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The new Constitution of the European Union, its influence on the national legal systems, and the relations of the national courts, in particular the national constitutional courts, with the European Court of Justice in Luxembourg

I. Preliminary remarks

1. The development of the European constitution is going through a period of profound change. In the past, and to this day, the state of the Treaties as it had been achieved at a particular point in time (for instance, in the Treaties of Maastricht, Amsterdam, and Nice, and in their original version, the Treaties of Rome) represented, and represents, the Constitution of the European Communities. The Constitution for Europe", the final version of which has been in existence since 18 June 2004, and which was signed with all due ceremony on 29 October 2004 by the Heads of State or Government of the 25 Member States of the European Union and by

representatives of the four countries that want to join the EU in the next few years (candidate States for accession: Bulgaria, Croatia, Romania, Turkey) is supposed to consolidate and replace the Treaties that have been existing to date, to the extent that they are still valid. On closer inspection, however, one gets the impression that the European Union is also experiencing an extension on the substantive level, which means that the Constitution for Europe" does not merely consolidate existing regulations.

2. With the enlargement of the European Union on 1 May 2004 by ten Member States through which it has now become a union of 25 states, the process of integration in Europe has attained a new spatial dimension. This is why the undertaking of creating a Constitution for Europe while at the same time considerably increasing the number of Member States of this united Europe is not unproblematic. The enlargement and closer integration of such a community can hinder the states, and the people, from growing closer. In this context, it must be mentioned that the draft Constitution for Europe, as it has been presented now, avoids defining the final state that the Community strives to achieve; the same applies to other declarations by the contracting States. Just as always, these documents merely mention an advancing integration" or an irreversible dynamic process". In this

context, the question inevitably arises whether these catchwords can provide sufficient grounds for justifying that the importance of the national constitutions is relativised and that the contracting States gradually dispose of their statehood by conferring more and more powers on the Community.

3. The Community, which has been enlarged to comprise 25 Member States, is home to more than 400 million people now. Taking this fact into consideration, the European Union’s claim to itself must be that not only Europe, but the entire world receives positive impulses for world peace from it. The indispensable and necessary precondition for this is a solid, transparent legal system that is acceptable without reservation to all Member States. The legal system of the European Union can only live up to its peacemaking function, and to the impulses that emanate from this function worldwide, if in the European Union itself, the Member States and first and foremost the people not only accept it but internalise it and live in accordance with it on conviction.

To achieve that Community law is accepted is first of all the competence of the Court of Justice of the European Communities, that is, of the European Court of Justice, in Luxembourg. The European Court of Justice is the sole institution that is competent to safeguard

the Community Treaties, and, in the future, the European Constitution. One must, however, realise that as far as the acceptance of Community law in the contracting States is concerned, things are not looking too good. The number of infringement proceedings for late or inadequate implementation of Community law is increasing. Against this background, it is rather surprising that more and more powers are conferred on the Community while a large number of contracting States is not at all willing to correctly implement Community law.

4. The raising of awareness with the aim of achieving a European polity turns out to be difficult. There is a variety of reasons for this. One important reason seems to be that with the exception of the newly founded European Greens, there are no political parties that are present in all European Member States. Not the representatives of political parties that are present across the Community are represented in the Parliament of the European Union but the representatives of the national political parties. Under these conditions, it is safe to assume that the political parties will not be able to articulate a comprehensive political will of the people that covers the Community as a whole.

Already the first referendum on the draft Constitution in Spain, with its low voter turnout (below 50% of those entitled to vote), has shown

that people show but little interest in the development of the European Community.

II. The relation of European Community's legal system with the contracting States' legal systems

1. As regards the subject matters that it deals with, the legal system of the European Community is defined by the contracting States. Unlike the legal system of a state in the conventional sense, the European Community's legal system was not defined from the outset, when the Community was founded. Instead, since the foundation of the European Economic Community and of another two European Communities by the Treaties of Paris[1] and the Treaties of Rome in 1951 and 1957[2], which together formed the nucleus of today's European Union, the Community's legal system has been further developed. As its name shows, the original Community was an economic community. Accordingly, the competence of the European Economic Community, as well as that of the other two Communities, was strictly limited as regards its subject matters. It was only in the course of decades that the original Community of six Member States

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1 Treaty establishing the European Coal and Steel Community of 18 April 1951

2 Treaty establishing the European Economic Community of 25 March 1957 – now: European Community; and Treaty establishing the European Atomic Energy Community of 25 March 1957; the contracting States of both treaties were Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

was enlarged to, eventually, 15 Member States (before the latest major enlargement on 1 May 2004), and gradually, its competences were extended as well. The transfer of competences to the Community level has always followed the so-called principle of conferral, i.e. the principle that the powers of the Community are limited to those specifically conferred on it[3]. This means that there is no blanket clause for the establishment of Community competences.

