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2002

The European Court of Justice's Revolution: Its Effects and the Conditions for its Consummation. What Europe can learn from Fiji

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The Court of Justice’s Revolution: Its Effects and the Conditions for its Consummation

What Europe can learn from Fiji

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Introduction

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The object of this article is twofold. First, it will try to develop a strictly positivist view of the relationship between the Community and Member State legal systems. Starting from the assumption that the Community legal system is based on a revolution by the Court of Justice, it will claim that this revolution does not (yet) apply to the Member State legal systems. In doing so, it will distinguish between an external, pluralistic, and an internal, monistic view of the systems in question. Taking the external point of view, this article will deny that there is, in our day, a single unified system comprising both the Community and the Member State legal systems. Those systems succinctly may be described by two apparently (but only apparently) contradictory statements: (i) The revolutionary jurisprudence of the Court of Justice brought about a new legal system (i.e. the autonomous Community legal system) independent of, but incorporating, the Member State legal systems; and: (ii) This revolution had no immediate incidence on the pre-existing Member State legal systems which, according to the

1 On the concept of revolution in this context cf. T.C. Hartley, "The Constitutional Foundations of the European Union", LQR 117 (2001) 225 at 228 et seq. and, generally, F.M. Brookfield, Waitangi and Indigenous Rights, Revolution, Law and Legitimation (Auckland University Press 1999) at 13 et seq.; similarly H. Kelsen, Reine Rechtslehre (2nd ed. Österr. Staatsdruckerei Wien 1960) at 213; A. Merkl, "Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior", in: idem, Gesammelte Schriften (D. Mayer-Maly et al., ed.), vol. I/1, Duncker & Humblot Berlin 1993, p. 169 at 200 et seq. "Revolution", therefore, is not used in this article in any derogatory sense but in the Kelsenian tradition. Indeed, Merkl, ibid., has aptly demonstrated that in the Austrian history of the mid-19th century, it were not the popular uprisings that were revolutionary (in a legal sense) but some quiet (one might say administrative) mesasures subtly changing the ultimate source of the law.

2 This distinction is the decisive difference to pluralistic legal theories denying the internal monistic approach. Those legal theories only try, in the last analysis, to make an external point of view accessible to the internal operator. But this is an impossible feat; cf. Th. Schilling, "On the Value of a Pluralistic Concept of Legal Orders for the Understanding of the Relation between the Legal Orders of the European Union and its Member States", Archiv für Rechts- und Sozialphilosophie 83 (1997) 568 at 574-575.

3 Even I. Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?", CMLRev. 36 (1999) 703 at 710 accepts that "the institutions of the Community and those of the
jurisprudence of the supreme courts at least of some of them, remain independent of, and incorporating, the Community legal system.

Member States are [formally separate and belonging to the different levels of government]".
Second, this article will consider means to overcome this dichotomy by discussing possibilities to achieve in law, *i.e.* without the intervention of an original constituent power, understood in this article as the people not yet constituted (anew), a system comprising both the Community and Member State legal systems. Put differently, this article will discuss the conditions of the consummation of the Court of Justice's revolution by which it will understand the acceptance, by the Member State legal systems and their supreme courts, of their incorporation into the Community system, and the withdrawal of their competing claim to autonomy. The point of departure of this part of the discussion will be a recent decision of the Fiji Court of Appeal⁴ which, for the author, opened up a new perspective on the subject under discussion.

**The Community and Member State Legal Systems**

*The Choice of a Legal System*

Before starting the examination of the relationship between the Community and Member State legal systems, some general considerations on the way to deal with a plurality of legal systems may be indicated. If norms are to be applied to a given set of facts, and if norms of different legal systems may arguably be applied, it is necessary to know from which system the norms actually to be applied are to be taken. The choice of that system may include, in the case of supposedly revolutionary developments, the question whether one or the other of the legal systems exists as such. This choice may be made from the inside of any one of the legal systems in question or, for quite different purposes, from the outside of all of them.

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The external view is that of the observer. For him, it is no problem whatsoever to look at different legal systems at the same time even if those systems concern different historical, fictitious or real settings. He is perfectly free to consider these systems as entirely separate, or as linked to one another. If the observer chooses to consider two systems as linked, and supposing that of two linked legal systems one must incorporate the other (if there is not a third legal system superimposed to both of them) he has the further choice of the legal system he considers as incorporating the other. This choice of a legal system is a completely arbitrary decision which will be guided only by the observer’s cognitive interest.

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6 Of course, this is the archetypical work of a comparative lawyer. A telling example is the story of the goring ox expounded, e.g. by A. Watson, Legal Transplants, Scottish Academic Press Edinburgh 1974 at 22-24.

7 According to H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre, 2nd ed. J.C.B. Mohr Tübingen 1928, p. 104 f., the assumption of two legal systems is only possible in the sense of an alternative insofar as their specific existence (Geltung) is concerned. To put it differently: If there are only two legal systems linked to one another, their relationship must be one of superiority and inferiority. A juxtaposition of two legal systems is only possible if there is a (third) superior system delimiting and coordinating them: ibid. at 111. And cf. Merkl (supra, n. 5) at 298.

8 Cf., e.g. Merkl (supra, n. 5) at 313 and 316, on the choice between international and municipal law.
In the case of supposedly revolutionary developments, the observer may judge the supposed revolution under different aspects. He may refer to aspects of legitimacy\(^9\) which are, strictly speaking, outside the law\(^10\). He may consider the legality of the revolution either from the point of view of the system or systems supposedly overthrown by the revolution\(^11\) or from the point of view of a system supposedly superimposed on both the revolutionary and the pre-revolutionary systems\(^12\). He may also consider the revolutionary system only from its proper point of view\(^13\). But it is also open to the observer to refrain from making any choice. Instead, he may describe two (or more) internal points of view. This applies as well to the question of the choice of a legal system as such as to the choice of the point of view for judging revolutionary developments. This is the position taken by

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\(^11\) This is done, in the present context, by Th. Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations", *Harv. Int'l LJ* 37, 389 (1996). It is also done by H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, J.C.B. Mohr Tübingen 1972, § 2/26, and his followers. Ipsen has invented a "State integration power" that could only be found, if it existed at all, in the Member State legal systems. On this piece of legal metaphysics cf. Schilling (supra, n. 2) at 569-570.

\(^12\) This is done, in the present context, by W. Wengler, "Réflexions sur l'application de droit international public par les tribunaux internes", *Revue générale du droit international public* 1968, 921 at 960 and n. 108 (at 989) who has shown the reasoning given by the Court of Justice for its revolution to be unsound under international law.

