

# **One or many constitutions? The constitutional future of the European Union in the 2000s from a legal perspective**

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## **1. The rise and rise of constitutionalism**

Everyone, it would seem, is a constitutionalist today. One shift in approach that does seem to have come out of the whole sorry mess of the last six years or so of failed endeavour is that most if not all observers of EU law and politics now seem to accept that the language of constitutionalism and constitutionalisation is appropriate and useful for describing the legal structures under which the EU operates. There does now seem to be a widespread consensus that the EU already has – as lawyers have been arguing for decades – a constitutional framework, albeit one which has a composite and limited character, as befits an entity which inhabits an ambiguous and hard-to-define space between the ‘conventional’ (nation) state and the ‘conventional’ international organisation. It is against the background of an increasingly permissive consensus about using the general language of constitutionalism to describe the European Union, therefore, that debates have been conducted about the fate of the Constitutional Treaty, and about the extent to which it could be described as truly ‘constitutional’ in character (bearing in mind that Part III of the Constitutional Treaty contained much material dealing with questions which are matters of ‘ordinary’ law in most national legal and constitutional orders). A distinction continues, however, to be drawn between small ‘c’ and large ‘C’ constitutionalism. It is the proposition that the Union should be accorded a single documentary Constitution (big ‘C’) which clearly generates the greatest controversy within many national debates. In contrast, it seems easier, at least for national political elites, to acknowledge that the existing treaties already have a limited constitutional (small ‘c’) character.

It is possible to characterise the Constitutional Treaty, for all its faults, as achieving a rather delicate (and potentially quite effective) compromise amongst the

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countervailing interests of the different Member States which solemnly signed it in October 2004. It is said to be ‘a good try’. That was not enough, as we now know, to convince all those with a stake in the ratification process to give their assent. But having tried hard once, and failed, it becomes much harder, for all concerned to achieve the same satisfactory compromise the second time around. It is easy to see how the failure of political leadership both in the EU institutions and in the Member States during the ratification process has now let the ‘referendum genie’ out of the bottle, and it will be hard if not impossible to put it back. It will not be easy for those who seek to push for the further development of the European Union to go back to the elite-led process of treaty reform and incremental change which dominated the years 1985-2001 (during which time no less than four amending treaties were signed<sup>2</sup>). Moreover political elites dominated not only the issue of treaty reform but also key decisions about enlargement (2004 and 2007), all of which have been taken behind closed doors in the European Council, regardless of their supreme importance for citizens in all the Member States and accession countries. It is not only the changed tenor of many discussions about the future of the Constitutional Treaty, but also the way in which the current accession negotiations involving Croatia and Turkey are being handled with an eye to wider public opinion, which highlight how difficult it now is to revert to the *ex ante* situation of elite decision-making behind closed doors. For it cannot now be assumed that eventually such decisions will receive consent and approbation from national electorates, whether directly via referendums or indirectly via general elections, or indeed passively as a result of the passage of time.

## **2. Legal and political constitutionalism in the EU**

In this paper, I want to outline the importance of incorporating legal as well as political questions into the debate about the EU’s constitutional future. As an essential supplement to the political arguments outlined above, this paper develops a separate legal-constitutionalist argument about the future of EU constitutionalism. Two questions will be asked:

- what are the principal contemporary features of the European Union’s ‘old’ constitution, and what are the pressures affecting further development of this constitution (small ‘c’) at the present time; and

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<sup>2</sup> Single European Act 1985, Treaty of Maastricht 1992, Treaty of Amsterdam 1997, Treaty of Nice 2001.

- is it possible to revert to ‘old’ incremental constitutionalism, given the failure of the ‘new’ constitutionalist enterprise which aimed to give the European Union a single documentary constitutional text, which many interpreted (rightly or wrongly) as a constitution with a big ‘C’?

Here is not the place to rehearse in full the arguments regarding the EU’s constitutional past, present and future. Suffice it to say that there exists a symbiotic relationship between the two key reference points for constitution-building in the EU – informal and incremental constitution-building (small ‘c’), and formal and documentary constitution-building (big ‘C’).<sup>3</sup>

On the one hand, we have what the EU’s gradually evolving informal constitutional framework which has a composite structure, and is based on the existing treaties, as interpreted and applied by the Court of Justice and other political and legal actors. This composite constitutional structure enshrines both the rules according to which the EU operates, and the underlying political and ideological values and structures which infuse these rules.<sup>4</sup> Speaking schematically, one could summarise the central tenets of this constitutional structure as the following:

- The principle of the supremacy of EU law in relation to national law;
- The possibility for individuals to rely upon provisions of EU law before the national courts, the obligation on national courts to interpret national law in the light of EU law to achieve a conforming understanding of national law, and the possibility for and, in some circumstances, the obligation on national courts to refer questions of EU law to the Court of Justice for resolution;
- The authoritative role of the Court of Justice in giving rulings on the meaning and validity of provisions of EU law, and the emphasis which it has placed in its case law on rule of law issues and the role of fundamental rights in the EU legal order;
- The principle of limited powers, whereby the EU institutions are limited by reference to the objectives and competences defined in the EU Treaties;

<sup>3</sup> For more detail see J. Shaw, ‘Europe’s Constitutional Future’ [2005] *Public Law* 132-151.