However, the scope of Community competences has meanwhile experienced a considerable increase. Since 1 January 2002, there is, for instance, a European currency, which has, however, not been

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[3] This has until now been expressed in Article 7 section 1 subsection 2 of the Treaty establishing the European Community: Each institution shall act within the limits of the powers conferred upon it by this Treaty" and is now provided in Article I-11 of the draft Treaty establishing a Constitution for Europe: (1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, the Union shall act within the limits of the competences conferred to it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States. (3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol. (4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

adopted by all Member States of the Community, for, example, not by Great Britain and Sweden.

Apart from the Community Treaties, and apart from the Community that has been founded on this basis, there is also the European Union under the Treaty establishing the European Union[4]. This is a construction under public international law which will be in force until the entry into force of the Constitution for Europe, and which is mainly concerned with judicial cooperation. Judicial cooperation facilitates handling relations of mutual legal assistance between the contracting States. It covers criminal law as well as civil law. Although, for instance, no uniform criminal law has been established in the European Union to date, there is, nevertheless, the so-called European arrest warrant. Under the European arrest warrant, any citizen of a contracting State that has acceded to the agreement establishing such arrest warrant can be arrested even in his or her home state on account of an arrest warrant that is issued by a court of another contracting State. In this case, the home state is obliged to extradite its citizen without any further detailed examination. The extradition proceedings under public international law, with the Courts performing a thorough examination of a large number of preconditions

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[4] Treaty of Maastricht of 7 February 1992

that had been common practice to date will not take place any longer. Moreover, the Federal Republic of Germany has made the participation in the European arrest warrant possible only by restricting the ban on extradition of German citizens under Article 16 subsection 2 sentence 2 of the Basic Law (*Grundgesetz – GG*)[5]. Before, the German constitution banned the extradition of German citizens.

2. One must not imagine the interaction between the legal system of the European Community and the legal systems of the contracting States as that of two separate legal systems. Instead, when a competence is conferred on the Community level, the law that is made on this level replaces the national legal system for the specific area concerned. This means that in the areas in which competences have been conferred on the Community, the legal system of the Community has the significance of a national legal system for the specific area. In this case, there is no longer a contrary national law.

3. The particularities of the relations between community law and the law of the contracting States become clearest if one compares them with the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms and the

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[5] Article 16 subsection 2 of the Basic Law reads as follows: No German may be extradited to a foreign country. The law can provide otherwise for extraditions to a Member State of the European Union or to an international court of justice as long as the rule of law is upheld.”

national legal systems. The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) is a union of states that has been created in accordance with the principles of the law of international agreements, which has come into being to collectively guarantee certain rights specified in the Universal Declaration of Human Rights, and which has also established a court for this purpose. This Court is the European Court of Human Rights in Strasbourg, France. Under Article 46 subsection 1 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Judicial referral proceedings are not provided for. This is logical because the convention applies on the national level, but merely strengthens the legal position of the individual on the national level without replacing national law. Apart from this, the Convention has a different rank in the different contracting States. In some contracting States, it ranks equally with the constitution, in others, its rank is that of a law below the constitution; the latter is the case, for instance, in the Federal Republic of Germany. The Convention’s exclusive concern is always to protect human rights and fundamental freedoms in the specific individual case, but not to bind a national legislature. Especially in Germany, this would not be possible exactly because the Convention

ranks below the constitution and the legislature is only bound by the constitution, not by its own laws. For states such as the Federal Republic of Germany, obligations also arise from the principle of commitment to international law, which is enshrined in the constitution, and from the legal system that is derived from it[6].