\(^13\) This is done, in the present context, most radically by those anonymous authors quoted by C.N. Kakouris, "La relation de l'ordre juridique communautaire avec les ordres juridiques des Etats membres (Quelques réflexions parfois peu conformistes)" in: F. Capotorti et al (ed.), *Du droit international au droit de la intégration. Liber Amicorum Pierre Pescatore* 1987, 319 at 331 and n. 20: "Une opinion extrême à même été soutenue, «qu’il n’était même pas besoin de ratification pour qu’il [the EC Treaty] prenne effet!"
this article. In the context under discussion, it is believed, this choice fits best the cognitive interest pursued by
the author in this article, i.e. correctly to describe the legal facts as they are found on the ground.

In contrast to the many options open to the observer, the internal view — the only one open to a legal
operator\textsuperscript{14}, \textit{e.g.} a court — is severely restricted. The operator by necessity acts within the boundaries of "his
own" legal system. This basically is the one which has created his office\textsuperscript{15} and has laid down the rules for its
functioning. To put it differently, the operator's "own" legal system is that system part of which the operator's
office is (institutional principle). If he is operating within a revolutionary system, for him that is the end of the
matter. To consider the revolution, as it were, from the outside might involve a (counter-)revolution by the
operator. For him, it is principally impossible to look beyond his own legal system except insofar as he is
permitted to do so by that system\textsuperscript{16}. From this flows a double consequence if more than one legal systems are to
be considered: (i) the operator is not free to consider systems simply juxtaposed to his own; he must only
consider those legal systems which are in some way linked to the latter. And (ii) he has no choice between legal
systems when considering which one incorporates the other; whenever the operator has to consider a foreign
legal system, he has to consider it as incorporated into his own, or as subordinated to it.

But there may be an exception to the institutional principle, or an extension of it. It appears that not the legal
system having set up the operator's office is truly decisive in this context but rather the legal system from which
the powers of the operator are derived. Although, as a rule, this will be the same legal system, exceptionally it
may be a different or an additional one. Indeed, there is, under aspects of legal theory, nothing to prevent a legal

\textsuperscript{14} What Max Weber called the "Rechtsstab".

\textsuperscript{15} Cf. Brookfield (\textit{supra}, n. 1) at 18-19.

\textsuperscript{16} M. Pawlik, "Die Lehre von der Grundnorm als eine Theorie der Beobachtung zweiter Ordnung", \textit{Rechtstheorie} 25 (1994) 451 at 461 \textit{et seq.}
system from granting powers to an operator whose office was created by, and who may be acting under, a
different legal system. In this way, one and the same operator may derive powers from more than one legal
system all of which systems therefore must be considered as “his own” legal systems. On the decision among
those systems, the operator’s restrictions of choice discussed above cannot apply. More fundamentally even,
there are no possible legal grounds for the operator’s choice among “his own” legal systems. As, however,
extra-legal decisions of this kind must be anathema to the operator’s legal mind, he will try to transform them
into, or at least make them appear as, legal decisions. This is, as we shall see, less complicated than one might
expect. 17

The Community Legal System

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17 Cf. infra sub “The Simple Legal System”. 
The jurisprudence of the Court of Justice is revolutionary. Its revolution is commonly dated in the 1960s. More specifically, the *Costa v. ENEL* judgment of 1964 may be considered as point of departure of the Court of Justice's relevant jurisprudence. In this judgment, the Court, deviating from its *Van Gend en Loos* judgment of one year before, did not see the Community legal system any longer as a new system "of public international law". With this decision, it effectively disrupted the link connecting the Community system with the pre-existing Member State systems. Since then, the Court of Justice has insisted in a long line of precedents on the autonomy

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18 On the concept of revolution used in this article see supra, n. 1. The idea of a "multilevel constitutionalism" as expounded by Pernice (supra, n. 3) passim and most succinctly at 715, is also of a revolutionary nature. The "multilevel constitution" based on the conclusion of the European treaties is something radically different from the one-level constitutions clearly in force before that conclusion, and the conclusion of those treaties did not take place in the form provided for constitutional amendments in the Member States' respective constitutions. Indeed, Pernice, *ibid.*, considers it as a revolution by the pouvoir constituant, i.e. "by the peoples of the Member States acting through their treaty-making institutions and procedures". While such a method of giving a "historically first constitution" to an entity is indeed possible, there are no indications that the legislatures of the Member States (or their peoples through them) were acting as an original constituent power of the Community when ratifying the EC Treaties. Cf. Schilling (supra, n. 11) at 393-394. Against the claim by Pernice *ibid.* at 717 that the integration clauses in the Member State constitutions "establish direct constitutional relations between the people and the supranational institutions" it must be stated that these clauses generally do not allow for such an interpretation, at least not according to the normal rules of interpretation, that they are generally not interpreted in this fashion, that Pernice doesn't even try to offer such a lege artis interpretation and that, if such an interpretation might be possible under a post-modern "anything goes" approach, it does at the very least not correspond to the law as found on the ground. — This is not to deny that the European treaties may be considered as a treaty-constitution; cf. Th. Schilling, "Treaty and Constitution. A Comparative Analysis of an Uneasy Relationship", *Maastricht Journal of European and Comparative Law* 3 (1996) 47 at 50-52.


of the Community legal system. Possibly the clearest expression this claim to autonomy has found in the Court of Justice’s jurisprudence is its insistence that “[r]ecourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.” In this way, by categorically claiming autonomy for the Community legal system, the Court of Justice has put that system on a revolutionary basis. As any revolution, it is, at the same time, illegal from the point of view of the system or systems overthrown by the revolution, a fact of life to be reckoned with from the point of view of an external observer and the basis of a new legal system from the proper point of view of the revolution.

22 According to Th. Oppermann, Europarecht, 2nd ed. Munich 1999, p. 230 (para. 617), this autonomy is an axiomatic basic assumption (my italics).


