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Federalism in the Federal Republic of Germany and the European Union

Peter J. Tettinger

A. FEDERALISM IN THE FEDERAL REPUBLIC OF GERMANY

In Europe, besides Switzerland, Germany has had a very long tradition of federalism. Considering federalism's roots — from The Holy Roman Empire of the German nation, which showed remarkable federal elements; to the reformation process; and to the Guestphalian peace in 1648 — I only can refer to it in general terms.

I. Basics

Today the Federal Republic of Germany is a federation consisting of several individual states, the Ländere. This is in line with the German constitutional tradition. Consider the Constitutions of 1848, 1871, and 1919 (with a harsh break in 1933: Gleichschaltung).

The federal nature of the system of government in the Republic is reflected in the fact that these, after reunification, now sixteen individual states are not mere provinces but states endowed with their own powers. The Socialist German Democratic Republic ("DDR") was a centralized state, and reunification came into force by the reactivated eastern Ländere (Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen) entering the Federal Republic.¹

The Ländere have governments of their own and government authority which is not derived from the Federation. Consequently, the individual states have constitutions with creative clauses such as "sports have to be promoted by land and municipalities," which,

1. Professor of Constitutional Law, University of Cologne, and Judge of the Constitutional Court of North Rhine-Westphalia (Germany).
according to Article 28, § I cl. 1, must be consistent with the principles of a republican, democratic, and socially responsible constitutional state as laid out in the Basic Law. Clause 2 requires that "in each of the individual states, counties and municipalities the people shall be represented by a body elected by general, direct, free, equal and secret ballot." Together these clauses 1 and 2 of Article 28, § I represent the principle of homogeneity. A substantial characteristic of the federal state is the distribution of the tasks and powers between the individual states and the Federation. This competence dualism becomes concrete in the federal constitution — the Basic Law — regarding the distribution of powers by specific legislative, executive, and judicial bodies.

Concerning this matter, the fundamental provision is Article 30 of the Basic Law which states that "the exercise of governmental powers and the discharge of governmental functions is incumbent on the individual states insofar as this Basic Law does not otherwise prescribe or permit."

Related to this provision, the Basic Law contains several specifications about the distribution of legislative powers in Articles 70 et seq., the execution of federal laws and the federal administration in Articles 83 et seq., and the finance complex in Articles 104a et seq. Some authors speak about German vertical federalism, whereas they declare the United States' system to be horizontal federalism. Thus, even a cursory review illustrates that German federalism is different from the others and that it is very complicated.

II. Federal Legislation

In compliance with Article 70 of the Basic Law, the individual states have the right to enact legislation as long as the Basic Law itself does not empower the Federation to do so. Thus, there is a fundamental assumption in favor of the competence of the individual states. Consequently, in theory, federal legislation is in the hands of the individual states. In practice, however, the most important ranges of legislation are reserved for the Federation be-

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5. GG art. 28, § I, cl. 1.
7. GG art. 30.
cause the Basic Law provides comprehensive catalogues of areas subject to the legislative jurisdiction of the Federation. Articles 71 et seq. divide the responsibility for legislation into three categories, namely exclusive, concurrent, and framework legislation at the federal level.

Article 71 states what exclusive legislation means: "On matters within the exclusive legislative powers of the Federation the individual states have authority to legislate only if, and to the extent that a federal law explicitly so authorizes them."9 The individual states are, in all other respects, excluded from the legislation. Supplementing this provision, Article 73 contains a complete catalogue of the areas of legislation which fall exclusively within the purview of the federal government. For example, the Federation has the exclusive power to legislate on foreign affairs, defence, monetary matters, aviation, and some areas of taxation.