4. The difference between Community Treaties and the Community's legal system on the one hand and the Convention and the legal system of its Contracting Parties on the other hand makes it clear that it would always have been necessary to regulate the hierarchy of statutes between the legal system of the Community and the national legal systems in the Community Treaties. This, however, has not been done to date, and it is done only now in Article I-6 of the draft Constitution in such a way that the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States. This means of course that all Community law, irrespective of its rank, has primacy over the entire national legal system of the contracting States. This is a conflict-of-laws rule that is usual in federative states. Article 31 of the constitution of the Federal Republic of Germany provides that Federal

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[6] On the scope of the binding effect of judgments of the European Court of Human rights, see the Görgülü case; on this: European Court of Human Rights, Third Section, Judgment of 26 February 2004 - Application no. 74969/01 (*Neue Juristische Wochenschrift* – NJW 2004, pp. 3397 ff.) and Federal Constitutional Court, Judgment of 14 October 2004 - 2 BvR 1481/04 (NJW 2004, pp. 3407 ff.)

law takes precedence over *Land* (state) law”. For the national hierarchy of statutes in the Federal Republic of Germany, this means that also an ordinance of the Federation, which ranks lowest in the hierarchy of statutes, takes precedence over the entire law of a *Land*, that is, of one of the constituent states of the Federal Republic of Germany, including its state constitution.

This conflict-of-laws rule, which is highly important for the creation of a common legal system of subjects of international law, has been developed by the Court of Justice of the European Communities in Luxembourg. On the one hand, the Court’s action was logical because the conflict-of-laws issue had to be settled. Otherwise, legal certainty and reliability of the Community’s legal system could not have been guaranteed. On the other hand, one must realise that the fact that the gap was filled in such a way by a Community institution in favour of the Community’s legal system should never have been tolerated – for rule-of-law reasons and also under the law of international agreements.

This results from the following: The conferral of a competence on the Community level by the contracting States does not necessarily express a willingness to be bound in such a way that one is prepared to forgo the guarantees of one’s own national constitution in favour of the Community law that will be created then. For decades, this issue

was especially pressing because no human rights and fundamental rights had been developed on the Community level. The Charter of Fundamental Rights of the European Union, which will now be integrated into the Constitution, has only recently been proclaimed[7]. However, a state such as the Federal Republic of Germany has from the outset been banned from conferring own competences on a supranational level and then evading its commitment to the fundamental rights, taking as a basis for this the jurisprudence of the European Court of Justice in Luxembourg, which states that the entire Community law takes precedence over national law, also over the fundamental rights guaranteed therein. Under national constitutional law, this is an outright violation of Article 1 subsection 3 of the Basic Law[8]. Allow me to illustrate this reflection by an example taken from the national level of the Federal Republic of Germany. In the Federal Republic of Germany, the state is banned from evading its commitment to the fundamental rights, for instance by creating organisational forms under private law. Under private law, the fundamental rights are not directly applicable. In Germany, the opinion

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[7] Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (Official Journal of the European Communities of 18 December 2000, 2000/C 364/01)

[8] Article 1 subsection 3 of the Basic Law reads as follows: The following fundamental rights are binding on legislature, executive and judiciary as directly valid law."

is expressed in this context that the state is not allowed to take refuge in private law, and the perspective that is taken in this respect is always that of substantive law. What is decisive is not the form that is chosen, but the substantive content of a measure.

5. The question of the rank of Community law as against the law of the contracting States is connected with another problem, the pressing nature of which is seldom fully realised. It is the broader question of what quality the union of states will have attained upon the entry into force of the Constitution. On account of the earlier versions of the Treaty, however, it is possible that the union of states has already attained a quality that corresponds to the one that will be achieved upon the Constitution’s entry into force.

The question is whether a European federative state with its own state power has come into being, with the contracting States, as it were, being reduced to constituent states of such a federative state. Admittedly, it is regularly denied that the stage of a European federative state has already been attained; such solemn declarations are, however, not likely to relativise the legal situation that has been created under the Treaty. In the final part of my presentation, I will therefore give you a rough outline of the contents of the Constitution

for Europe” so that you can form your own impression as regards the elements of statehood that exist.

Even if one denies the existence of a federative state, one can at any rate not rationalise away the fact that with the scope of integration which has been attained, at all events a partially federative state has come into being.