24 This is shown by all those who convincingly have demonstrated the Court of Justice’s jurisprudence to be wrong under aspects of legitimacy, international law and Member State law; cf. citations in n. 9-12. Indeed, there cannot be any legal reasons for a revolution. — The inverse case not of the revolutionary creation of a wider unity but of the revolutionary dividing of an existing unity, i.e. of the British “imperial crown” in some regional crowns including the “crown in right of New Zealand” is discussed by Brookfield (supra, n. 1) at 124 et seq., with further references.
Considered from that latter point of view, the Court of Justice’s revolution entails by necessity the incorporation,

*i.e.* subordination of the Member State legal systems into the Community legal system. This is not only a

postulate of legal theory (which it is)\(^{25}\), it becomes also abundantly clear, as a matter of the positive law

developed by the Court of Justice, when one considers institutes as the direct applicability of Community law, the

*Francovich* jurisprudence on State liability\(^{26}\) or the rules on interim relief contained, *e.g.* in *Factortame*\(^{27}\). It is true

that the Court of Justice claims that the Community system of law is integrated into the legal systems of the

Member States\(^{28}\). Taking that claim at face value, it should mean that the Community legal system is part of

Member State law. Further, it appears to imply that Community law is at the disposal of Member State law. But

this must be quite the contrary of what the Court obviously means. Its whole jurisprudence tells us that it

considers Community law as paramount and to a large degree independent of Member State law. Thus, the

claim discussed must be understood in this sense that it is the superiority of Community law which is integrated

into the Member State legal systems.

\(^{25}\) Cf. n. 7.


593, affirmed in Case *Francovich*, para. 31.
To conclude: the Court of Justice’s revolution has created, from its proper point of view, a new, separate legal system. From the specific point of view of an external observer here chosen, i.e. to describe the operators’ internal points of view this is a fact of life which must be accepted; while it may be critisised, from a different point of view, as “illegitimate” it cannot be disputed away. But the point of view here chosen requires also to describe, and to accept, the point of view of the pre-revolutionary systems, i.e. the Member State systems which must now be discussed.

The Member State Legal Systems

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29 Hartley (supra, n. 1) at 232.
It is important to realise what the Court of Justice’s revolution could not achieve, at least not on its own: it could not put an end to the Member State legal systems’ competing claim to autonomy. Within those legal systems, the Community system and its Court have a say only insofar as the former permit it. From the viewpoint of any one of the Member State legal systems, based on the historical truth of the conclusion of the European treaties, it is that system which incorporates the Community legal system and which consequently decides upon the limits of that incorporation. This may be exemplified by the German Federal Constitutional Court’s position:

According to the latter’s case-law, norms of Community law that negate those structures fundamental to the German Basic Law cannot be effective in Germany. Thus, the German Constitutional Court finds in the German constitution certain limits for the superiority of Community law which, according to that court, is based on German law. This finding presupposes the subordination of the Community legal system under the German legal system and thereby effectively denies the Court of Justice’s revolution in the Member State legal systems.

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30 Insofar, I differ from the statement of Hartley (supra, n. 1) at 231 according to which “[i]f the European Grundnorm were to change so as to transform the Community Treaties into a self-sustaining constitution, the result would be that Community law would not longer apply in the Member States because the Member States accepted it: it would apply whether they liked it or not.” But I agree with the statement ibid. at 232 n. 26.

31 Cf. the references in Hartley (supra, n. 1) at 233, n. 35, and in Schilling (supra, n. 2) at 574, n. 58.

32 This is the construction put on the German Constitutional Court’s ”Solange I“ decision (BVerfGE 37, 271, 280) by J. Limbach, ”Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa“, Neue Juristische Wochenschrift 2001, 2913 at 2916. According to Limbach, ibid., the essential basic assumptions in law made by that decision are not controversial.

33 Cf., e.g. German Constitutional Court, Dec. 12.10.1993 [1994] 1 C.M.L.R. 57 = BVerfGE 89, 155, 188 — Maastricht. If, according to Limbach (supra, n. 32) at 2917 et seq., the reserve competence claimed by the German Constitutional Court is only the expression of a normative perception common to all modern democratic constitutions and according to which all public power is limited by human and citizens’ rights, this perception is applied, by the German Constitutional Court, all the same in the form given to it by the German Basic Law; cf. BVerfGE 102, 147, 164 — Bananas.
However, it is sometimes claimed that the Court of Justice’s revolution from the 1960s has been ratified since then by the numerous treaties concluded among the original Member States, and between them and acceding Member States. It certainly is true that not unfrequently, these treaties have reacted to the Court of Justice’s case-law. But generally, they have abstained, with some rather minor exceptions, as well from overruling judgments of the Court of Justice34 as from ratifying them35; certainly, they have neither overruled nor ratified its

34 Cf., e.g. the Protocol concerning Article 141 (ex Article 119) of the Treaty establishing the European Community (the ‘Barber’ Protocol) which originated in the Maastricht Treaty and aimed at restricting the effects ratione temporis of Case C-262/88, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, [1990] E.C.R. I-1889; this Protocol was accepted by the Court of Justice in Case C-109/91, Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf, [1993] E.C.R. I-4879, para. 15-20, handed down shortly before the coming into force of the Protocol. Cf. also the amendment of Article 141 EC by the introduction, in the Maastricht Treaty, of a para. 4 which was meant to overrule the Court of Justice’s jurisprudence largely denying acceptance to affirmative action, in particular Case C-450/93, Eckhard Kalanke v Freie Hansestadt Bremen, [1995] E.C.R. I-3051 in which the Court had held that “as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly ... National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity” (paras. 21-23). However, at least in Case C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, [2000] E.C.R. I-5539, para. 54-55, the Court refused to accept this amendment: “In those circumstances, it is necessary to determine whether legislation such as that at issue in the main proceedings is justified by Article 141(4) EC. In that connection, it is enough to point out that, even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued.” Proportionality, by the way, is not further discussed anywhere in that judgement.

35 The human rights jurisprudence of the Court of Justice largely has been ratified especially by the relevant provisions of the EU Treaty as the Court itself recognised in Case C-415/93, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SAV Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, [1995] E.C.R. I-4921, para. 79: “...
revolutionary jurisprudence. Under these circumstances, not too much should be made of the fact that that
jurisprudence was not overruled: as those treaties could only be concluded by all the signatories acting in
consent, i.e. unanimously, a possible overruling could have been prevented by a single Member State. Indeed,
the fact that some case-law of the Court of Justice, but not its revolutionary jurisprudence, has been unanimously
ratified by the Member States, might lend itself to an e contrario argument in relation to the latter jurisprudence.

The fact that no overruling has occurred therefore cannot be taken to constitute subsequent State practice to be
considered, under Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties, in interpreting those treaties
as it does not ”establish.. the agreement of the parties regarding [the] interpretation” of the European treaties.

