*' provisions. The first set of provisions ('*aller*') concern the transfer of powers and the passing on of power and responsibilities, which, from the national perspective, are to represent the State in the EU. The second set ('*retour*') relates to the national response to what comes out of the EU. A third set of provisions, which is still rather rare, concerns the changed relationship and balance between the national in-

stitutions and organs themselves (during the decision-making process at the EU level and during implementation), as a consequence of membership, as well as, where relevant, between the central (federal) State and the federated entities. Since these arrangements ultimately all relate to the consequences of membership, I have also categorised them under the heading '*retour*'.

a. Aller-provisions

Transfer of powers or limitation of sovereignty

Of the fourteen Constitutions under review,⁶⁵ all contain transfer of powers provisions. Out of these, seven (Belgium, Italy, the Netherlands, Spain, Greece, Denmark and Greece)⁶⁶ still base their membership of the Union on 'old fashioned' and general transfer of powers provisions, without specifying the EU. The other Member States have either adapted these provisions for the benefit of the EU, such as *Portugal* or *Sweden*, or have special Europe provisions in a separate chapter (*Germany*, *France*), and in the case of *Austria* they are complemented with a separate constitutional law. *Finland* has a unique approach, in that the Constitution itself organises a 'hole', a vacuum in the constitution, which even allows for derogations from the Constitution.

Now, why is it considered vital that the Constitution specifically allows for a transfer? The reason is that without such permission, membership is considered to be unconstitutional, for breach of the principle of sovereignty in all or several of its various appearances: State sovereignty, national sovereignty, and popular sovereignty. It is now clear that membership of the EU entails important changes in the workings of the most fundamental principles of the Constitution and its arrangements: separation of powers, democracy, rule of law, and protection of fundamental rights. Accordingly, accession in fact brings about a dramatic shift in the constitutional arrangements. Hence, it requires constitutional change, or at least a specific constitutional authorisation to enter into international treaties causing these internal changes. Consequently, many national Constitutions distinguish between 'simple' transfers of powers which do not entail constitutional amendment, and those which do, and which often require that stricter procedures are complied with, mostly similar to those that apply to constitutional amendment.

⁶⁵ Because of the absence of a written constitutional document, the UK is not included here.

⁶⁶ A declaration has been added to the Greek Constitution, stating that the general provision in Article 28 serves as the basis for Greek membership of the EU.

The procedure for additional transfers

Most Constitutions now require a special majority in parliament, or a referendum, for the approval of additional transfers of power to the EU. This is not so, however, in all of the Member States under review. In the Netherlands, Spain, Italy and Belgium, new transfers require a simple Act of Parliament, although in Belgium no less than seven parliamentary chambers must give their consent. The Spanish and Dutch referendums were not constitutionally required. Nevertheless, *politically* it may now have become difficult to avoid new referendums. Accordingly, one of the main objectives of the Netherlands government for the Reform Treaty was to remove all constitutional elements, and to present it as a simple revision, involving a few additional powers for the EU. Consequently, a new referendum would not be required. In its coalition agreement, the new government which came to power in February 2007 agreed to ask the Council of State for advice on whether a new referendum on the Reform Treaty was called for.

The *Irish* Constitution is the only one which requires a referendum for every new Treaty amendment, since every ratification requires a constitutional amendment. Most Constitutions require a special majority in parliament. Some distinguish between transfers encompassing constitutional amendment and those which do not.⁶⁷ In other Member States, the Constitution is not conclusive about transfers which affect the Constitution. The question then arises about whether such transfer of powers is constitutionally allowed for, which may in itself and constitutionally generate constitutional amendments (Belgium), or whether such transfer requires specific and explicit prior constitutional amendment (Portugal). When this is not provided for, it will often be for the courts to decide whether and how far European law, deriving from the Treaties agreed to in accordance with their constitutional requirements, can deviate from the national constitutional provisions. The question mostly arises after the entry into force of such law, and is mostly phrased in terms of primacy. This issue will be discussed in more detail in the next section.