III. The relations of the European Court of Justice in Luxembourg with the courts of the contracting States, in particular with the Federal Constitutional Court of the Federal Republic of Germany

1. Relations of the European Court of Justice with the nonconstitutional courts

On account of the relations of the Community’s legal system with the legal systems of the contracting States which I have just described, especially with their legal systems being replaced in the areas of competence that have been conferred on the Community, it is unproblematic that the courts of each contracting State apply like national law the primary Community law as well as the national law that has been created, for instance, on account of Community

directives. The courts can only rule on legal disputes on the national level in the areas in which an original competence of the national legislature no longer exists if they base their rulings on Community law. Also the public authorities of the contracting States must execute such Community law, and like the courts, they therefore ultimately act like Community institutions. Thus, each contracting State provides the basis of the centralised power that is located at the Community level. This is the same model that can be found in a federative state with the characteristics of the Federal Republic of Germany. Pursuant to the Federal Republic of Germany's constitution, the focus of law enforcement and of jurisprudence lies with the *Länder* (the states). The Federation may only establish its own courts and public authorities where this is set out in detail, and hence permitted, in the constitution of the Federal Republic of Germany.

What is important, and this is a highly appropriate regulation that has been part of the Community Treaties from the very beginning (initially Article 177, then Article 234 and now Article III-369 of the draft Constitution), is that the European Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Constitution.[9]. Such obligation to submit questions to the European

[9] Article III-369 of the draft Constitution reads as follows:
The Court of Justice of the European Union shall have jurisdiction to give

Court of Justice for a preliminary ruling is indispensable for reasons of legal certainty. It cannot be left to the discretion of the courts of the contracting States how they interpret the Community treaties. If this were the case, such a union of states would call itself into question from the very beginning. No contracting party, for instance in international trade, would venture on such unsafe grounds.

2. Relations of the European Court of Justice with the constitutional courts of the Member States, in particular with the Federal Constitutional Court of the Federal Republic of Germany

As far as the interpretation of the Community Treaties, and subsequently that of the Constitution of Europe, is concerned, it is quite possible that rivalries and conflicts arise between the European Court of Justice and the constitutional court of a contracting State. Such a situation will come into being if a dispute arises about whether

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preliminary rulings concerning:
a) the interpretation of the Constitution;
b) the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where such a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If any such question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with a minimum of delay.

a competence has been conferred on the Community at all and if so, to what extent. In this context, the Federal Constitutional Court has created the legal concept of a legal instrument of European institutions and organs that transgresses the limits of the sovereign rights conferred on them" (the so-called *ausbrechender Rechtsakt*) to secure for itself the competence to pass a final ruling on such an issue. Even if the Federal Constitutional Court's Maastricht Decision, which has been published in the official collection of decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE), volume 89, page 155, is cited again and again as a reference for this legal concept, it is, indeed, considerably older. It can be found, apparently for the first time, in the "Solange I" decision of 29 May 1974 (2 BvL 52/71, BVerfGE 37, 271 (279-280)). It is taken up, and further developed beyond European Community law, in BVerfGE 58, 1 (30-31) – the EUROCONTROL case –. The concept is strongly emphasised once again in the Solange II decision from the year 1986 (BVerfGE 73, 339 (375-376) and brought to a close in BVerfGE 75, 223 (242)).

One cannot ignore that under the law of international agreements, the legal concept of the transgressing legal instrument will inevitably meet with reservations because on the one hand, it affects the other

contracting parties' authority just as much as it affects legal certainty. On the other hand, under the overall structure of the Treaty, which lays down that the contracting States will indeed continue to be the Masters of the Treaties" and that it is not yet intended to establish a unitary European federative state with a state power above all contracting States, which would also involve jurisdiction to rule on its own jurisdiction, the European Court of Justice in Luxembourg inevitably cannot be the Community's constitutional court in the conventional sense. Its position is merely that of a court of appeal concerning primary Community law set out in the Treaties and secondary Community law. Issues, however, that concern for instance the conferral and the scope of a Community competence or the withdrawal from the Treaty, its partial termination or the winding up after a Member State's withdrawal from the Treaty, require a court having power to decide on jurisdictional problems between courts. Such a court would also make the fall-back competence of each national constitutional court obsolete.