Another claim sometimes made in relation to Member States other than the original six is that the former, by
accessing to the European Communities, have accepted the Court of Justice’s revolution as part of the acquis
communautaire36. But this cannot be correct: the accession treaty can only be construed as binding the accessing
Member States to those rules effectively ”acquis”, i.e. those rules binding also the extant Member States. As the
Court of Justice’s revolution was effective only in the Community legal system and not in the Member State legal
systems, the respective accession treaties cannot be taken to make this revolution effective in the accessing
Member States’ legal systems. Indeed, the Højesteret, i.e. the Danish Supreme Court has decided that, in

36 Cf., e.g G. Holzinger, ”Die bevorstehende Öffnung Österreichs in den Europäischen Wirtschaftsraum und
die Europäischen Gemeinschaften — Rechtssetzung unter besonderer Bedachtnahme auf den demokratischen
1/1, Vienna 1993, p. 94 at 95.
extraordinary situations, the Danish courts have the inalienable right to declare a Community measure
inapplicable in Denmark if it is based on an application of the EC Treaty which is outwith the sovereignty transfer
brought about by the Danish law on accession. Similar to the jurisprudence of the German Constitutional
Court this decision presupposes the subordination of the Community legal system under the Danish legal
system and thereby effectively denies the Court of Justice's revolution in the legal systems also of Member States
other than the original six.

37 Højesteret, case Carlsen et al. v Rasmussen, judgment of 6 April 1998 No. 1361/1997, Ugeskrift for

38 Cf. text supra at n. 32 et seq.
Of course, it would be otherwise if there were a positive act by the Member States confirming the Court of Justice’s revolutionary jurisprudence; such an act would indeed establish an agreement under Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties. In this context, the “Protocol on the application of the principles of subsidiarity and proportionality”, which originated with the Treaty of Amsterdam and is annexed to the Treaty establishing the European Community, is sometimes quoted. According to para. 2 of that Protocol, *inter alia* “[t]he application of the [said] principles ... shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law”. But this clause, hidden as it is in a very specific protocol, cannot be taken to decide generally the most fundamental question of that relationship by ratifying the Court of Justice’s jurisprudence. Indeed, according to its very words, this clause only denies the subsidiarity and proportionality principles any influence on those principles developed by the Court of Justice but does not reinforce or ratify the latter. It is a negative clause rather than a positive one.

In any case, as the view here considered is the internal view of the Member State legal systems, it is those systems which must decide on the possible ratification of the Court of Justice’s revolution. As such a ratification would imply the end of the autonomy of the Member State legal systems, it would be a revolutionary act open only to the Member States’ *pouvoir constituant (originaire)*, understood in this article as its people not yet constituted (anew), or, under conditions to be discussed shortly, to their highest courts. Therefore, the lines of arguments here discussed are tenable, if at all, only in those Member States in which the *pouvoir constituant* was

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39 Cf., e.g. J.-C. Piris, "Does the European Union have a Constitution? Does it need one?", EL Rev 1999, 557, n. 108, who “particularly stress[es] the constitutional importance of paragraphs 2 and 3 of [that] Protocol”; Pernice (*supra*, n. 3) at 719 who takes that Protocol as confirmation of “the principles established by the [Court of Justice] on the relationship between Community law and national law ... Thus, ... primacy of European law is founded on the common decision of the peoples of the Member States to achieve a functioning structure of political action above the State level. This structure may not be put into question by the institutions of an individual Member State".
involved in the supposed ratification of the Court of Justice’s revolution. Whether this was the case is doubtful even in those Member States in which the ratification of the respective treaties took place on the basis of a popular vote; in those States in which the constitution provides for a popular referendum the people may as well be seen, for this very reason, as pouvoir constitué. More specifically in relation to the subsidiarity protocol, the above objection based on the hidden nature of the clause in question must carry special weight when it is submitted to popular vote. It is therefore very doubtful whether the pouvoir constituant of any of the Member States has indeed ratified the Court of Justice’s revolution. Neither, as far as I am aware, has any superior Member State court assumed that revolution to be ratified by subsequent treaties or interpreted the said Protocol as ratifying the Court of Justice’s revolutionary jurisprudence. Under the point of view here chosen, this decision, or rather this failure to decide, must also be accepted.

The Aggregate

The subordination of the Community legal system under the respective Member State legal systems is, of course, incompatible with the revolutionary autonomy of Community law as understood by the Court of Justice. For both the Court of Justice (once it had effected its revolution) and the Member States’ highest courts, in particular the German Constitutional Court, their respective views are unavoidable; they are but a consequence of their necessarily restricted internal views. From the point of view of an external observer, these incompatible views may be seen as the expression of the legal fact that the Community legal system and the Member State legal systems are distinct legal systems mutually incorporating one another. They are best explained by the

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40 Therefore, I do not share the criticism by P. Eleftheriadis, “Begging the Constitutional Question”, JCMS 36 (1998) 255 that “both the Court of Justice and the German Constitutional Court have refused to acknowledge the nature of [the] problem and, by simply asserting what had to be established, have just begged the constitutional question”; as operators within their respective systems, they simply had no choice to act otherwise.

assumption of two different, distinct and incompatible constructions of the same legal material comprising each
both Community and Member State law. The difference between the constructions lies in this that the respective
system incorporating the other is ultimately based on its own basic law. The incorporating system therefore
structures the whole legal material which, however, is common to both systems. As the constructions
constituting these systems — a Community construction ultimately based on the EC treaties, and a Member
State construction ultimately based on the respective Member State constitution — are incompatible, they
cannot be taken together to form a system; rather, they may be dubbed the aggregate of Community and
Member State law\(^{42}\).

Better to describe that concept of an aggregate, it may be useful to consider a somewhat parallel situation in
private international law. It is of the very essence of that law to decide on the legal system the norms of which
are to be applied to a given set of facts. Take, e.g. a German court deciding that it has to apply French law to such
a set of facts. It will apply French law because of a rule of German private international law ordering it to do so.
Take a French court in a similar but reversed case. It will apply German law because of a rule of French private
international law ordering it to do so. Both courts would also apply their respective proper law if the case
decided by the other one would have to be decided by themselves. Ideally, the substantive rules those courts will
apply, and the results they come by, will be the same. Notwithstanding, nobody would claim that French and

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\(^{42}\) Seen thus, the question magisterially treated by Hartley (supra, n. 1) at 226-232, i.e. whether the
Grundnorm of the EU has been legitimately changed by the Court of Justice, becomes without object or, rather, is
split in two: was there a Grundnorm change (or, rather, the presupposition of a new Grundnorm) in the
Community system (here, the answer must be yes), and was there such a change in the Member State systems
(here, the answer must be no).
German law are one and the same legal system; rather, both these systems incorporate the relevant norms of the respective other. From the observer’s point of view, this appears to be a close enough parallel to the situation of the Community and Member State legal systems as long as the Court of Justice’s revolution has not been consummated.