Substantive conditions for membership

More and more Constitutions contain substantive conditions on membership, for instance the German,⁶⁸ Swedish,⁶⁹ Greek,⁷⁰ and Portu-

⁶⁷ For instance, the Constitutions of Austria, Sweden (Articles 10 (2) and 10 (5) of the Instrument of Government).

⁶⁸ Article 23 (1) of the Basic law.

⁶⁹ Article 5 of Chapter 10 of the Instrument of Government.

⁷⁰ Article 28 (3) of the Greek Constitution

guese⁷¹ Constitutions. These are often referred to as 'structural safeguard clauses', and were first developed in the case law of several constitutional courts, most famously in the case law of the *Bundesverfassungsgericht* (*Solange*). They also go under the notion of counterlimits ('*controlimiti*'). In other Member States, these conditions are not made explicit in the Constitution, but they may be presumed. The French *Conseil constitutionnel*, for instance, reviews whether international treaties, including those by which powers are transferred to the EU, comply with the '*conditions essentielles de la souveraineté nationale*'. These constitutional conditions mostly relate to respect for fundamental rights, and to basic constitutional requirements, most specifically the rule of law and democracy.

What, then, is the effect of such provisions? They cannot, from the perspective of European law, be invoked against EU law or to escape international liability for failure to comply with treaty obligations. First and foremost, they serve as instructions for those responsible at the national level for the negotiation, conclusion and ratification of the founding, accession and amendment treaties, ie the government, parliament, and possibly also the people in a referendum. They are not allowed to conclude and ratify treaties which would infringe these conditions, or affect the principles mentioned. In this sense, these conditions also contain the outer limits of membership. Secondly, the same instructions are directed to those organs of the State which participate in decision-making at the European level, once the Treaty has entered into force. The national representative in the European Council or the Council, or the delegate in a comity, remains bound by the instructions of the proper Constitution. Under this 'constitutional two hat theory', national representatives do not remove their constitutional hat when entering the European negotiating room. Even when acting as European agents, they remain bound by the national Constitution. Thirdly, these conditions will be used as standards for review by the national (constitutional) courts. Obviously, recourse to these constitutional conditions by a national court as against European law would not be in accordance with the orthodoxies of European law and the primacy thereof. Yet, the presence of these safeguards in the national Constitution may well be the price to pay for the participation of the State in European integration, and for the loyal acceptance of European law in the bulk of cases. Finally, and while constitutional provisions obviously do not apply outside the national boundaries, these conditions serve to constitutionalise the Treaties, as a caution to the European institutions in general and to the ECJ in particular. In a composite constitution, as has been described above, national constitutional principles have also to be taken into account at EU level. This is especially true for the principles which are common to the Member States.

⁷¹ Article 7 (6) of the Portuguese Constitution.

Organising the State's participation in the EU institutions

Transferring powers to the EU does not simply mean abandoning those powers. Indeed, the Member States participate in the institutional structure of the EU. The manner in which the State is represented in the European institutions influences both the EU decision-making process, and the national constitutional arrangements and balance of powers. In some Member States, but not many, constitutional provisions deal with the manner in which the State is represented at the EU level, and/or in which way the state participates in decision making at the EU level. The *Portuguese* and *Austrian* Constitutions are most elaborate in this respect. In most Member States, however, these issues are either not considered to require constitutional regulation. Finally, in federal states, provision is made, either in the Constitution or in arrangements having an equal standing, such as organic laws, for the representation of the federated entities at EU level, or the manner in which the State represents the federated entities at the EU level. There are several manners in which this can be achieved.