In the case of concurrent legislation, which is defined in Article 72, § I, the individual states have "authority to legislate as long as and to the extent that the Federation does not use its legislative power."10 Thus, with access to areas which are subject to the concurrent legislation, the Federation takes priority over the individual states. However, in the case of concurrent legislation, the Federation does not have unconditional legislative jurisdiction. According to Article 72, § II the federal government may only legislate "if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest."11 Such a requirement can be eliminated, for example, by treaties of the individual states among themselves. Areas which fall into the category of concurrent legislation are included in the complete catalogue of Article 74. Among others, concurrent legislative powers extend to the following matters: civil and criminal law (No. 1), economic affairs (No. 11), nuclear energy (No. 11a), labour relations as well as social security (No. 12), land law (Nos. 15 and 18) as well as the laws concerning foreigners (No. 4), shipping (No. 21), road transport (No. 22), and air pollution control and noise abatement (No. 24).

There are other areas which fall, in the first instance, under the jurisdiction of the individual states, but where the federal gov-

9. GG art. 71.
10. GG art. 72, § I.
11. GG art. 72, § II.
government can issue regulations. Subject to Article 75, in the context of framework legislation, the individual states do not have full legislative authority so far and so long as the Federation executes its legislative power. Legislative jurisdiction of the Federation in this area is also due to the requirement stated in Article 72, § II.

Different from the situation concerning concurrent legislation, the Federation may not enact complete and final provisions, but may only enact framework regulation even if the condition of Article 72, § II is met. Framework regulation is a regulation which is able to be completed and needs to be completed by legislation of the individual states. Article 75 therefore states in § I that the Federation "has the right to enact general rules" and in § III that the individual states "are obligated to issue the necessary provisions within an appropriate period of time which is determined by law." Framework regulation of the Federation may contain details or directly valid regulations only in exceptional cases. Framework legislation applies, for instance, to the general principles of higher education, nature conservation and landscape management, regional planning, and water management.

There are additional areas which are in the legislative jurisdiction of the Federation, namely Article 91a for joint tasks and Article 109 for budgetary law, which are called principal legislation. Furthermore, under certain tight conditions, unwritten legislative authorities of the Federation are recognized.

The individual states are responsible for those areas of legislation not covered by the federal government or which the Basic Law does not place within the ambit of the Federation. Thus, they enact legislation on educational and cultural policy almost in its entirety, as a manifestation of their "cultural sovereignty." They are also in charge of local authority, government, and police law.

III. Implementation of Federal Legislation and Executive Powers

Characteristic of the federal system in Germany is that the distribution of executive and administrative powers does not follow the distribution of legislative jurisdiction; rather, it is separately regulated in Articles 83 et seq. of the Basic Law. The reason for the separate regulation is the administration's concern with the

12. GG art. 75, § I.
13. GG art. 75, § III.
difficult circumstances under which a decentralized administration can react more appropriate than a centralized administration.

As mentioned before, Article 30 contains a fundamental assumption in favor of the competence of the individual states. Article 83 solidifies this assumption in such a way that “the individual states shall implement federal legislation in their own right in so far as this Basic Law does not provide or permit otherwise.”¹⁴ This means that states implement the laws within their own responsibility and in so doing are not subject to the instructions of the Federation. The Federation exercises only a limited legal supervision according to Article 84, § III. It can only issue general administrative rules with the consent of Bundesrat.¹⁵ Directives of the Federation are possible, subject to Article 84, § V, and solely in exceptional cases. Thus, the individual states are administered independently of the Federation. The individual states generally execute federal laws “as matters of their own.”

For certain areas, the Basic Law provides for the execution of the federal laws by individual states on behalf of the Federation. This “execution by the individual states on federal commission” is stated in Article 85. By law and from experience, this means that the individual states are supervised by the Federation and bound to federal directives which are issued with the consent of the Bundesrat. Whether “execution by the individual states on federal commission” takes place must be expressly stated in the Basic Law. Areas of application are, for instance, administration of federal motorways (Article 90, § II) and execution of nuclear energy laws (Article 87c).

Direct federal administration is referred to in Article 86 as the execution of laws “by its own administrative authorities or by federal corporations or institutions established under public law,” and it means that the Federation “issues, insofar as the law in question contains no special provision, general administrative rules” and “provides for the establishment of authorities insofar as the law in question does not otherwise provide.”¹⁶ This direct federal administration is only permitted if the Basic Law provides it, as in Article 87. It is basically limited to the foreign service, the labour offices, customs, the Federal Border Guard, and the Federal Armed Forces.