It must be stressed again that the distinctness of the Community and Member State legal systems is not between, on the one hand, the Community legal system in a narrow sense, consisting exclusively of the rules found in the treaties and in secondary Community legislation, and, on the other hand, the Member State legal systems also in a narrow sense, consisting exclusively of the rules found in the Member State constitution and in Member State legislation. The narrow systems clearly are not distinct, and Art. 234 E.C. is the most obvious indication thereof. This distinctness is rather characterised by the very fact that both the Community and Member State legal systems are mutually incorporating the rules of the respective other one. It is between two incompatible constructions of the same legal material.

Against a different argument similarly proposing a separation of two legal systems it has been objected that "the suggested separation of the two legal orders poses ... problems. The very idea that a court may be operating within two separate hierarchical legal orders seems to me to be undermining the purpose for which a hierarchical ordering of sources is set up in the first place. ... Creating a hierarchy of sources ensures that the

\[\text{[T]he task assigned to the Court by Article [234 of the EC] Treaty is ... that ... of assisting the administration of justice in the Member States}: \text{Case 149/82, Robards v. Insurance Officer} \text{[1983] E.C.R. 171, para. 19, affirmed in Case C-83/91, Medlickev. ADV/ORGA} \text{[1992] E.C.R.I-4871, para. 25 and in Case C-451/99, Cura Anlagen, judgement of 21 March 2002, para. 26. Cf. also Pernice (supra, n. 3) at 724 with further references who claims a "unity in substance of Community and national law" (although continuing: "forming one composite legal system").}

\[\text{Cf. Kakouris (supra, n. 13) at 331.}\]
choices of the legislator ... will belong to a systematic legal order that will provide an authoritative and — ideally — uncontroversial resolution of disputes. But this argument is less valid against the concept of distinctness of legal systems as understood in the present article. As this distinctness is between two constructions comprising respectively the norms of the other system, at least on a day-to-day basis the main objection raised against the theory of separation, i.e. that "we will have to abandon the positivist ideal of a legal system arranged as an order of sources" is not valid against the theory of distinctness here expounded.

Possibilities of the Evolution of a Unified Community Legal System

*The Republic of Fiji v. Chandrika Prasad*

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45 Eleftheriadis ([supra, n. 10](#)) at 217.

46 On the relevance, in revolutionary circumstances, of this objection against the theory here expounded cf. text at n. 63 *et seq.*

47 Eleftheriadis ([supra, n. 10](#)) at 217.
Even if the Court of Justice’s revolution could not put an end to the Member State legal systems’ competing claim to autonomy, it may have led to a different kind of revolution in those systems. To explain this a discussion of the important decision of the Fiji Court of Appeal in re Republic of Fiji v. Chandrika Prasad may be useful. The facts, insofar as relevant in the present context, are simple. In Fiji, a revolution of the military had taken place. That revolution had been successful in this sense that the country was quiet again and that a counterrevolution was not to be expected. The leader of the revolution had declared the Fiji constitution to be abrogated. The revolutionary government had re-established the Court of Appeal; its judges had remained in office without being required to take an oath of allegiance to the new regime. The Court of Appeal was called upon to decide whether, in spite of all that, the old, pre-revolutionary Fiji constitution was still the highest law of the land. For the Court of Appeal, the decisive question was whether the revolution had been effective; to answer that question, it applied a very demanding set of rules on effectivity comprising rules on burden of proof, on effectivity in a narrow sense and on democratic legitimation of the revolution. The revolutionary government could not satisfy the Court of Appeal that its revolution had been effective under that set of rules. Consequently, the Court of Appeal concluded that the old Fiji constitution was still in force. The revolutionary government basically complied with that ruling by organising elections according to the old constitution although the underlying tensions between the indigenous and the immigrant population were not resolved.

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48 n. 4.


50 In spite of concerns in the press (cf., e.g. M. Brown, "Supreme Court being stacked, says Chaudhry", Sydney
This decision raises questions as to the Court of Appeal's competence and, at the same time, as to the legal system within which the Court of Appeal decided and part of which the set of rules on effectivity was. The Court of Appeal has called its competence supra-constitutional. At the same time, it resisted "the temptation to discuss the theoretical basis for exercising this supra-constitutional jurisdiction. It is sufficient to observe that such a jurisdiction has been exercised by Judges in other cases." Indeed, a scholarly article on the law of successful treason has discussed more than a dozen such cases. But the Court of Appeal's decision gives, all the same, a clear indication of the legal system from which that court derived its competences: it underlined that the judges of the Court of Appeal were "sitting as Judges of a Fiji Court".

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51 Following Brookfield (supra, n. 1) at 23 et seq.

This indication must be taken to mean that the Court of Appeal’s competence was based on the law of Fiji. This law, applied in an ordinary court procedure in which the decision was found on the basis of the parties’ respective burden of proof\textsuperscript{53}, cannot be but positive law\textsuperscript{54}. The competence being supra-constitutional, however, it cannot have been derived either from the old Fiji constitution or from a revolutionary constitution. It may only have been found in a legal system superordinated to the systems based on both these constitutions and containing, besides the rules on competence, the law applied by the Court of Appeal, \textit{i.e.} the law on the basis of which the Court of Appeal decided which constitution to apply.

It is this superordinated legal system which is of interest in the present context. It must be a tiny, very simple system stating that a constitution is abrogated by a revolutionary constitution only if the latter is effective according to a given set of rules. It is this simple system — a “norm behind the Grundnorm\textsuperscript{55} of both the pre-revolutionary and revolutionary constitutions\textsuperscript{56} — which coordinates\textsuperscript{57} and unifies the legal systems based

\textsuperscript{53} Here applies the observation by G. Teubner, \textit{Law as an Autopoietic System} (1993) at 3, quoted from M. Koskenniemi, “Hierarchy in International Law: A Sketch”, EJIL 8 (1997) 566 at 578, according to whom “the highest level in a hierarchy «loops into» the lowest one’ so that ‘[i]n the last analysis, the final arbiter of divine law is the triviality of procedural norms’.

\textsuperscript{54} Cf. generally Kelsen (supra, n. 1) at 242 et seq. Cf. also O.W. Holmes, ”The Path of the Law”, Harv. L. Rev. 10 (1897) 457: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” The same applies to judicial decisions recognising a revolution even if they may be dubbed “fundamentally political judgments dressed in legalistic garb” (thus S.A. de Smith, ” Constitutional Lawyers in Revolutionary Situations”, W. Ontario L.R. 7 [1968], 93 at 94). — According to Menzel (supra, n. 4) at 158, however, this law is part of the general theory of State (?).