3. The submission of questions of interpretation to the European Court of Justice

a) On the national German level, problems connected with the submission of questions, which I have dealt with before, can take different shapes. A court can, for instance, be tempted to evade the obligation to submit questions to the European Court of Justice by making a referral to the Federal Constitutional Court (Article 100 subsection 1 of the Basic Law[10]). The Federal Constitutional Court has always resisted such intentions in a very clear manner, which is a good thing. In the year 1992 already, it declared judicial referrals to the Federal Constitutional Court inadmissible where it is certain as regards the statute whose constitutional review is applied for that it may not be applied on account of contrary Community law. In such case, the submitting court's decision does not depend on the validity of the statute (BVerfGE 85, 191). Also in its order concerning the common organisation of the market in bananas, the Federal Constitutional Court strengthened once again the position of Community law and in

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[10] Article 100 subsection 1 of the Basic Law reads as follows:
Where a court considers that a statute on whose validity the court's decision depends is unconstitutional, the proceedings have to be stayed, and a decision has to be obtained from the state court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This also applies where this Basic Law is held to be violated by *Land* law or where a *Land* statute is held to be incompatible with a federal statute.

particular the position of the European Court of Justice (BVerfGE 102, 147). The decision states that constitutional complaints and judicial referrals which assert that fundamental rights guaranteed in the Basic Law have been infringed by secondary European Community Law are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has declined below the standard of fundamental rights required after the Solange II" decision (BVerfGE 73, 339 (378-381)). I would like to mention only in passing that since the passing of this decision, no judicial referrals or constitutional complaints on this area of dispute have been received by the Federal Constitutional Court.

b) In connection with this subject, one can also ask oneself whether national constitutional courts can be obliged to invoke the jurisdiction of the European Court of Justice for a preliminary ruling so that they can bring a legal dispute to a close at the national level. As concerns this delicate question, I would first of all like to revert to the following minimalist position: It depends on the constitutional situation in the respective Member State, that is, it depends on the competences and the standard of review of the national constitutional court. I can very well imagine that with a corresponding wording of the Treaty under the

law of international agreements, the Federal Constitutional Court could be obliged in the course of such proceedings to apply for a preliminary ruling of a supranational Treaty Court.

The Federal Constitutional Court will discuss these problems next week in the framework of an oral hearing about the European arrest warrant. During my next visit, I will be able to give you detailed information on this.

Irrespectively of whether one takes as a basis the regulation contained in Article 234 of the Treaty of Amsterdam, which, in the context that we are dealing with here, refers to the interpretation of this Treaty", or the version of Article III-369 of the draft Constitution, which deals with the interpretation of the Constitution", the constitutional law issue is always the same. In accordance with the letter of the law, the Federal Constitutional Court of the Federal Republic of Germany at any rate can never be obliged to make a submission to the European Court of Justice. This follows from the fact that Article 234 of the Treaty of Amsterdam, as well as Article III-369 of the draft Constitution, whose paragraphs 1, 2 and 3 are identical with Article 234 of the Treaty of Amsterdam as regards their content, presuppose that the courts referred to, which apply Community law, are courts below the constitutional level.

The Federal Constitutional Court of the Federal Republic of Germany, at any rate, is not to apply Community law, and it is not to rule on the scope of application or the validity of Community law. Moreover, the regulatory context of paragraphs 2 and 3 (paragraph 4 of the draft Constitution can be left out of consideration here because it concerns deprivation of liberty in view of the introduction of the European arrest warrant) conveys the prerequisite that they deal with instances within the national sequence of courts. For this reason alone, there is no connection, in the Federal Republic of Germany, between these versions of the Treaty and the Federal Constitutional Court because the Federal Constitutional Court is not a part of a national sequence of courts. It is a separate instance for the review of violations of the constitution. Pursuant to German law, the constitutional complaint is an extraordinary legal remedy and not another remedy in a sequence of courts. Moreover, the Federal Constitutional Court of the Federal Republic of Germany is a constitutional body of equal rank with the Federal President, the Federal Government, the *Bundestag* and the *Bundesrat*. Its standard of review is exclusively the constitution of the Federal Republic of Germany. This is why only in extremely rare, exceptional cases the

Federal Constitutional Court could be obliged to make a submission to the European Court of Justice.

Such a rare exception could occur where a so-called interpretation in conformity with the Basic Law" of nonconstitutional national law conflicts with Community law. This, however, shows very clearly that, if only with a view of the fact that there are 25 contracting States now in which the position of the constitutional courts in the law relating to the organisation of the state is by no means or identical the regulation that exists in this respect at Community level is insufficient. The obligation to make a submission must be drafted more precisely as concerns its contents and its prerequisites.