¹⁴. GG art. 83.
¹⁵. See GG art. 84, § II.
¹⁶. GG art. 86.
Finally, one can say that the distribution of powers in the Federal Republic of Germany is based on a functional division among different levels of government: while the central level makes the laws, the federal units are responsible for implementing them. This kind of federalism in which competences are shared rather than divided up between the two levels of government is called "cooperative federalism." In this system the vast majority of competences are "concurrent" or "shared." The functional division of labour requires a strong representation of interests of the federal units at the central level. Their reduced capacity of self-determination must be compensated by participatory rights in the Federation. In Germany this task is fulfilled by the Bundesrat.

IV. The Bundesrat – a Special Federal Body

The individual states are involved in the federal system of the Federal Republic of Germany not only by the exercise of jurisdiction as stated in the Basic Law but also by means of the Bundesrat. The Bundesrat represents the sixteen federal states and embodies the federal element of the Federation. It does not consist of elected persons like in the United States Senate or members of the state parliaments; rather, it is composed of members of the Länder governments which appoint and recall them. Each individual state has between three and six votes, depending on the size of the population. The Bundesrat is not an organ of the individual states but a federal body that exercises exclusively federal powers. In the Bundesrat, the Länder are able to participate in legislation and governmental administration on the federal level. For instance, in certain cases the consent of the Bundesrat is necessary in order to pass a bill, although the Federation is entitled to legislative jurisdiction in principle. In executive matters, the Bundesrat takes part in the federal supervision over the individual states and in the enactment of general administrative rules for the individual states. In addition, it participates in the establishment of federal authorities in the cases of Article 87.

If the political constellations in central and local state government should differ, the Bundesrat can act as a political counterweight and thus as the instrument of the opposition without inciting rebuke for obstructing the democratic process. This is one point for current reform discussions because of situations similar

17. GG art. 51, § I.
to the French problem of “cohabitation.” The Bundesrat elects its President for a one-year term following a fixed rotation schedule. The President of the Bundesrat exercises the powers of the federal President in the event of the latter’s indisposition.

V. Judicial Power

Article 30 also applies to judicial power. Consequently, the individual states are responsible for jurisdiction in general. So most of them (fifteen of sixteen) have created a Constitutional Court of their own. In Nordrhein-Westfalen, four of the seven Constitutional Court judges are elected by parliament for a term of six years. It is a part-time position; so I have been able to act as a university law professor at the same time as a Constitutional Court judge. The judges, nevertheless, must proceed in accordance with federal substantive and procedural law (according to Article 74, § I, cl. 1). Subject to Article 92 of the Basic Law, judicial power “shall be exercised by the Federal Constitutional Court, the federal courts provided for in this Basic Law, and the courts of the individual states.”

A federal jurisdiction for the establishment of supreme federal courts is stated in Article 95. Regulations concerning the Federal Constitutional Court (“FCC”) are contained in Articles 93 and 94. Domiciled in the city of Karlsruhe in Baden-Württemburg, the FCC consists of two panels, each with eight full-time judges, half of whom are elected by the Bundestag, and the other half, by the Bundesrat. Each judge serves for twelve years and may not be re-elected. There is an age limit of sixty-eight years.

The FCC rules only in response to petitions listed in Article 93 of the Basic Law. In compliance with Article 93, § I, cl. 4a, every citizen has the right to file a constitutional complaint if he claims that one of his other basic rights has been violated by public authority. As a general rule, however, he must previously have appealed to the courts responsible and have been turned down by them. The FCC also rules on disputes concerning the extent of the rights and obligations between the central government and the states, or between individual federal institutions who have been vested with rights of their own by the Basic Law. Additionally, subject to clause 2, the FCC checks whether federal and state laws

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18. See GG. art. 93, § I, cl. 3.
19. See GG. art. 93, § I, cl. 1.
can be reconciled with the Basic Law. If the Court declares a law to be null and void, the law may no longer be applied. The FCC has repeatedly concerned itself with matters of great significance as they regard domestic or international policy and of considerable interest to the public. There is no "political question" doctrine, so "judicial activism" is an issue. For example, the judges once ruled on whether it was in line with the Constitution to deploy German soldiers out of area, whether the "Maastricht" treaty was constitutional, and whether fundamental protection of life can be reconciled with the rulings under German criminal law on abortion. Independent of their political persuasions, federal governments must bow to decisions of the eight judges.