\textsuperscript{56} Cf. Brookfield (supra, n. 1) at 26: “[I]n any particular legal order in which the judiciary is separated from the other branches of government, there may be behind Kelsen’s ‘basic’ norm a norm or principle more basic still upon which the judges’ supra-constitutional jurisdiction is founded.”
respectively on those constitutions. It must be judge-made law and a supra-constitution, putting the Fiji Court of
Appeal, as arbiter on the effectivity of the revolution, on top of the two constituent powers having issued the two
constitutions and the orders of which principally have to be obeyed.

The Simple Legal System

Seen in the abstract, such a simple legal system may only be assumed in the case of institutional continuity
between the pre-revolutionary and revolutionary legal systems, i.e. if the same courts are given power to
adjudicate by both those systems. If the revolutionary constitution has abolished the old courts and has
established new ones in their place, and thereby created institutional discontinuity (fundamental revolution), the
old constitution holds no sway over the new courts which have no power of adjudication under it. In this case,
there is no room for a simple legal system; the new courts have no power to determine the status of the new
regime because they are a part of it, and of nothing else.

57 Cf. n. 7.
Inversely, if, under the revolutionary constitution, the courts are maintained and their judges remain in office, they must be taken to be called upon to adjudicate under the new constitution. The corresponding power under the old constitution is their's in any case. In such a case, the court has the choice either to adhere to the old constitution and not to use the power it is granted under the revolutionary one, or to follow the revolution and to ignore the old constitution in future, or, finally, to use both powers. There can be no legal guide-lines for this revolutionary, i.e. political choice. If the court refuses the revolutionary power or, inversely, if it adheres to the revolution, this political decision is the end of the matter; from there on, the court becomes a part of the system it has chosen, and may not any longer decide on the status of that system (if not by a [counter-]revolutionary act).

If, however, the court accepts both the pre-revolutionary and the revolutionary power, it may transform the political choice into a legal decision. Indeed, in this case, a conflict between the norms of both constitutions granting the court adjudicating power becomes possible. Of this conflict, Lord Reid has said in Madzimbamuto v. Lardner-Burke, that "where a court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory[,] it must decide. And it is not possible to decide that there are two lawful governments at the same time". Such a decision of the extant court may be based on a simple legal system superordinated over both the one under which it has been created and the new revolutionary system. If it is based on such a system, the political choice is transformed into a legal decision. This is something every court must be tempted to do: indeed, to make a political choice is not part of the general mental set-up of a court whereas adjudication according to legal yardsticks is.

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58 This power is not terminated by the revolution as such nor by a possible abolition of the old courts if they are re-established immediately; under the old constitution, the revolution, being by definition illegal, and therefore the possible revolutionary abolition, have no consequences in law. Indeed, the Fiji Court of Appeal was "re-established" by the revolutionary government.

59 Privy Council, Madzimbamuto v. Lardner-Burke [1969] 1 AC 645 (PC) 723, per Lord Reid.
This is the point to return from Fiji to Europe and to discuss how the Court of Justice’s revolution, while, in principle, leaving the Member State legal systems untouched, all the same could have an important effect upon them: it has established, and therefore there is now, an additional legal system competing with the respective legal systems under which the Member States’ courts had been created. That system, i.e. the autonomous Community legal system, authorises the Member State courts to adjudicate according to its own revolutionary premises. Thus, the Court of Justice’s revolution has given a power to the Member State courts which they did not have before. This is not the power (and, indeed, the obligation) to apply Community law which clearly flows, in appropriate case, from the European Treaties even if the latter are considered as part of Member State law. It is the revolutionary power to accept the Community legal system as autonomous, and therefore as incorporating the Member State legal system. This is well expressed in the French adage routinely quoted by the Advocates General according to which the Member State courts at the same time are “juge communautaire de droit commun”. This additional judicial power of the Member State courts is comparable to the power a revolution within a State system gives the extant courts of this State. As there is plainly, in the Member State

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62 There is one important difference to revolutions with institutional continuity within a single State: There, there is, as a rule, only one legal operator whose decisions generally will allow clearly to state which legal system has been chosen. This is shown by the judgment of the Fiji Court of Appeal (supra, n. 4) and by all the decisions quoted by it with just one exception, i.e., on the one hand, High Court of Southern Rhodesia, Madzimbamuto v. Lardner-Burke [1968] 2 S. Afr. L.R. 284 [Southern Rhodesia HC], and, on the other hand, Privy Council,
legal systems, institutional continuity, for those legal systems the Court of Justice’s revolution has not been fundamental. Therefore, the competition of the pre-revolutionary Member State legal systems and the revolutionary Community legal system has given Member State courts the possibility to choose between (i) adhering to their proper Member State constitution, (ii) following the Court of Justice’s revolution, and (iii) making use of both powers and assuming a simple legal system superordinated, on the one hand, to their own and, on the other hand, if not to the Community legal system as such, at least to the Community legal system insofar as it concerns the Member State in question. Either the acceptance of the Court of Justice’s revolution, or the assumption of a simple legal system, if the requirements of the set of rules on effectivity to be assumed with it are met, will lead to the consummation of the Court of Justice’s revolution: not by anything further that Court could do beyond having created, by its revolution, the possibility of that acceptance or assumption, but by a decision of the Member State’s courts which may take the form either of a purely political choice, or of an additional legal decision pursuant to the respective simple legal systems only they may assume.

In this revolutionary context, the objection against the theory of separation discussed above63 could possibly also be raised against the theory of distinctness here expounded. But it is not that the courts were operating, in this context, “within two separate hierarchical orders”64; rather, they have to decide, once and for all (or, at least, until the next revolutionary occasion) which of two rival hierarchical systems to apply. So the courts will never operate, at the same time, within two systems. That they have to choose between two systems is exactly the hallmark of the revolutionary context and, as such, inevitable.

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63 Cf. text at and after n. 44.