b. 'Retour' provisions

The Incoming Tide: The effect of EU law in the domestic legal order

The question of how European law takes effect in the domestic legal order and which rank it takes in the domestic hierarchy of norms, or how it relates to other norms applicable in the land, is an issue which is mostly not explicitly dealt with in the Constitution. In many Member States, these issues are resolved by recourse to constitutional provisions, but very often these provisions were not adopted with a view to coping with the issue of EU law specifically. Indeed, the question of the effect of European law and its place in the domestic legal order arose during the first phase of European constitutional integration. None of the founding Member States had made provision for these questions for the EC specifically, and, what is more, the issue was left open during the negotiations of the Treaties.⁷² Accordingly, when the ECJ held that, as a matter of Community law, the direct effect of certain provisions of Community law and their primacy derive from the nature of Community law itself, most national courts responded by translating ECJ case law into the language of their own constitutional system. Hence, the French courts had recourse to a new interpretation of Article 55 of the Constitution to found the French version of direct effect and primacy. In Germany (Article 24) and Italy (Article 11), direct effect and primacy of Community

⁷² See the *Memoirs* of Pierre Pescatore, 'De werkzaamheden van de "Juridische Groep" bij de onderhandelingen over de Verdragen van Rome' (1981) *Studia Diplomatica* 167.

law over ordinary legislation was based on the constitutional transfer of powers provisions.⁷³ Basing direct effect and primacy on a constitutional provision is not in itself contrary to European law. Nevertheless, these provisions are also used to grant the courts the power to introduce limits to the applicability of European law in the domestic legal order. Indeed, these provisions must be read in the context of the entire Constitution, which limits them. As a consequence, European law is only applicable insofar as it does not infringe the fundamental provisions of the national Constitution.

In the absence of constitutional primacy and transfer of powers provisions, the Belgian *Cour de cassation* followed the lead of the ECJ (and the Luxembourg *Cour de cassation*), and founded primacy and direct effect on the very nature of international treaties, which applied a fortiori to Community law.⁷⁴

Also, the relationship between the Constitution itself and European law is a matter which, ultimately, is often left for decision by the courts. Exceptions are the Dutch, Irish and - via a *renvoi* to European law - the Portuguese Constitution, which *do* provide for the constitutional immunity of European law. In other words, the Constitution itself provides that in the event of conflict, the Constitution gives way to EU law. The Irish Constitution is one of the few Constitutions of the EU-15 to expressly provide for the direct effect and primacy of European law - applying even to third pillar law - even over the Constitution. This was considered necessary in the Irish context, since the Constitution specifically declares Irish dualism on the relationship between international treaties and Irish law.

The national division of powers in EU matters

Membership of the EU and participation in EU decision-making has important consequences for the national separation of powers. Indeed, international relations and foreign policy are, in most Member States, the province of the government. The transfer of powers to the EU has the direct effect that matters which used to belong to the province of the legislature, through transfer to the EU, shift from the legislature to the government. National parliaments were traditionally called losers, or at least latecomers, in European integration,⁷⁵ losing out to their governments

⁷³ It may seem bold to derive primacy from a provision allowing for the transfer of powers to an international organisation. For an explanation of the arguments, see M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2006) 620.

⁷⁴ See the famous judgment in *Franco-suisse le Ski*, decision of 27 May 1971 [1972] CMLR 330.

⁷⁵ A Maurer and W Wessels (eds), *National Parliaments on Their Ways to Europe: Losers or Latecomers?* (Nomos, Baden Baden 2001).