VI. Perspectives

The real strength of the individual states lies in their administrative functions and in their participation in the legislative process at the federal level through the Bundesrat. The individual states are responsible for all internal administration, and their bureaucracy actually implements most federal laws and regulations. Individual state administration performs a threefold task: handling matters that fall exclusively within its jurisdiction (such as schools, police, and regional planning); implementing parts of federal law in its own right and on its own responsibility; and finally, implementing other parts of federal law on behalf of the federal government. Thus, in constitutional practice, in the course of its development, the Federal Republic of Germany has become a state where most legislation is enacted centrally, whereas the bulk of administration is conducted at the individual state level — another point of current reform discussions.

The Basic Law emphasizes the core idea behind federalism, which also includes the principle of subsidiarity. Accordingly, matters should only be submitted to a higher authority if the previous one is not as well-equipped to handle them. This means that there is a progressive scale of authorities, extending upwards from municipalities via the individual states (Länder), via central government (Bund), continuing up to the European Union ("EU").

21. BVerfGE (Decisions of the FCC) 90, 286 ff.
22. BVerfGE 89, 155 ff.
23. BVerfGE 39, 1 ff.
According to the principle of the single authorization (principle of conferral of competences) the EU can act only in matters expressively assigned to it. Procedures and limits of the transfer of sovereign powers in Germany result from consequences of this state sovereignty, irreversible principles laid down in Articles 20 and 28 of the Basic Law (a federal, republican, democratic, and social system governed by the rule of law), and an option for establishing a united Europe in Article 23, § I, cl. 1 of the Basic Law, where it states:

With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social, and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by law with the consent of the Bundesrat.  

In these days a Federalism reform commission, composed of members of Bundestag and Bundesrat, is at work. It should have made consensual proposals to change the Constitution in December 2004, but unfortunately failed to do so.

B. “FEDERALISM” WITHIN THE EUROPEAN UNION

I. “Federal” Nature of the European Union

The sometimes so-called, sometimes denied, federal structure of the EU significantly differs from German federalism. The EU may be described as a system of multi-level governance, where sovereign rights are shared and divided among supranational, national, and subnational (regional) institutions. Because of the specific ways in which the division of power is organized among the different levels in the EU, traditional theories of international relations and European integration have difficulty capturing the nature of “federalism” in the EU. For example, in the United Kingdom, “federalism” seems to be a swearword, so it is not found in any of its EU documents.

24. GG. art. 23, § I, cl. 1.
It is commonly agreed that the EU has developed into more than an international organization or confederation of states because the Member States of the EU co-operate more closely than those of a confederation. Besides the economic union, now there is a currency union. Nevertheless, due to the fact that the Member States maintain their national sovereignty, the EU has not become a federal entity either. There were strong discussions about whether such an entity could have a "constitution," and the compromise was a "Treaty establishing a Constitution for Europe."\footnote{26. See P. M. Huber, Europäisches und nationales Verfassungsrecht, VVDStRL (Publications of the Association of German Scholars of Constitutional Law) 60 (2000) p. 194, 196 ff., 234 f.; P. J. Tettinger, Ein Schritt in die richtige Richtung, aber ... – Anmerkung zum Konventsentwurf eines Vertrags über eine Verfassung für Europa –, NWVBl 2003, 414 ff.}

The founders of the European Communities (now European Union) did not envisage a truly federal structure. Hence, the EU has developed into a political community with comprehensive regulatory powers and a proper mechanism of territorially-defined exclusion and inclusion. In the course of time the EU acquired more and more sovereign rights in a wide variety of policy areas which range from exclusive jurisdiction to far-reaching regulatory competences. In addition, EU regulations increasingly penetrate even the core of traditional state responsibilities, such as the police and armed forces.