64 Eleftheriadis (supra, n. 10) at 217.
The Limpingly Fundamental Revolution

It remains to consider whether the Court of Justice’s revolution was fundamental, or not, on the Community level, i.e. whether there was institutional continuity on that level. In doing so, one has to bear in mind that the establishment of the Community by treaty created a new court, i.e. the Court of Justice but was not revolutionary, and that the Court of Justice’s revolution some 10 years later, between the judgments in Cases Van Gend en Loos and Costav. ENEL⁶⁵, did not create a new court. This militates against the assumption of a fundamental revolution. But the opposite view is also arguable: under legal aspects, the question whether those two quite distinct historical events may be considered, in law, as one, may be answered in the affirmative. The Court of Justice’s original legitimation, based as it was, via the ratification of the European treaties, on the Member State constitutions, may be considered as lost exactly because of the revolution⁶⁶. As the Court — in its present composition — must have the last say also in relation to its “pre-revolutionary” decisions⁶⁷, e.g. the Van Gend en Loos judgment, also these decisions must be read, in our time, as revolutionary. By this means, the Court of Justice’s revolution could be related back to the establishment of the Community when a new court had been created. Under practical aspects, however, the question is moot and does not merit further discussion.

Whether or not the Court of Justice, without acting in a (counter-)revolutionary manner, may assume a simple legal system superimposed over the Community legal system and the Member State legal systems is of no practical relevance as long as that Court simply claims the autonomy of the Community legal system⁶⁸ and as


⁶⁶ Cf. text at n. 21.

⁶⁷ Thus, for the German Constitutional Court, Limbach (supra, n. 32) at 2917.
long as a change of this jurisprudence is not in view.

In contrast, as stated above, the Court of Justice’s revolution has not led to institutional discontinuity in the Member State legal systems. Its revolution therefore may be seen as limpingly fundamental. Whereas for the Court of Justice the claim to autonomy of the Community legal system is absolute in this sense that a change of its relevant jurisprudence is not to be expected, the Member State courts have the possibility — of which they have not yet expressly made use — to subordinate their proper legal system to the Community system by conceding their competing claim to autonomy. As described above\textsuperscript{69}, this possibility has been opened to the Member State courts by the revolutionary jurisprudence of the Court of Justice, and their making use of it would also constitute a revolution from the point of view of the respective Member State legal system. Indeed, such an alignment of the jurisprudence of the Member State courts with that of the Court of Justice would require them either to make a corresponding political choice by accepting the Court of Justice’s revolution or additionally to consider the Court of Justice’s revolution as meeting the requirements of the relevant set of rules of their respective simple legal system.

\textit{The Possible Contents of a Simple Legal System}

As to the possible contents of a simple legal system in the Community-Member State context, some indications may be found in the German Constitutional Court’s case-law. That court has denounced the Community’s shortcomings in substantive democracy, in particular its lack of homogeneity which it has considered necessary for a democratic legitimization of the Community\textsuperscript{70}. This statement may be read as a hint that, if and when such homogeneity will be achieved\textsuperscript{71}, the revolutionary Community legal system might be acceptable as such to the

\textsuperscript{69} Cf. text \textit{supra}, at n. 60.

\textsuperscript{70} BVerfGE 89, 155, 185 \textit{et seq.} — Maastricht.

\textsuperscript{71} According to the German Constitutional Court, \textit{ibid}. at 185, such factual conditions may develop in time within the institutional framework of the European Union.
German Court. Read thus, the German Constitutional Court's judgment, while squarely based on the German Basic Law, provides for the possibility to subordinate, after a change of the factual situation, the German legal system to the revolutionary Community legal system.

In any case, it may be expected, as only reasonable, that the Member State courts will make a political choice, or will assume a simple legal system and consider the requirements of its set of rules met, once the Community legal system will be based on a constitution accepted by popular vote in their respective State even if this vote cannot be construed as a decision of the original constituent power. Even today, such an assumption would not be out of the question in those Member States that have acceded to the Community by means of direct democracy. But I do not know of any case in which a Member State court had made such a choice, or had expressly assumed a simple legal system, let alone affirmed that the requirements of its relevant set of rules had been met.

The Conditions Necessary to Determine the Existence of such a System

Member State courts may choose between the Community legal system and their proper constitution, or assume a simple legal system, expressly or by necessary implication. An express decision on the question of the legal system to apply, or on the assumption of a simple legal system, as it had been taken, for example, by the Fiji Court of Appeal, is not on the books. On the other hand, it is difficult for the observer to determine the contents of a court decision which can only be implied. Indeed, in the last analysis, it is not possible to determine by implication whether a court decision has been taken on the assumption of a simple legal system or on the basis of a political choice, as in both cases the possible outcome — application of the pre-revolutionary or the revolutionary constitution — will be exactly the same.

But it is even difficult, for the observer, to determine by implication whether a court has opted for the
revolutionary or the pre-revolutionary system, *i.e.* for the Community or the Member State system. Such a determination is possible only if the court’s decision contains *dicta* permitting only one interpretation (coming thus close to an express decision), or if there are differences between the jurisprudence of the Community courts and the jurisprudence of the Member State courts that would lead, in the individual case, to different results.

And cf. Hartley (*supra*, n. 1) at 227: “If the *Grundnorm* of the legal system of the European Union were to change, things would at first be much the same as before.”
Dicta allowing only for one interpretation may be found in the German Constitutional Court’s jurisprudence quoted above, i.e. that norms of Community law that negate those structures fundamental to the German Basic Law cannot be effective in Germany. Thus, the German Constitutional Court finds in the German constitution certain limits for the superiority of Community law. This finding presupposes the subordination of the Community legal system under the German legal system. It follows clearly that the German Constitutional Court has opted for the pre-revolutionary system, presumably, as it does not expressly assume a simple legal system, on the basis of a purely political choice. German case-law provides also for an example for differences between Community and German jurisprudence as to the concrete result of a litigation. Some lower courts considered the definition of the scope of the right to property in the Community legal system to be different from its definition in the German legal system. Indeed, these courts considered German law as providing better protection for banana importers than Community law, and as being of such fundamental importance as to take precedence over that law. Led astray by the "misunderstanding" that the German Constitutional Court, in the guise of cooperation, intended to exercise a control over the Court of Justice, they therefore disregarded the relevant Community law they considered to be in conflict with the German Basic Law. From the jurisprudence of both the German Constitutional Court and of the lower courts just quoted, the observer may imply that the respective

73 Cf. text at n. 32 et seq. Cf. also the jurisprudence of the Danish Supreme Court, quoted above at n. 37.


75 On this "misunderstanding" cf. Limbach (supra, n. 32) at 2917, quoting C.-O. Lenz, EuZW 1999, 311.

76 Cf. Finanzgericht Hamburg, decisions of 19 May and 8, 21 und 28 June 1995, quoted in Case C-364 und 365/95, T. Port [1998] E.C.R. I-1023, para. 44 et seq. It is of no importance in the present context that these decisions were quashed as a matter of German statute law; cf. order of the Bundesfinanzhof of 22 August 1995, quoted *ibid.*, para. 46.
courts had opted for the application of the Member State legal system.