<sup>4</sup> N. Walker, “The White Paper in Constitutional Context”, in *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, (eds.) C. Joerges, Y. Mény and J.H.H. Weiler, Jean Monnet Papers 6/01 (2001), ([www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)).

- The principle of implied powers, which means that provided the EU institutions have been given a particular objective under the EU Treaties, they will also have the power to pursue that same objective.

This framework has evolved gradually and incrementally, since the early 1960s, when the Court of Justice handed down a number of seminal judgments, in particular *Costa v. ENEL* and *Van Gend en Loos*,<sup>5</sup> right through to the present time. Successive treaty amendments have also formed an important part of that evolving framework.

However, since 2000, the EU and its Member States have been engaged – thus far unsuccessfully – in the qualitatively different attempt to develop the EU’s constitutional framework, this time through the drawing up and adoption of a more encompassing and unitary documentary constitution. This is the second reference point for EU constitution-building.

This phase of constitutional development began with the Declaration on the Future of the Union appended to the Treaty of Nice, which recognised the unsatisfactory nature of the Intergovernmental Conference which concluded in December 2000 and articulated some of the key challenges facing an enlarging EU in the future.

Eventually, after the work of the Convention on the Future of the Union and a further IGC had been concluded in 2004, that section of the process concluded with the signature by the Member States of the Treaty establishing a Constitution for the European Union in October 2004.<sup>6</sup> However, signature merely signalled the beginning of the ratification process which was always expected to be challenging. It now seems extremely unlikely that the Constitutional Treaty will ever come into force in its current form, given that it was rejected in popular referendums in France and the Netherlands in mid-2005. With the ratification process stalled indefinitely, the Constitutional Treaty itself seems to exist in limbo.

There is, however, a strong relationship between these two points of reference for constitution-building. The Constitutional Treaty itself was very much a hybrid document. It drew very heavily upon the resources offered by the existing informal constitutional framework, while at the time innovating in a number of important areas,

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<sup>5</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 6/64 *Costa v. ENEL* [1964] ECR 585.

<sup>6</sup> OJ 2004 C310/1.

especially in relation to institutional design.<sup>7</sup> Had the Constitutional Treaty come into force as originally scheduled, on 1 November 2006, it would have been impossible to understand the future arrangements without frequent and detailed reference back to what had gone before, because of the symbiotic relationship which would exist between the ‘new’ and the ‘old’ EU constitutionalism.<sup>8</sup>

With the possibility of a documentary constitutional framework for the European Union now blocked for the foreseeable future, other avenues of constitutional development are inevitably going to be pursued by the Member States and the EU institutions. Of course, there are some observers who suggest that the entire constitution-building enterprise has been an unnecessary distraction for what remains, in essence, a limited exercise in international cooperation between sovereign states guaranteed already by a sufficiently diverse and effective range of legitimation mechanisms. On that view, all reform endeavours which wrongly seek to focus on impossible strategies of democratisation should cease immediately.<sup>9</sup> The constitutional promoters can, however, probably muster the larger number of voices speaking in favour of further developments on the constitutional and/or the treaty reform front<sup>10</sup> than can the naysayers of further reform. Some of that reforming energy has been diverted into consideration of the possibility of concluding a type of ‘Constitutional-Treaty-lite’, or a ‘Nice Treaty *bis*’, which might garner sufficient support at the national level from government, but which would not necessarily need ratification via referendum because of its limited character.<sup>11</sup> The focus in many of these proposals, although they have differed in areas of detail, has primarily been upon minimal institutional reform to smooth the ongoing effects of both the 2004 and

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<sup>7</sup> See generally J-C. Pirijs, *The Constitution for Europe: A Legal Analysis*, (Cambridge: Cambridge University Press, 2006).

<sup>8</sup> J. Shaw, ‘Legal and Political Sources of the Treaty establishing a Constitution for Europe’, (2004) 55 *Northern Ireland Legal Quarterly* 214-241.

<sup>9</sup> E.g. A. Moravcsik, ‘What Can We Learn from the Collapse of the European Constitutional Project?’ (2006) 47 *Politische Vierteljahresschrift* 219-241.

<sup>10</sup> For a regularly updated review of the issues and the literature see ‘The European Union Constitution’, a site for researchers, journalists and citizens:  
<http://www.unizar.es/euroconstitucion/Home.htm>.

<sup>11</sup> See the proposal for a mini-treaty by French Presidential candidate of the right Nicolas Sarkozy: N. Sarkozy, Speech to Friends of Europe, 8 September 2006, Brussels; ‘France’s Sarkozy urges EU reform’, BBC News Website, 8 September 2006, <http://news.bbc.co.uk/1/hi/world/europe/5327488.stm>; N. Sarkozy, ‘EU reform: what we need to do’, *Europe’s World*, Autumn 2006, 56.