In spite of this, the EU currently lacks two significant features of a federal polity. First, EU Member States remain the "masters" of the treaties, in terms of holding the exclusive power to amend them, change them, and ratify them domestically, as is mandatory. Even in the areas of "exclusive competences," the EU cannot legislate without the consent of the Member States. With the exception of monetary policy, there is no area in which Member States have completely ceded sovereignty to the EU to the extent of excluding their direct participation in decision-making. Second, the EU has no real "tax and spending" capacity. Moreover, it lacks an essential element of democratic control: the composition of the European Commission as the "EU executive" is not chosen directly by European citizens.

Because of the inability to subsume the federal structure of the EU under common patterns, the German Federal Constitutional
Court has created the term "bond of states" for the EU as a system between a confederation of states and a federal entity.\textsuperscript{27} Although establishing some important changes concerning the institutions of the EU and the division of powers between the Union and its Member States, this situation will not really change when the new constitution for Europe is in action.

\textbf{II. Central lines of the Treaty Establishing a “Constitution for Europe”}

Between February 2002 and July 2003, the so-called European Convention, presided over by Giscard d'Estaing, and composed of representatives of the Heads of State and Government of the Member States, representatives of the national parliaments of the Member States, members of the European Parliament and representatives of the European Commission drew up a draft Treaty establishing a Constitution for Europe ("TEC").\textsuperscript{28} In June 2004, the Heads of State and Government of the twenty-five Member States of the EU agreed on a European Constitution which was based upon this draft constitution. The final version now must be ratified by the twenty-five Member States of the EU.\textsuperscript{29}

The Constitution is arranged into four parts. The first one is concerned with the basic principles of the EU. These include the common values, the objectives of the EU, the categories of competences, and regulations concerning the exercise of these competences, as well as fundamental definitions related to the institutions and to certain political policies. Within this context Article I -7 clarifies that the EU has legal personality. The second part of the Constitution contains the Charter of Fundamental Rights of the Union, formulated in the year 2000 by another European Convention presided over by Roman Herzog.\textsuperscript{30} Part three is the actual


\textsuperscript{28} See for a general survey T. Oppermann, Eine Verfassung für die Europäische Union, Der Entwurf des Europäischen Konvents, DVBl 2003, 1165 ff. u. 1234 ff.

\textsuperscript{29} Conference of the representatives of the governments of the member states, 29. Oct. 2004, CIG 87/2/04, REV 2. Do not be disturbed by different texts in steps of development. Now there is a new count on all 448 Articles (with Protocols in addition). – For example, Art. 1 of the Fundamental Rights Charter is now Art. II-61 of the Constitution.

core of the Constitution. It describes the individual policies within which the EU may act (principle of conferral of competences). Part four contains final clauses.

1. Competences

The division of competences between the EU and its Member States follows the principle of conferral of competences whereby the Union can only act within the limits of the competences conferred on it to attain the objectives set out in the Constitution. The same article expressly states that "competences not conferred upon the Union in the Constitution remain with the Member States."32

The constitutional treaty recognizes three types of competences — exclusive, shared, and complementary.

The EU has exclusive competence in a specific area when it alone is able to legislate and adopt legally binding acts. The Member States may intervene in this area only if empowered to do so by the EU. Article I-13 specifies the areas in which the EU has exclusive competence. Examples include monetary policy, common commercial policy, and customs union.

In shared competence, the Member States and the EU have powers to legislate and adopt legally binding acts in a specific area. The Member States exercise their powers in so far as the EU has not exercised, or has decided to stop exercising, its competence. Most of the EU’s competences fall into this category. Article I-14 contains a non-exhaustive list of shared competences, for example, internal market, area of freedom, security and justice, energy and environment.

In certain areas and in the conditions laid down by the Constitution, the EU will have competence to carry out actions to support, coordinate, or supplement the actions of the Member States, without thereby superseding their competence in these areas. This is known as complementary competence. Legally binding acts adopted by the EU in this connection may not entail harmonisation of Member States’ laws or regulations, and are known as supporting, coordinating, or complementary competences (Article I-17). This applies amongst others to the area of industry, protec-

32. Id.
tion and improvement of human health, and cultural and civil protection.

Apart from this classification, Member States will always be able to exercise competences using the enhanced cooperation mechanism. For example, Article I-44 states that Member States that wish to do so may establish enhanced cooperation between themselves within the framework of the EU’s non-exclusive competences.