These examples apart, in positive law, differences in jurisprudence are apparently avoided, in our day, in all Member States. The superiority of Community law over all Member State law, including constitutional law, which must be seen, from the point of view of the revolutionary Court of Justice, as developed on the basis of its revolution, is accepted by the highest courts of all Member States, although, expressly or presumably, on a different basis. Restrictions to this superiority which have sometimes been claimed by Member State courts have never been decisive but always pure *dicta*. Concerning the German examples of differences just given, in the meantime the German Constitutional Court has made it clear, by interpretation of German law, that the differences between Community law and German constitutional law found by lower courts did not exist; there is no such difference because German law accepts the Court of Justice’s human rights jurisprudence as long as this jurisprudence, seen as a whole, is by and large up to the standard of the German Basic Law, differences in individual points notwithstanding. The German Constitutional Court’s decision in question is particularly interesting in that it claims for that court, in theory, a reserve competence necessarily based on the pre-revolutionary German constitution while at the same time accepting, for all practical purposes, that the Court of Justice’s competence is of last resort. This precarious compromise between pre-revolutionary theory

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78 But cf. the analysis of the Court of Justice’s case-law by Hartley (*supra*, n. 1) at 242.

79 Cf. Hartley (*supra*, n. 1) at 243.

80 Cf. BVerfGE 102, 147, 163 — Bananas.

81 *ibid*.

82 Cf. BVerfGE 102, 147, 164 — Bananas.
and revolutionary practice, while it avoids differences between the respective jurisprudence of the two courts, still upholds the German Constitutional Court’s theoretical claim to the application of the pre-revolutionary system.

It is probably one of the reasons for this decision by the German Constitutional Court, and for decisions in other Member States leading to similar results, that in view of the complexity of national and international systems of court protection, clarity and legal certainty require to avoid differences in jurisprudence\(^8_3\); indeed, "[t]he function ... of a judge is to assist in bringing about stability, not conflict"\(^9_4\). From the point of view of the observer, it is perfectly acceptable, and even required in the absence of clear-cut rules, for courts to take into consideration general principles like those just mentioned\(^8_5\). Even so, this avoidance of differences is an astonishing feat as the Member State courts continue, at least presumably, to decide on the ultimate basis of their respective constitutions, while the Court of Justice decides on the ultimate basis of the European treaties. This situation easily might have led to differences in the jurisprudence of the different courts which could have destroyed the Community. However, it has successfully been dealt with on the one hand by the Member State courts accepting the superiority of Community law at least as long as that law keeps within certain very wide limits, and on the other hand by the Court of Justice respecting those limits as a matter of legal fact. This avoidance of differences

\(^8_3\) Thus Limbach (\textit{supra}, n. 32) at 2915 on the relationship between the German Constitutional Court and the Court of Justice of Human Rights.


may be called a flexible cooperation of these courts.86 As there is no coordinating legal system, none of the courts considered having assumed a simple legal system, in the last analysis such cooperation is based on judicial politics only and cannot be required in law.87

Conclusion

The avoidance of differences in jurisprudence, however, makes it difficult to define the existing legal situation in terms of legal theory. Indeed, as a consequence of this avoidance, and insofar as there are not, as in Germany, any judicial dicta to the contrary, it has become doubtful whether the Member State courts do still adhere, as presumed in the present article, to their proper constitutions as the ultimate bases of the law they apply. At the same time, in the absence of conflicts which are exactly avoided by the said judicial cooperation, it cannot be ascertained beyond doubt that they accept the European treaties as such ultimate basis.

86 The German Constitutional Court’s use of the term “cooperation” in BVerfGE 89, 155 at 175 and 178 — Maastricht has been criticised by much of the academic notes on that decision; cf. the references in M. Heintzen, “Die ‘Herrschaft’ über die Europäischen Gemeinschaftsverträge — Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?”, Archiv des öffentlichen Rechts 119 (1994) 564 at 583, n. 82. If understood as here in the text, it is an innocuous, indeed necessary precondition of the functioning of the aggregate of Community and Member State legal systems which functioning, according to Pernice (supra, n. 3) at 719, is required by a “common decision of the peoples of the Member States”. Similarly as here Heintzen, ibid., at 589.

87 B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, in A.-M. Slaughter et al. (eds.), The Court of Justice and National Courts — Doctrine and Jurisprudence; 1998, p. 277 at 292-293, concludes that a number of the Member State highest courts have found a “fine-tuned balance between requirements of European integration and state sovereignty” looking like “peaceful coexistence’ whose maintenance is in the hands of the political and judicial institutions of the Member States”.

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Under these circumstances, an observer will have to assume, in discussing the question discussed in the present article, an undefined state of uncertainty as long as the Court of Justice’s revolution has neither been accepted nor refuted, expressly or by necessary implication, in the legal system of a Member State. This state of uncertainty may last for a long time or even indefinitely if differences between the jurisprudence of the different courts can be avoided by their cooperation. Most likely, it will only end, in relation to any one Member State, with an appropriate decision by the supreme court of that Member State. Such a decision might be expected if either the Community will get a true constitution by popular vote or, inversely, if, maybe in the context of the next enlargement, the Community legal system will no longer be able plausibly to entertain its claim to autonomy. As long however as either it will remain uncertain whether a Member State’s highest court has accepted the Court of Justice’s revolution in that Member State’s legal system, or such a court will even continue expressly to adhere to its proper constitution as the ultimate basis of the law it applies, as long a community in law, i.e. a community with a unified legal system considered by all relevant courts in the same way will not have been achieved. For the time being, therefore, a cooperation of the courts, based in the last analysis on considerations of judicial politics, is at the same time the prerequisite of the state of uncertainty and the best of


89 A similar result is reached by N. MacCormick, "Beyond the Sovereign State", MLR 56 (1993) 1 at 4 et seq.

90 An alternative way has been discussed in Schilling (supra, n. 88), i.e. that lower courts of a Member State might refuse to follow their supreme court’s jurisprudence and might align their jurisprudence, again in an revolutionary act, to that of the Court of Justice.
all possible results.\footnote{In a former article, I have rejected as highly disturbing a claim of pluralistic theories according to which "not all legal questions can be answered in law"; cf. Schilling \textit{(supra, n. 2)} at 580 \textit{et seq.} There is nothing to take back. While the answer to be given in law may depend on the court competent to give it, differences are not to be expected as long as the Community and Member State courts cooperate.}