2007 enlargements,<sup>12</sup> and possible future enlargements.<sup>13</sup> A limited number of observers call for the resurrection of the Constitutional Treaty itself,<sup>14</sup> albeit sometimes in a revised form, in order to focus more directly on the issues where the EU is expected to ‘deliver’, such as climate change and social issues.<sup>15</sup> The European Commission has tended to avoid too many shrill pronouncements directly on the Constitutional Treaty, for fear of alienating opinion in the national capitals, but the general view of most individual Commissioners who have actually expressed a view<sup>16</sup> is supportive of the Constitutional Treaty, and concerned about the implications of potentially ‘watering it down’, in order to achieve acceptance.

The approach taken by the German government in advance of its 2007 Presidency has been a little difficult to read. On the one hand, the German position appears to reject the Sarkozy mini-Treaty option, and instead supports the integrity of the Constitutional Treaty.<sup>17</sup> On the other hand, the German government seems to accept the inevitability of holding a short ‘technical’ intergovernmental conference (ruling out a repeat Convention) to agree a new looking constitution during the latter half of 2007. However, many think this is an over-optimistic timetable given the schedule of likely political changes at national level during the first part of 2007, including the French presidential election and the anticipation that Tony Blair will step down as UK Prime Minister.<sup>18</sup>

Perhaps the better view about the political future of European constitutionalism at this stage is to avoid too much short term prognosis about the Constitutional Treaty and to

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<sup>12</sup> E.g J. Emmanouilidis and Almut Metz, *Renewing the European Answer*, Bertelsmann Stiftung, CAP, EU-Reform Papers, 2006/2.

<sup>13</sup> ‘MEPs outline list of further reforms for EU enlargement’, EU Observer, 14 November 2006, <http://euobserver.com/15/22850>.

<sup>14</sup> ‘European Socialists set to relaunch Constitution’, *EurActiv*, 24 October 2006, <http://www.euractiv.com/en/constitution/european-socialists-set-relaunch-constitution/article-159040>.

<sup>15</sup> A. Duff, *Plan B: How to Rescue the European Constitution*, Notre Europe, Studies and Research, No. 52, 2006.

<sup>16</sup> See, for example, ‘Commissioners reject Sarkozy mini treaty plan’, EUObserver, 22 November 2006; M. Wallström, ‘The consequences of the lack of a European Constitution’, Presentation to the European Parliament Constitutional Affairs Committee, 22 November 2006.

<sup>17</sup> ‘Germany plans to revive EU Treaty,’ 11 October 2006, <http://news.bbc.co.uk/1/hi/world/europe/6041680.stm>; ‘Merkel set for lonely battle to resurrect full EU constitution’, *The Times*, 4 December 2006.

<sup>18</sup> ‘EU constitution talks likely to sideline Brussels’, EU Observer, 6 December 2006, <http://euobserver.com/9/23039>.

adopt instead a longer term perspective.<sup>19</sup> Such a perspective would focus, with an open mind, on the question: ‘what sort of constitution for what sort of European Union?’ Some commentators have pointed out that, over a period of years or even decades, the most enduring and effective ideas put forward in documents such as the earlier Tindemans report of 1976 or the Draft Treaty of European Union elaborated by the first directly elected Parliament after 1979, have tended to be incorporated into the European Union’s legal and constitutional structure in the end.<sup>20</sup> The Constitutional Treaty may eventually fall into this category, acting as a laboratory of ideas over a period of time. To put it another way, if what is in the Constitutional Treaty would ‘work’ in an EU context, then it will most likely be picked up again in future reforms, probably piecemeal rather than all at once, over a period of years.

However, if the longer term view is adopted (and the longer term view can co-exist comfortably with the adoption of minimal institutional reforms in the shorter term), the ideas of ‘old’ incremental constitutionalism will inevitably remain at the forefront of discussion. The longer term view would reject a fixed end-point for the development of the European Union, but would continue to embrace the ambiguous and hard to define nature of the EU as it exists at present, with its mixture of federal, supranational and intergovernmental features, both legally and politically. It is impossible to know the finality of integration, *pace* the wishes of former German Foreign Minister Joschka Fischer.<sup>21</sup> In the meantime, what we do know is that it is not only in the political sphere that there are sometimes uncomfortable relations between the European Union and its Member States, but also in the legal sphere.

### **3. EU Constitutionalism: a pluralist challenge**

Some legal commentators have sought to apply doctrines of legal pluralism familiar from legal anthropology and legal theory in order to provide a conceptually satisfactory frame for the sometimes uncomfortable juxtaposition of national law and what is still most accurately termed ‘European Community’ law (i.e. the law stemming from the Treaty of Rome establishing the European (Economic)

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<sup>19</sup> See also Shaw, above n.3 at 150-151.