The Federal Constitutional Court has, however, already been confronted with an extraordinary combination of circumstances in which the question, which in view of the circumstances was at any rate not altogether remote, arose whether the Federal Constitutional Court could be obliged to invoke the jurisdiction of the European Court of Justice for a preliminary ruling. Not long ago, the Federal Constitutional Court had to rule on the applications to ban the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands – NPD*) (2 BvB 1, 2, 3/01 – concluded by decision BVerfGE 107, 339). In these proceedings, the respondent party, in this

case the NPD, which was affected by the application for a party ban, lodged an application to stay the proceedings and to make a submission to the European Court of Justice. For reasons of time, I cannot go into detail here. Just let me tell you that the party ban that had been applied for had a Community law dimension on account of the participation of the party in the elections to the European Parliament and due to the party's substantiated intention to take part in elections to the European Parliament also in the future. The Federal Constitutional Court's Second Senate, under whose competence the party ban proceedings fell, deemed the party's request unfounded and denied the application. It emphasised in particular that there was no need to clarify questions of the interpretation of Community law laid down in the Treaties. The Senate held that pursuant to applicable law under the Treaties, the Community had no competence to regulate the law on political parties. The relevant law under the Treaties was restricted to the regulation provided in Article 191 of the Treaty establishing the European Community[11].

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[11] Article 191 of the Treaty establishing the European Community reads as follows:
Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.

c) The combinations of circumstances that the Federal Constitutional Court designated as transgressing legal instruments in the past can no longer be regarded as such, at any rate under the regulation in Article III-369 of the draft Constitution. In the past, it may have been tolerable that such a fall-back competence to examine Community law outside an international agreement was secretly maintained on the national level. Because the Federal Constitutional Court's Maastricht Treaty decision (published in BVerfGE 89, 155) has been known since 1993, this provision would have had to be drafted differently if one did not intend to confer on the European Court of Justice a comprehensive competence, including the sole power of definition as regards the acts of conferral of competences to the Community. The disagreement and the imperfection as concerns the drafting of the Treaty were known from the very beginning and were manifest throughout the Community. If in this case, the contracting parties and especially the Federal Republic of Germany, whose task it would have been in the first place, did not see to it that a corresponding regulation was incorporated into the Treaty, one must, to be fair and in accordance with the generally accepted principles of international law, accord to the European Court of Justice a comprehensive competence and power of definition as to which

competences have been conferred on the Community level, and to what extent this has been done.

IV. Overview of the draft Constitution for Europe

Against the background described before, the draft Constitution and its ratification in the states of the European Community must live with a contradiction. What is missing, and I have mentioned this before, is a definition of the ultimate objective of the dynamic process". At the same time, the question whether the stage of a European federative state has not been achieved already, with the consequence that the Member States, contrary to their constant declarations, are no longer the Masters of the Treaties at all, is avoided. This would boil down to the Member States having lost most of their sovereignty.

It would take more than a whole day for me to present and explain to you in detail only the essential parts of this draft Treaty. Only this may already show you that in qualitative terms, the undertaking reaches much further than it may seem if one were to judge only from what those responsible advocate in public speeches. I therefore leave it to you to form your own opinion about the quality that the union of

states will have from the stage in which the draft Treaty will have been ratified by all contracting States.

1. In its introduction, the draft Treaty assumes that the citizens and the states of Europe want to build a common future. The Union of states shall coordinate the policies by which the Member States aim to achieve these objectives and shall exercise on a community basis the competences that the Member States confer on it (Article I-1). The competences that have been conferred on it are, however, highly diverse and leave very little on the national level.

The following fields of policy have been conferred on the Union:

- Non-discrimination (Article I-4 paragraph 2; Articles III-123 and 124) and the citizenship of the Union (Article I-8; Articles III-135 et seq.)
- The internal market, with the following areas:
  - Establishment and functioning of the internal market (Article I-3 paragraph 2; Articles III-130 et seq.)
  - Free movement of persons and services (Article I-4 paragraph 1; Article I-8 paragraph 2), which includes
    - Freedom of movement for workers (Articles III-133 et seq.)

- Freedom of establishment (Article I-4 paragraph 1; Article III-137 et seq.)
- Freedom to provide services (Article I-4 paragraph 1; Articles III-144 et seq.)

- The internal market also includes:
  - Free movement of goods (Article I-4 paragraph 1; Article III-1), which comprises:
    - The customs union, customs cooperation, and the prohibition on quantitative restrictions on imports and exports (Article I-13 paragraph 1 letter a; Articles III-141 et seq.)