2. The Principle of Subsidiarity

Moreover, the principle of subsidiarity regulates the exercise of powers. This means that the EU should only act if its action is more effective than that of the national governments of the Member States. The subsidiarity principle is intended to determine whether, in an area where there is joint competence, the Union can take action or should leave the matter to the Member States.

But who monitors the application of the subsidiarity principle?

The draft Constitution has introduced a major innovation concerning this subject, which is incorporated in two protocols that are attached to the Constitution. The main innovation is the creation of a system for monitoring the application of the principle of subsidiarity which, for the first time, directly involves the national parliaments — the so-called early warning system. In addition to forwarding directly all Commission consultation documents (green and white papers and communications), it is proposed that the Commission also send to the national parliaments "the annual legislative programme as well as any other instrument of legislative planning or policy strategy that it submits to the European Parliament and to the Council of Ministers." Moreover all legislative proposals sent to the European Parliament and to the Council of Ministers shall simultaneously be sent to Member States’ national parliaments. Each national parliament can then review the proposals and submit a reasoned opinion if it considers that the principle of subsidiarity has not been complied with. If one third of parliaments share the same view, the Commission must review its proposal.

It also is confirmed that any Commission proposal must be justified with regard to the principle of subsidiarity. This allows the

national parliaments to notify publicly the European institutions and their own governments of any proposal which they believe fails to comply with the principle of subsidiarity. The protocols also give national parliaments the right to bring actions before the Court of Justice, via their Member State, on grounds of infringement of the principle of subsidiarity by a legislative act.

3. European Institutions

The competences conferred upon the EU by its Member States are exercised by the institutions of the EU. Article I-19 (of Title IV, the title covering the Union's institutions) states: "[T]his institutional framework comprises: the European Parliament, the European Council, the Council of Ministers, the European Commission [and] the Court of Justice of the European Union." Alongside these five main institutions there are two other institutions: the European Central Bank and the Court of Auditors. The latter two are mentioned separately in Chapter II of Title IV, Article I-30 and I-31, entitled "The other Union institutions and advisory bodies." Thus, there are seven bodies that have been classified as institutions of the EU.

a) The European Parliament

The European Parliament is the only European institution which is directly elected by the citizens of the EU. These elections must be based on direct universal suffrage in free and secret ballot and allow the European citizens to elect their representatives for a term of five years. However, there is no equality of votes because the number of mandates to be assigned by each Member State is fixed in advance and differs a great deal from Member State to Member State (for example, Luxembourg gets six seats; Germany, ninety-nine). According to Article III-330, the Council by Law shall establish the necessary measures for the election of the Members of the European Parliament by direct universal suffrage in accordance with principles common to all Member States.

Parliament is acting within the legislative procedures of the European Union in a graduated intensity. For "Legislative Acts" (Article I-34), the Parliament gets equal legislative powers with

34. Id. at art. I-19.
35. See id. at art. III-330 et seq.: "The functioning of the Union" with detailed provisions governing these institutions.
the Council of Ministers. Thus it is co-legislator in almost all cases, with the exception of a dozen acts, where it will only be consulted. European laws and framework laws will, pursuant to the Convention's proposal, be adopted by the Parliament and the Council of Ministers. In addition, Parliament has functions of political control and consultation as laid down by the Constitution, such as control of the Commission or execution of the budget.

b) The European Council

Article I-21 repeats the definition of the role of the European Council in the EU's development, as the institution which "provides the Union with the necessary impetus for its development and shall define its general political directions and priorities" but states that it does not exercise legislative functions.