<sup>20</sup> P. de Schoutheete, ‘Scenarios for escaping the constitutional impasse’, *Europe’s World*, Summer 2006, 74.

<sup>21</sup> J. Fischer, *From Confederation to Federation - Thoughts on the finality of European integration*, Speech given at the Humboldt University Berlin, 12 May 2000. Available from <http://www.rewi.hu-berlin.de/WHI/english/>.

Community). Legal pluralism, as a theoretical model, focuses on the plurality of sources (and types) of law, recognising sources beyond the two paradigms of national law and international law. Consequently, when applied to the European Union, legal pluralism goes beyond the stark conceptions of monism and dualism which have traditionally been used in order to figure out the relationships between EC law and national law.<sup>22</sup> EC law, and indeed the European Union legal order as a whole, escape the binary classification of national and international law, when one takes into account the complexity of the relationship between EC law and national law as conceived by the Court of Justice and national courts. In addition, EC law puts in place unique relationships between national courts *inter se* based on principles such as mutual recognition, which require judicial cooperation across boundaries. These relationships go well beyond that which normally would pertain between two sovereign states. Legal pluralism emphasises the interdependence and intertwined nature of the different legal orders, and does not insist – as national courts often do – upon either the fundamentally separate nature of each of the legal orders, or the notion that one system must necessarily, in the final analysis, encompass the other. As a variant of legal pluralism, theories such as multilevel constitutionalism explicitly incorporate both the EU and the national constitutional orders into a multi-stranded and complex unity.<sup>23</sup>

While national judges have generally eschewed the explicit adoption of the theories which have been expounded by academic commentators, a review of the application of EC law in the national courts shows that the majority of national courts, including national constitutional courts, have pragmatically avoided engaging in too many conflicts with the strictures of the doctrines which the Court of Justice has advanced about, for example, the supremacy of Community law. Thus national judges have preferred to use tools of interpretation, sometimes implicitly ceding ground to EC law, in preference to fostering outright clashes.<sup>24</sup> A minority of national courts have ceded

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<sup>22</sup> For examples see N. Walker, 'European Constitutionalism and European Integration', [1996] *Public Law* 266, N. MacCormick, *Questioning Sovereignty*, (Oxford: Oxford University Press, 1999); M. La Torre, 'Legal Pluralism as Evolutionary Achievement of Community Law', (1999) 12 *Ratio Juris* 182-195; C. Richmond, 'Preserving the identity crisis: autonomy, system and sovereignty in European law', (1997) 16 *Law and Philosophy* 377-420.

<sup>23</sup> E.g. I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 703-750.

<sup>24</sup> See J. Shaw, *Law of the European Union*, Basingstoke, Palgrave, 2000, 3<sup>rd</sup> edition, 430-432 and 476-480.

authority to the Court of Justice in a rather explicit way, e.g. in Belgium. In the UK, the subtle drafting of the European Communities Act 1972, combined with some creative and quite euro-friendly interpretation on the part of most of the higher judges, has meant that there is generally little overt conflict between UK law and EC law, despite what one might expect as a result of the doctrine of parliamentary sovereignty. Even in Germany, Italy and Denmark, where there has been explicit articulation at the level of higher courts, and especially constitutional courts, of the strict requirements of national sovereignty and the supremacy of national constitutional rules, in practice there have been relatively few concrete challenges to the effects of EC law.

What has sometimes been an uneasy settlement between different legal authorities of the Member States and the EU, which tend to see themselves as the guardians of their respective legal orders, has persisted for a remarkably long time. However, since what appears to be the failure of the Constitutional Treaty, do we now find ourselves in a different situation? Can it be said, against the backdrop of such a long period of pragmatic acceptance, that there has now been an *ex post facto* delegitimation of the Court of Justice's constitutionalisation of the original founding treaties, and of its constitutionalising case law such as *Costa v. ENEL* and *Van Gend en Loos*? The question must be asked whether this could be said to be one of the effects of the French and Dutch referendum votes. After all, two of the changes proposed by the Constitutional Treaty which were rejected by the French and Dutch voters did concern the sedimentation of this form of 'old' constitutionalism for the EU, notably Article I-6 of the Constitutional Treaty on the question of supremacy (which came under discussion in the Netherlands during the referendum campaign) and Article I-9 on the incorporation of the Charter of Fundamental Rights as a legally binding source of law.