- Other elements of the internal market are:
  - The movement of capital and payments (Article I-4 paragraph 1; Articles III-156 et seq.)
  - The definition of the rules on competition that are required for the functioning of the internal market (Article I-13 paragraph 1 letter b; Articles III-161 et seq.)
  - Fiscal provisions (Articles III-170 and 171)

- The approximation of the provisions laid down by law, regulation or administrative action in Member States (Articles III-172 et seq.).

Other main fields of activity that have been assigned to the Union are:

- Economic and monetary policy (Articles III-177 et seq.), which includes *inter alia*:
  - The establishment of a European Central Bank (Articles III-185 et seq.)
  - The objective of a single currency

- The promotion of employment (Articles III-203 et seq.)
- Social policy (Articles III-209 et seq.)
- The strengthening of the Union's economic, social and territorial cohesion (Articles III-220 et seq.)
- The definition of a common agricultural and fisheries policy (Articles III-225 et seq.)
- The policy on the environment (Articles III-233 and 234)
- Consumer protection (Article III-235)
- A common transport policy (Articles III-236 et seq.)

- The establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures (Articles III-246 and 247)
- Research, technological development and space (Articles III-248 et seq.)
- The policy on energy (Article III-256)

- Another important policy area of the Union is the creation of an area of freedom, security and justice (Article I-42; Articles III-257 et seq.); this includes, *inter alia*, a common policy on asylum and immigration, judicial cooperation in civil and criminal matters (Articles III-269 et seq.) and police cooperation (Articles III-275 et seq.).

- Apart from this, there are areas in which the Union may take coordinating, complementary or supporting action (Articles III-278 et seq.), directed for instance towards improving public health, towards ensuring that the conditions necessary for the competitiveness of the Union’s industry exist, towards promoting culture and tourism, education and vocational training, youth, sport,

civil protection and administrative cooperation.

- Finally, the European Union pursues a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions (Article I-40; Articles III-294 et seq.). The common security and defence policy is an integral part of the common foreign and security policy. It provides the Union with an operational capacity drawing on civil and military assets (Article I-41).

Many of the competences that have been mentioned had already been conferred on the European Community and are now supposed to be conferred on the European Union. But this will of course not be the end of the matter. Because qualitatively, the Constitution of the European Union is, apart from consolidating the existing treaties, an important step towards the European Union's own statehood, that is, towards a European federative state.

On the one hand, areas that have deliberately not been integrated into the supranational order of competences of the European Communities to date are supposed to be conferred on the European Union, which will be vested with its own legal personality upon the Constitution's entry into force. This concerns, for instance, the common foreign and security policy. In this context, the office of a Union Minister for Foreign Affairs (see above all Article I-28; Article III-296) and a European Defence Agency (see Article I-41 paragraph 3; Article III-311) will be created for the first time in European cooperation. Other examples are the cooperation in the fields of justice and home affairs, and the citizenship of the Union.

On the other hand, the competences of the Union will, in a certain manner, be detached from the contracting States, and these competences will thus attain a greater independence. This becomes evident with the subsidiarity clause in Article I-11 of the draft Constitution, which contradicts the principle of conferral, and the creation of a flexibility clause in Article I-18, pursuant to which the Union can procure for itself competences that are not provided in the Constitution if they prove necessary to attain objectives set out in the Constitution.

The expansion of the Union’s competences on the substantive level will be underpinned on the institutional level:

Like the European Community before, the European Union will have its own institutions on the European level. These institutions are the European Parliament, the European Council, the Council of Ministers, the European Commission and the Court of Justice of the European Union.

- The European Parliament shall, jointly with the Council (of Ministers), exercise legislative and budgetary functions. The European Parliament shall exercise functions of political control and consultation as laid down in the Constitution. It shall also elect the President of the Commission. The European shall be composed of representatives of the Union’s citizens. They shall not exceed 750 in number (Article I-20).
- The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions. The European council shall consist of the Heads of State or Government of the Member States, together with its President

and the President of the Commission. The Union Minister for Foreign Affairs shall take part in its work (Article I-21).

- The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once (Article I-22).
- The Council of Ministers shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Constitution. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote (Article I-23).
- The Commission shall promote the general interest of the Union and takes appropriate initiatives to that end. It shall ensure the application of the Constitution, and measures of the institutions adopted pursuant to the Constitution. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union’s

external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements (Article I-26).

- Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members (Article I-27, paragraph 1).
- The President, the Union Minister for Foreign Affairs and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament (Article I-27, paragraph 2).
- The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the Union Minister for Foreign Affairs. The Union Minister for Foreign Affairs shall conduct the Union's common foreign and security policy. He or she shall contribute by his or her proposals to the development of this policy, which he or she shall carry out as mandated by the Council. The same shall apply to the common security and defence policy (Article I-28).

- The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Constitution the law is observed. Member States shall provide remedies sufficient to ensure legal protection in the fields covered by Union law (Article I-29).
- The European Central Bank, together with the national central banks of those Member States that have introduced the currency of the Union, the euro, shall conduct the monetary policy of the Union. The primary objective of the European System of Central Banks shall be to maintain price stability and to support the general economic policy in the Union (Article I-30).
- The European Court of Auditors shall examine the accounts of all Union revenue and expenditure and shall ensure good financial management (Article I-31).

- The European Union shall act through European laws, European framework laws, European regulations, European decisions, European recommendations and European opinions (Article I-33).

In summary, the following can be stated:

- The Union shall conduct a common foreign and security policy.
- The Union shall constitute an area of freedom, security and justice.
- The draft Constitution contains detailed provisions concerning the democratic life of the Union (Articles I-45 et seq.) and
- it regulates the Union's finances (Articles I-53 et seq.).
- The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation (Article I-57).
- The Union shall be open to all European States which respect its fundamental and are committed to promoting them together (Article I-58). On the other hand, any member State may decide to withdraw from the Union in accordance with its own constitutional requirements (Article I-60).

- A large part of the Constitution (Part II) is the Charter of Fundamental Rights of the Union. The fundamental rights go far beyond, for instance, the catalogue of fundamental rights that is contained in the constitution of the Federal Republic of Germany.

Such a comprehensive catalogue of fundamental rights is not unproblematic because of the difficulties posed by its implementation (see for instance Article II-75: right to engage in work).

- The Union and the Member States shall work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change. Within the framework of social policy, the Union has as its objectives the promotion of employment and improved living and working conditions; it shall contribute to a lastingly high level of employment by encouraging cooperation between Member States and by supporting, and if necessary, complementing their action in this field. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

Other objectives which the Constitution of the European Union strives to attain include:

- a better distribution of competences between the European Union and its Member States;

- the creation of simplified instruments for European Union action;
- the creation of measures with a view to achieving more democracy, transparency and efficiency in the European Union; greater participation by the national Parliaments in the legitimisation of the European project, simplification of decision-making processes; greater transparency and better comprehensibility of the functioning of the European instruments.
- The improvement of the structure, and the strengthening of the role of all three instruments of the European Union.

2. In the framework of my presentation, these indications may be sufficient. I think it has become clear that with the Treaty establishing a Constitution for Europe, the union of the Member States has reached an intensity and quality that requires a very careful and considerate coordination with the existing structures of international organisations, on a world-wide scale, for example, with that of the World Trade Organisation, with that of the International Monetary Funds and the World Bank. Apart from this, it is important with a view to foreign and security policy to ensure coordination with NATO and with the Organization for Security and Cooperation in Europe. All in all, the undertaking as such is quite laudable, but one must not ignore its

imponderabilities. Only with considerable difficulties will it be possible to achieve many of the European Union’s objectives that have been formulated. This applies above all to the level of employment. In the Federal Republic of Germany alone, with its population of approximately 83 million, there are much more than five million unemployed persons. So far, the European Union has not succeeded in eliminating, or resolving, a contradiction that exists particularly in this field: It was precisely the constant enlargement of the Union that has led to a destabilisation of the level of employment within the European Union. There are no indications of there being a possibility for this contradiction to be resolved in a consistent and conclusive manner on the level of the European Union. This alone, however, must give rise to doubts because at present, we are even less able to see in which way this European Constitution is supposed to create a joint Europe of currently 25 Member States, with more candidates just around the corner. Even now, what is laid down in the text of the Treaty is breaking apart, because not all the Member States are taking part in the so-called euro zone, that is, in the Community currency. Moreover, not all the Member States are members of the so-called Schengen Agreement, which guarantees an unhindered and unchecked crossing of borders. If, therefore, at the very stage of the

ratification procedure, reference is made to a multi-speed Europe or to a core Europe" with another Europe grouped around it, one must ask oneself in all seriousness what ultimate background such a political undertaking has on a world-wide scale.