and contributing to widening the democratic gap in European decision-making by failing to hold their national governments to account in fields where they used to adopt legislation. Instead, in many fields, they have let themselves be transformed into secondary legislatures, implementing European legislation, within the limits set by the European institutions (including their own governments). Democratic input in EU decision-making was supposed to run via the European Parliament. In addition, accountability should be channelled through the national governments, being held to account by their own parliaments. Thus, while the Council is accountable to no single body at the European level, the national representatives in the Council are accountable to their parliaments individually. This latter form of democratic input and control has increased over the past decade. While the powers of the European Parliament have gradually increased, its role is perceived as insufficient to supply democratic legitimacy to EU law, and national parliaments are now regarded crucial in redressing the democratic deficit, and guaranteeing accountability. In most Member States, parliamentary involvement in EU decision-making runs via scrutiny of the government under the rules and mechanisms of ministerial responsibility (which usually applies *ex post*), complemented, more and more, with *ex ante* mechanisms. The latter mechanisms are used by national parliaments to influence the government's position in negotiations at the EU level, through mandate, strict scrutiny or other types of influence. Obviously, scrutiny by national parliaments presumes that they are informed of what goes on at the EU level. In some Member States, the rules and mechanisms governing parliament's role in EU decision-making are those applying to national decision-making, without any constitutional or legislative change. Since the Treaty of Maastricht, however, several Member States have changed the constitutional provisions relating to the parliament's role, often in the Europe provision or chapter in the Constitution, and worked out in legislative provisions. Examples are Article 23 (1) and (2) of the German Basic Law,⁷⁶ Articles 88-4 of the French Constitution, Article 23e of the Austria Constitution, or Articles 161(n), 163(f) and 197(i) of the Portuguese Constitution. The involvement of national parliaments in EU matters usually runs along the very same rules and practices as those applying to national politics and law making. Research has pointed out that in many Member States, parliament's involvement is often defective, because, despite the flow of paperwork and documents, there is a lack of information and oversight. Added to this, EU decision-making hardly ever leads national parliaments to hold a minister fully accountable for their contribution to EU decision-making, and

⁷⁶ This is further elaborated in the Act on Cooperation between the Federal Government and the Bundestag in Matters Concerning the European Union, and the new Agreement on Cooperation in the Field of EU Affairs.

there is still a widespread disinterest of national MPs in European affairs. This is still considered to be overly complex, deriving from an external source, 'Brussels', which is considered to represent non transparent and unaccountable bureaucracy. In the end, the traditional mechanisms of parliamentary scrutiny built on ministerial responsibility often prove to be unconvincing mechanisms of parliamentary control, even more than for national policy and law making.

Since the Treaty of Maastricht, and especially with the Protocol on national parliaments annexed to the Treaty of Amsterdam, the role of national parliaments in European decision-making has been taken from the exclusive realm of national constitutional law, and a European constitutional dimension has been added to it. The role of national parliaments is no longer strictly a matter of national constitutional law alone, but an attempt is made to steer, organise and increase their involvement at the European level.⁷⁷ Still, the adaptation of the national parliament's role and the constitutional rules governing it, is slow. It does take place, however, even if this is not always reflected in the constitutional texts. This is a hugely important evolution, and it is a search for constitutional best practice and best constitutional design. Indeed, the participation of national parliaments serves to increase constitutionalism and democracy at the EU level as well as at the national level, both of which do not necessarily coincide. At the same time, decision-making at the EU level should not be obstructed. The process of democratisation and constitutionalisation in the EU is a process of designing a constitutional framework, taking place at both the EU level, the national level, as well as the trans-national level. The search is for improved mechanisms to achieve democracy and accountability in the EU as a polity beyond the State, and these mechanisms will not be found at one level only, European or national. The developments in the role of national parliaments and the research and conceptualisation conducted in this respect are examples of this search. National constitutional law and practice will continue to play an important role in this development.

A second issue in the shift in the separation of powers as a consequence of EU membership is the effect on the legislative powers of parliament when implementing EU legislation, mostly directives. When implementing directives, parliaments are no longer the 'sovereign' parliaments they used to be. They are bound by the limits imposed by the legislation to be implemented. In some Member States, the implementation of Community law is delegated to secondary legislatures. In *Ireland*, for example, this is done in the Constitution itself. Under that delegated

⁷⁷ Protocol No 9 on the role of national parliaments in the European Union (1997). The TECE contained two protocols on the role of national parliaments and on monitoring subsidiarity and proportionality, encompassing the so-called 'early warning mechanism'.

power, the Government can issue secondary legislation, which can even amend primary legislation if this is necessitated by membership. In the Netherlands, the issue is now much debated, and may be taken up in the next round of constitutional amendment.