Even if we cannot attribute a direct causality to the French and Dutch referendum votes, could at least a more diffuse challenge to the underlying legitimation of EU law be found in the additional challenges faced by the EU legal order as it faces up to simultaneous processes of widening and deepening? Widening – that is enlargement – sees the challenge of incorporating another twelve legal orders within the multilevel constitutional order of the Union since 2004. This cannot happen overnight, or without challenges at the domestic level. The issue of (recently regained) national sovereignty (in both practical and legal terms) is a live issue in most if not all of the

twelve new Member States. In many cases, those same states have been endowed, since the early 1990s, with rather activist constitutional courts. Deepening of European integration has occurred, in recent years, most notably in the area of justice and home affairs. This is an area where a substantial amount of EU policy-making still occurs under the heading of the so-called third pillar, where both the procedures for adopting new legal instruments, and in some respects those instruments themselves, are of a hybrid nature, where they are in more respects akin to international law instruments than those of the supranational European Community, or first pillar. On the other hand, the area of justice and home affairs law, which raises many questions about immigration and asylum policy, criminal law, criminal procedure, and civil liberties at the national level, is one which is seen as central to notions of national sovereignty. Moreover, the national constitutional frameworks of the Member States, which establish systems of administrative law and criminal procedural law, are the backdrop against which the precise scope of legal rights and duties are frequently contested between the judiciary, the legislature and the executive. If this delicate balance were to be badly upset as a result of EU level intervention in this area, it is possible to see some serious challenges in the future to the authority of EU instruments adopted in this field and to the scope and exercise of EU competences.

The remainder of this paper will look at some examples where the EU legal order either is, or may in the near future be, under challenge as a consequence of either widening or deepening, or both simultaneously.

#### **4. The challenge of enlargement**

The legal consequences of enlargement include the empowering of national courts in relation to national legislatures and executives, as national courts of the new Member States become part of the legal order of the EU. Questions are bound to arise about the proper scope of judicial activism and restraint in that context.<sup>25</sup> The challenge of enlargement also means that courts, especially national constitutional courts, have to decide how to mediate the impact of EU law upon the national constitutional system.

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<sup>25</sup> Z. Kuhn, 'The Application of European Law in the New Member States: Several (Early) Predictions', (2005) 6 *German Law Journal* 563-582.

This means that the national courts of the new Member States must revisit some dilemmas which have long faced those of the existing Member States.

In 2005, the Polish Constitutional Court concluded that there was nothing unconstitutional for Poland in its accession to the EU (as the EU stands at the moment). It took the opportunity, however, to highlight some future risks for the application of EU law in Poland, by emphasising the absolute supremacy of Polish law over EU law, from the perspective of Polish constitutional integrity.<sup>26</sup> The trenchant nature of the Polish court's conclusions has had at least one commentator calling for ongoing 'constitutional modesty' on the part of the European Court of Justice and European Union law.<sup>27</sup> On the one hand, the Polish court articulated, not for the first time, the pragmatic constitutional principle of sympathetic disposition towards the process of European integration and cooperation between states, which should lead wherever possible to the avoidance of explicit conflicts. However, it cautioned that this principle has limits, such as that the interpretation placed upon a national constitutional norm must not contradict the wording of national constitutional law, and must not create an irreconcilable meaning. It also acknowledged that there may be irreconcilable inconsistencies between constitutional norms (which constitute the supreme law of Poland) and a Community norm. It held that:

‘Such a collision may in no event be resolved by assuming the supremacy of the Community norm over a constitutional norm. Nor may it lead to a situation whereby the constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation.’

In such a case, only a constitutional amendment would be able to remove the conflict. The court also called for the application of subsidiarity and a duty of mutual loyalty between the Union institutions and the Member States, such as would require the ECJ to be sympathetically disposed towards the national legal systems.

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<sup>26</sup> Judgment of 11 May 2005, K18/04, summary of judgment in English available at [http://www.trybunal.gov.pl/eng/summaries/wstep\\_gb.htm](http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm). For commentary see K. Kowalik-Bańczyk, 'Shall we polish it up? The Polish Constitutional Tribunal and the idea of supremacy of EU law', (2005) 6 *German Law Journal* 1355-1366.

<sup>27</sup> D. Chalmers, D., 'Constitutional Modesty (editorial)', (2005) 30 *European Law Review* 459.

Some of the language of the Polish Constitutional Court recalls the rather dramatic language of the German Constitutional Court in its judgment on the ratification of the Treaty of Maastricht.<sup>28</sup> Indeed, it would be wrong to suggest that the problem of fitting together national law and EU law is a problem unique to the courts of the new Member States. It is notable that when determining that there were no difficulties in the Constitutional Treaty's supremacy clause (Article I-6) for ratification by France and Spain, the respective constitutional courts of those two states viewed the issue primarily from a 'national' rather than an EU perspective.<sup>29</sup> For example, while recognising that the supremacy clause merely reflected a principle of European Community law which already existed, the French court none the less confirmed a national-centric view of the relationship of the EU legal order and the French legal order by holding that the French constitution stands outside the EU legal order and is thus not bound by EU law.<sup>30</sup> The Constitutional Treaty was treated as an international treaty, a measure which does not engage for France an enhanced level of integration which might mandate a constitutional amendment. However, in practice, as with the Polish case, the *Conseil constitutionnel* found interpretative means in order to avoid a direct conflict.