The European Council consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. It meets quarterly, convened by its President. When the situation requires, the President may convene a special meeting of the European Council.

c) The Council of Ministers

For each of its formations, the Council of Ministers will consist of a ministerial-level representative of each Member State. The Council of Ministers, jointly with the European Parliament, exercises legislative and budgetary functions. It will also have policy-making and coordinating functions. The executive powers conferred on it by existing treaties are not mentioned in Article I-21 but are found in Article I-37 on implementing acts.

The draft constitutional treaty reorganises the work of the various Council of Ministers formations. Thus, Article I-24 introduces two formations: the Legislative and General Affairs Council and the Foreign Affairs Council. The Legislative and General Affairs Council will ensure consistency in the work of the various Council of Ministers formations. When it acts in its General Affairs function, the Council of Ministers will, in liaison with the Commission, prepare and ensure follow-up to meetings of the European Council. When it acts in its legislative function, the Legislative Council will consider, and, jointly with the European Parliament, enact

36. Id. at art. I-21.
European laws and European framework laws. The Legislative Council, which is to be set up as part of the General Affairs Council, therefore represents an important innovation which demonstrates the legislative powers of the Council of Ministers.

The Foreign Affairs Council will, on the basis of strategic guidelines laid down by the European Council, flesh out the Union's external policies and ensure that its external actions are consistent. This Council of Ministers formation will be chaired by the Union Minister for Foreign Affairs.

d) The European Commission

In the draft constitutional treaty, the essential functions of the Commission are reaffirmed, namely the right of initiative (in particular as regards annual and multi-annual programming), overseeing the application of Community law, execution of the budget, management of programmes, and external representation of the EU, except in the case of the common foreign and security policy. It also stresses the principle of collective accountability and of responsibility to the Parliament.

At present, the Commission consists of twenty members. To ensure operational effectiveness from 2005 onwards, the Commission will consist of one national from each State. When the EU is comprised of twenty-seven Member States, the number of commissioners will be capped and a rotation system based on the principle of equality will be introduced under arrangements adopted unanimously by the Council.

According to Article I-27, the appointment of the members of the European Commission takes place as follows: "Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, . . . shall propose to the European Parliament a candidate for the Presidency of the Commission." Subsequently this candidate must be elected by the majority of the members of the European Parliament. The President of the Commission then selects the European Commissioners from persons whose independence is beyond doubt on the ground of their general competence and European commitment. The President and the persons

37. Id. at art. I-26.
38. TEC art. I-27.
so nominated for membership of the Collegium are collectively submitted to a vote of approval by the European Parliament.

e) The European Court of Justice

According to Article I-29, "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." The supreme body is now called "The Court of Justice" while the Court of First Instance of the European Communities is to be renamed "General Court." Article I-29 states that the Court of Justice of the European Union shall include "the Court of Justice, the General Court and specialised courts."

The European Court of Justice "shall ensure that in the interpretation and application of the Constitution the law is observed." It therefore rules on actions brought by a Member State, an Institution, or a natural or legal person in accordance with the provisions of Part III of the Treaty Establishing a Constitution for Europe ("TEC"), on the other cases provided for in the Constitution, and gives preliminary rulings, at the request of Member State courts, on the interpretation of Union law or the validity of acts adopted by the Institutions.

Finally, private individuals’ access to the Court of Justice will be facilitated by a provision in Part III that provides that any natural or legal person under certain conditions may institute proceedings against an act which is addressed to that person or which is of direct concern to him, and against a regulatory act, which is on direct concern to him and does not entail implementing measures. In this way, the draft Constitution should make it easier for citizens to challenge the EU’s regulatory acts under which penalties are imposed, even if these acts do not affect them individually, unlike what is required under existing treaties.

One can easily discern that the EU — for an outsider as well as for an insider — is a complicated entity, and it seems to become more and more complicated by this Treaty. Today nobody knows if it will be enacted. I personally am hopeful because this treaty, conferring and confirming the "acquis communautaire," in my opinion, is a clear step forward. I am not sure if this is to be seen in Britain and in some other member states in the same way. The

39. Id. at art. I-29.
40. Id.
41. See id. at art. III-364 P.4.
motto of the EU after all—*nomen est omen*—shall be "United in diversity."\(^4\)

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42. TEC art. I-8[3].