Specific provisions

Finally, several Member States have made changes to specific provisions in the Constitution which were considered incompatible with the obligations of membership. The most obvious examples are voting rights for non-nationals (Spain, France, Belgium, Portugal, etc) and the introduction of the euro (Germany, France, Portugal, Greece). This leaves aside the changes which may also be required to adapt to specific pieces of secondary legislation. The Framework Decision on the European Arrest Warrant, for instance, called for constitutional amendment in those States where the extradition of nationals was constitutionally precluded (eg Germany and France).

Conclusion: Lessons to be learned?

A first conclusion is empirical and follows from the overview of constitutional provisions and constitutional law. National constitutional legislatures have not been swift to respond to the new constitutional realities. These seem to be the dialectics of progress: several of the founding Member States still operate on the basis of the old constitutional provisions, and also adapt very slowly in constitutional practice to the realities of membership, and to the shifts in constitutional balance that come with it, as is particularly the case with Belgium and the Netherlands. In part, this has to do with the fact that these countries are open to international law in general,⁷⁸ and accordingly no need was felt to adapt the Constitution. Yet, there are indications that such negligence regarding the national Constitution may ricochet. Slow adaptation is obviously in the nature of Constitutions, which are entrenched and rigid and can only be amended by way of a difficult and lengthy process, often involving special majorities, and sometimes national elections and/or a referendum. Constitutions are not meant to change easily. At the same time, the process of constitutional change has become almost a permanent process at the EU level, with IGCs and Treaty amendments following each other rapidly (Maastricht 1991; Amsterdam 1996; Nice 2000; Rome 2004). There is a tension here, and national Constitutions struggle to keep up with constitutional change at the European level.

⁷⁸ Nevertheless, contrary to what is often said, Belgium could not be characterised as monist before *Franco-suisse le Ski*. Opinions were split, and the case law of the ECJ tilted the balance in favour of monism.

Second, national constitutions are, in principle, the province of the Member States, and it is for them to decide whether and how to adapt their Constitutions. Accordingly, there is a great deal of diversity in addressing the constitutional issues raised by membership. Nevertheless, some trends are visible. First, while several old Member States remain silent on the EU (the Netherlands, Spain) or mention the EU only marginally (Italy and Belgium), there is a trend to include Europe provisions in the national constitution. In addition, there is also a trend to make specific arrangements in constitutional practice and in legislation for adaptations to membership, such as parliamentary proceedings or implementing mechanisms. This is to be welcomed, since it increases constitutionalism at the national level, and indirectly also at the European level. It is not clear whether there are European requirements of 'good constitutionalism', and what these would be. At the very least, there are minimum conditions requiring the Member States to comply with the values of Article 6 EU and others mentioned in the Treaties. While these do not require national Constitutions to be adapted (as long as the result is achieved), in most Member States this would appear to be an element of compliance. Also, it is at least a matter of elegance to bring harmony between the national Constitution and the international obligations entered into.

Third, the academic debate in national constitutional law and the EU still focuses on two main issues: the transfer of power provisions and the procedure to be followed at times of European constitutional change, ie Treaty amendment, and secondly, the case law of national courts to EU law and its relation with the national Constitution. The position on how governments are to be held to account, how parliaments should influence EU decision-making, and how decentralised bodies are affected by EU legislation is still being developed. There is need for more research on these questions. In this respect, the national dimension of the constitutionalisation of Europe can be said to be lagging behind. Indeed the search for constitutionalism in the European composite constitutional order and for the best rules, procedures and mechanisms to achieve it, must be conducted at the European and the national level. National Constitutions must not be neglected in the process of the constitutionalisation of Europe.