What is striking about the Polish case is that the challenge is posed in starker language than have been most challenges from national courts thus far. It will be interesting to see at what point the Polish court might in the future tip towards asserting the logical consequences of its stark language of sovereignty through a rejection of the applicability of EU law in a particular case within Poland. In the accession treaty case, in practice, it avoids stark conflict by adopting pragmatic interpretations of the interrelationship between EU law and national law in order to ensure a concordant accommodation of the two legal orders. This exemplifies, as does the French case on the Constitutional Treaty, the uncomfortable co-existence of the

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<sup>28</sup> *Brunner v. The European Union Treaty* [1994] 1 CMLR 57 (unofficial English translation).

<sup>29</sup> Judgment of the *Conseil constitutionnel* no. 2004/505 DC of 19 November 2004, available at <http://www.conseil-constitutionnel.fr/decision/2004/2004505/2004505dc.pdf>; judgment of the *Tribunal Constitucional* no. DTC 1/2004 of 13 December 2004, available at <http://www.tribunalconstitucional.es/Stc2004/DTC2004-001.htm>.

<sup>30</sup> For a review of the judgments see T. Papadimitriou, 'Constitution européenne et constitutions nationales: l'habile convergence des juges constitutionnels français et espagnol', *Cahiers du Conseil constitutionnel*, no. 18, November 2004 – March 2005, available at <http://www.conseil-constitutionnel.fr/cahiers/>.

two putatively sovereign orders of the Member States and the European Union. As John Bell has noted (*à propos* the *Conseil constitutionnel*):

‘The constitutional order of the EU and that of the Member State can adjust happily to each other, as long as the ultimate question of who is sovereign is never put to the test.’<sup>31</sup>

With enlargement, the task of avoiding the mutually assured destruction of the national and EU legal orders through incommensurable claims upon sovereignty, a threat which Joseph Weiler highlighted some years ago,<sup>32</sup> becomes ever more challenging.

## 5. The challenge of deepening

As regards the issue of deepening, it is the particular challenges posed by the European Union’s ever more frequent and far reaching incursions into the field of justice and home affairs, and in particular national criminal law and criminal procedure, which demand attention above all else. In the *Pupino* case,<sup>33</sup> the Court of Justice addressed for the first time the question of the effects within national legal orders of measures adopted by the Council of Ministers under the powers conferred upon it under Title VI of the Treaty on European Union, dealing with police and judicial cooperation in criminal matters (the so-called ‘third pillar’).<sup>34</sup> In essence, the Court of Justice was dealing with the question of the extent to which the doctrines of the EU’s ‘old constitutionalism’, developed within the framework of the ‘first pillar’, or the EC Treaty, could be relevant in relation to the effects of third pillar measures, specifically in that case a Framework Decision on the Standing of Victims in Criminal Proceedings.<sup>35</sup> According to Article 34(2)(b) TEU, framework decisions are ‘binding on the Member States as to the result to be achieved, but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.’ They thus share the same characteristics in terms of legal effects as directives, at least so far as these are expressed in Article 249 EC. However, when the Member States decided

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<sup>31</sup> J.S. Bell, ‘French Constitutional Council and European Law’, (2005) 54 *International and Comparative Law Quarterly* 735-744 at 744.

<sup>32</sup> J.H.H. Weiler, ‘The Reformation of European Constitutionalism’, (1998) 35 *Journal of Common Market Studies* 97-131 at 125.

<sup>33</sup> Case C-105/03 *Pupino* [2005] ECR. I-5285.

<sup>34</sup> Space precludes the coverage of two other cases which examine the interactions between the first and the third pillars: Case C-160/03 *Spain v. Eurojust* [2005] ECR I-2077 and Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

<sup>35</sup> Framework Decision 2001/220, OJ 2001 L82/1.

to create a new type of legal instrument which they saw as suitable for achieving the goals of Title VI of the Treaty on European Union, they explicitly excluded one of the key effects which Court of Justice case law has ascribed to appropriate provisions of directives, which are sufficiently precise and unconditional to be enforced by national judges, namely ‘direct effect.’<sup>36</sup> That is, provisions of framework decisions cannot be relied upon by individuals before national courts as giving rise to rights which must be enforced in their favour.

However, the provisions of Article 34(2)(b) TEU did not deter the Court of Justice from extending a number of principles of ‘old’ EU constitutionalism. It began with the principle of loyal cooperation contained in Article 10 EC. The Court concluded (rejecting an argument made by the UK and Italian governments) that:

‘It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions.’<sup>37</sup>

This conclusion, once combined with the binding character of the framework decision under Article 34, helped the Court to conclude that there was a general obligation on national courts to interpret national law so far as is possible in conformity with relevant provisions of EU law. This is a similar obligation to that which exists as a general principle under the law pertaining to the EC Treaty, an obligation which is derived, like the general principle of the loyal cooperation of the Member States, from Article 10 EC.<sup>38</sup> The Court indicated that it made no difference that its jurisdiction under Title VI of the Treaty on European differs from that under the EC Treaty. It was likewise no obstacle to this conclusion that there exists in the TEU no equivalent to Article 10 EC; such a principle is implicit, as the Court noted, in view of ensuring the effectiveness or *effet utile* of Title VI. Thus having read a version of Article 10 into the Title VI of the Treaty of European Union, the Court was easily able to conclude

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<sup>36</sup> Case 41/74 *Van Duyn v. Home Office* [1974] ECR 137.

<sup>37</sup> Para. 42 of the judgment.

<sup>38</sup> Case 14/83 *Von Colson* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135.

that the consequential obligations upon national courts also pertained, including the duty of sympathetic interpretation, or indirect effect as it is sometimes termed. The Court then concluded that Articles 2, 3 and 8(4) of the Framework Decision on the Victims of Crime must be interpreted as enabling the national court to authorise young children, who claimed that they had been victims of maltreatment which was not of a sexual nature, to give their testimony in accordance with arrangements guaranteeing them an appropriate level of protection, for instance outside and prior to the public trial. This was despite the fact that under Italian law, as it stood, such arrangements applied only for the benefit of those who claimed to be victims of maltreatment of a sexual nature.

While the Court's reasoning has been subjected to some sharp criticisms,<sup>39</sup> generally the judgment has been welcomed as bridging the 'constitutional divide'<sup>40</sup> between the third pillar and the first pillar and extending greater judicial protection into the area of the third pillar (since the situation is highly unsatisfactory under the Treaties as they stand).<sup>41</sup> In some ways, the Court's judgment anticipated the 'de-pillarisation' which the Constitutional Treaty proposed to introduce into the European Union system, with the same legal instruments and legislative procedure being applicable across the board, including – with few exceptions – in the area of justice and home affairs. Much has been made of the timing of the judgment, which was handed down in July 2005, just after the infamous 'no votes' in the French and Dutch referendums. It is probably rather artificial to highlight that the judgment came literally within weeks of the referendums. All judgments are finalised some time before they are actually made publicly available, because of the constraints of the translation services in the Court of Justice, so the referendums themselves probably came too late to affect in any way the content of the judgment. However, more generally, the period during which the case was considered by the Court cuts across the time-span when it was becoming increasingly obvious that there were bound to be severe ratification difficulties because of the various referendums likely to be held. If it had not been the French or the Dutch, it would most likely have been the referendums held in Ireland, the UK, or Denmark. It would be difficult to suggest that the judges as individuals could have

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<sup>39</sup> E.g. M. Fletcher, 'Extending "indirect effect" to the third pillar: the significance of *Pupino*', (2005) 30 *European Law Review* 862-877.

<sup>40</sup> Fletcher, above n.39 at 862.

<sup>41</sup> M. Dougan, 'Legal Developments', (2006) 44 *JCMS Annual Review* 119-35, at 129.

been impervious to the gathering dark clouds affecting the referendum process from the beginning of 2005 onwards. As Fletcher puts it:

‘As the EU faces yet another political crisis following the failure of the Constitutional Treaty, the European Court of Justice has boldly stepped in to flex its transformative constitutional muscles once again.’<sup>42</sup>

At this early stage it remains uncertain how the national courts will react to such an additional demand to make provision for the effective application not just of EC law in its narrow sense, but now also of EU law in a wider (and traditionally more intergovernmental) sense? Moreover, it is not clear whether the conclusions of the Court of Justice should be regarded as being binding not only on the courts of a state such as Italy, which has provided for references to be made by national courts to the Court of Justice under Article 35 TEU, but also on those of a state such as the UK, which has not so provided. Thus UK courts are unable to consult the Court of Justice on the meaning and effects of measures of the institutions adopted under Title VI, although presumably they should draw inspiration from the interpretations given by the Court of Justice in cases where the latter has had an opportunity to pronounce upon ‘third pillar law’. Furthermore, domestically, will the principle of sympathetic interpretation, which inevitably leads national courts to make use of purposive canons of interpretation rather than narrower textual approaches alone, sit comfortably with the principle of legality in criminal law which demands a strict interpretation of the scope of any text which imposes criminal liability? The Court reiterated that the application of the principle of sympathetic interpretation in a case like this must not lead to the creation of new offences where this has not occurred independently through national implementing legislation, and should not trigger criminal liability in and of itself. However, it is hard to draw a very sharp distinction between that limitation on the principle of sympathetic interpretation imposed by the Court of Justice and a case such as *Pupino*, where it is the conduct of proceedings which is at issue.

Some evidence regarding the possible range of reactions of national courts to the challenges posed by *Pupino* can be drawn from the manner in which the national

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<sup>42</sup> Fletcher, above n.39 at 877.

courts have started to deal with the issues raised by the Framework Decision establishing the European Arrest Warrant,<sup>43</sup> especially a first tranche of cases which have seen constitutional challenges to the validity of domestic legislation implementing the Arrest Warrant. A number of national constitutional courts (those in Poland,<sup>44</sup> Germany<sup>45</sup> and Cyprus<sup>46</sup>) have annulled the transposing national legislation, on the grounds that it infringes the relevant national constitution. The particular difficulties facing national constitutional courts have been the question of surrendering nationals to the authorities of another state, and whether a sufficient basis had been provided in national law. However, it is not hard to see in the various national judgments an underlying concern about how far the harmonisation of criminal law, under the aegis of the third pillar, is going, for the purposes of achieving the avowed objectives of the third pillar in relation to freedom, security and justice.

The difficulty facing the EU is that, in the absence of an equivalent provision in Title VI of the Treaty on European Union to Article 226 EC, which empowers the Commission to police the implementation of EU law by the national authorities and to bring defaulting Member States before the Court of Justice if necessary, the whole system underpinning the European Arrest Warrant may unravel. While the Polish Constitutional Court suspended the effects of its judgment, allowing the national government time to find a solution to the problems of implementing the European Arrest Warrant in a way which was in conformity with Poland's EU obligations, the German Constitutional Court annulled the national legislation with immediate effect, thus reinstating the previous cumbersome measures dependent upon political discretion rather than the mutual recognition of judicial measures. This provoked a reaction in Spain, because the effect of the German decision was the release of a German national whose surrender, in connection with various investigations into terrorism and alleged Al Qaeda membership, had been sought by Spain. The Spanish

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<sup>43</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1.

<sup>44</sup> Judgment of 17 April 2005, P 1/05. See a note by D. Leczykiewicz (2006) 43 *Common Market Law Review* 1181-1191.

<sup>45</sup> Judgment of 18.7.2005, 2 BvR 2236/04, available at: <http://www.bverfg.de/entscheidungen/rs200507182bvr223604.html>. The Polish and German cases are discussed in J. Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony', Jean Monnet Working Paper 10/05, [www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org).

<sup>46</sup> Judgment of 7 November 2005, Case 294/2005.

courts thus concluded that the old rules now applied to German requests for extradition, and that all the relevant papers must be presented within 45 days, or those currently detained in Spain at the behest of European Arrest Warrants issuing from Germany would be released. Of course, it is arguable that before taking such steps any Spanish court should first have referred a question to the Court of Justice, questioning what, if any, principles of EU law (e.g. that articulated in *Pupino*) might be applicable in this type of case, bearing in mind the lacuna in German law as a consequence of the judgment of the German Constitutional Court. However, given the general reluctance of most national constitutional courts to refer questions to the Court of Justice, this is a rather theoretical objection to the Spanish approach in the face of the German judgment. It should be noted that in the context of a challenge on fundamental rights grounds to the legality of the European Arrest Warrant Framework Decision itself, brought about via the Belgian courts on behalf of a Belgium lawyers' association, the Advocate General in his Opinion referred to the European Arrest Warrant cases generating

‘a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems.’<sup>47</sup>

The issue of the constitutional foundations of the European Union, and the relationship between these foundations and the constitutions of the Member States, remains – it would seem – far from finally settled, in the legal as in the political sphere.

## **6. Conclusions**

This paper has attempted to add to the debate about the constitutional future of the European Union by incorporating also a legal perspective. It has not only brought the ‘old’, small ‘c’, constitutionalism of the European Union back into focus, but it has also emphasised the plural nature of the constitutional structure of the Union, highlighting the ongoing difficulties inherent in negotiating the fit between the constitutional frameworks of the Union and its Member States. While there may be a

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<sup>47</sup> Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Opinion of Mr Advocate General Ruiz-Jarabo Colomer of 12 September 2006, at para. 8.

greater willingness to use the language of constitutionalism in many political descriptions of what the EU is and how it works, the underlying difficulties attendant upon the ambiguous character of the EU remain as significant as ever.

It would be wrong to construe the rejection of the Constitutional Treaty as direct challenge of the constitutional future of the European Union. Given the relatively stable and well-functioning legal order which continues to underpin the EU, despite the complex and sometimes contested multilevel framework in which this constitutional framework operates, it seems that there is something solid for the EU to fall back upon. However, the paper has pointed out the pressures which are being brought to bear upon the 'old' constitutional framework, through widening and deepening, and has noted that these are occurring at precisely the same time that the EU is facing a future without a 'new' form of big 'C' constitutionalism given the referendum rejections of the Constitutional Treaty. It would be foolish to reject prematurely the possibility that there could be some diffuse cross-pollination between the two dimensions of EU constitutionalism, whether presently or at some point in the future, just as there would have been complex interactions between old and new constitutionalism in the event that the Constitutional Treaty *had* been ratified and come into force. Recent case law has demonstrated that the Court of Justice has started to identify some lines of development which ameliorate some of the more obvious weaknesses of the third pillar in relation to judicial oversight. It has not referred directly to those weaknesses, but the nature of its reasoning, which explicitly pulls ideas across from the first pillar into the third pillar without a direct textual authority in the Treaty on European Union, makes it hard to escape the impression that the Court is aware of those weaknesses and believes that they should, indeed, be addressed, if necessary through judicial action. The wisdom, not to mention the legitimacy, of such judicial activism at a time when the EU legal order is still adjusting to the impact of ten (twelve after 2007) new Member States remains to be seen.