

FOURTH WORKING SESSION

Chaired by Mr Constantin ECONOMIDES

Perspectives on the idea of confederation in Europe (here understood as based in particular on the European Union experience)

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a. **CONTEMPORARY CONCEPT OF CONFEDERATION IN EUROPE - LESSONS DRAWN FROM THE EXPERIENCE OF THE EUROPEAN UNION**

Report by Mr Yves LEJEUNE, Professor at Louvain Catholic University

The legal nature of the European Communities and, today, the European Union is one of the most complex and most debated issues in law¹. Ever since the E.C.S.C. was set up, every possible opinion on the subject has been expressed. The Communities have been described as federations; as partial or limited functional federations; as international organisations with a quasi-state or quasi-federal structure; as *sui generis* or supranational international organisations; and as one or more confederations. The adoption of the Maastricht Treaty has compounded the difficulty of describing such an entity. The components of the European edifice have multiplied and the European Communities have undergone a radical transformation, which began with the Single European Act in 1986.

The structure constituted by the Union and by its Community foundations inspire fresh attempts at definition, which inevitably come up against the hybrid nature of such a structure². And yet the Union and Communities "form a unified whole on the international scene"³. Could it be that this concentric system defies classification under the legal theory of the state?

¹ For previous attempts at definition, see P. HAY, *Federalism and Supranational Organizations*, Univ. of Illinois Press, 1966, pp. 29-76 and the bibliography referred to in pp. 77 and 78; K. von LINDEINER-WILDAU, *La supranationalité en tant que principe de droit*, Leyde, A.W. Sijthoff, 1970, pp. 153-159; L.J. CONSTANTINESCO, "La nature juridique des Communautés", *Ann. Fac. Droit Liège*, 1979, pp. 154-192; V. CONSTANTINESCO, *Compétences et pouvoirs dans les Communautés européennes : contribution à l'étude de la nature juridique des Communautés*, Paris, LGDJ, 1974. For more recent analyses, see C. LEBEN, "A propos de la nature juridique des Communautés européennes", in "L'Europe et le droit", *Droits*, n° 14, 1991, pp. 61-72 and the references mentioned in note 2.

² See, e.g., S. CASSESE, "L'architecture constitutionnelle de la Communauté européenne après Maastricht et la place des pouvoirs locaux", in *La décentralisation française et l'Europe* (H. PORTELLI, ed.), Boulogne Billancourt, ed. Pouvoirs Locaux, 1993, pp. 215-223; A.D. PLIAKOS, in *R.T.D.E.*, 1993, pp. 187-224.

³ S. CASSESE, *op. cit.*, pp. 215-216 (translation of the French original).

Before setting out a number of elements reflecting various opinions, some clarification of the concepts of federalism, international organisation, confederation, supranationality and "intergovernmentalism" is necessary (section I). This will be followed by a brief description of the institutional architecture of the European Union (section II). Lastly, the legal nature of the European edifice will be analyzed on the basis of recent legal and political developments and in the light of the case-law of the European Communities Court of Justice and the member States' constitutional courts (section III).

I. BRIEF ANALYSIS OF CERTAIN CONCEPTS

A. Federalism

In the broad sense of the term, political federalism is an *integration* movement giving rise to groups, associations, unions or confederations of states, or to federal states. In its strict sense, political federalism is a phenomenon of domestic law which structures and organises a single state by reconciling unity and diversity, equality and hierarchy, autonomy and interdependence.

Anglo-Saxon legal doctrine has pragmatically identified four federal characteristics of some international organisations such that they may be described as "functionally federal": power-sharing between "central" bodies and "regional" bodies; relative independence of these bodies *vis-à-vis* one another; direct action by these bodies on the people; and the principle of power-sharing, usually guaranteed by judicial review⁴. Obviously, these essentially descriptive characteristics can generally be found, to differing degrees, in all federal states as well as in a number of confederations and some integrated international organisations, such as the European Communities.

B. Supranationality

The European Union member states have invented and implemented a method of "group government", often dubbed supranational, which has no precedent elsewhere in the world⁵. The method chosen, namely the voluntary integration of democratic States, is a unique experiment in the history of mankind. In

⁴ See, e.g., I. BERNIER, *International Legal Aspects of Federalism*, London, Longman, 1973, pp. 2-6 and 211-216.

⁵ According to J. LEPRETTE (*Une clé pour l'Europe*, Brussels, Bruylant, 1994).

practical terms this finds expression in a set of "supranational" characteristics. This "supranationality" is no doubt a concept without specific legal meaning but which may have real descriptive value.

A "supranational" organisation is an international organisation dedicated to integration on which its founders have conferred characteristics considered unusual for intergovernmental organisations (though not necessarily for confederations). The more an international organisation integrates its members, the more "supranational" it becomes. It combines various characteristics set out in the treaty establishing it. It has the power to take decisions in respect of member states that are directly binding not only on their public authorities but also on the individuals within their jurisdiction. Its own organs perform their functions quite independently of the member states and take their decisions in accordance with the majority principle; individuals may appeal against such decisions before a judicial body of the organisation. This is indeed the case for the three European Communities.

Supranationality is therefore not simply an assortment of methods for calculating the respective weight of states in joint decision-taking to counterbalance the *de facto* inequality arising from the functional over-representation of small "powers". Nevertheless, the decision-making mechanism in "supranational" organisations, however autonomous they may be *vis-à-vis* their founding States, remains, by virtue of its origin, interstate and therefore intergovernmental in nature. The calculation of the respective weight of each member in "supranational" decision-making prevents "directorial" or hegemonic temptations as does, in general international law, the principle of the sovereign equality of states, which is not in any way a supranational principle.

C. The difference between an international organisation and a confederation

Can we argue that an international organisation pursuing this kind of integration is closer to the confederation of States model?

It is customary to say that a confederation is a group of states whose purpose remains state-based whereas an international organisation is a body distinct from its founding members who have invested it with special powers to pursue collective interests. While the confederation is, in principle, simply an organised

union of states without international personality⁶, the organisation usually has such personality⁷.

In both cases, it is public international law which governs relations between member States⁸. In both cases, the central organs exercise only those powers provided for in the treaty establishing the entity concerned. In both cases, they consist of representatives of all the member states. In both cases, the collective body is the fruit of the states' common will to cooperate in specific fields, in view of their *de facto* interdependence. In both cases, the structure created is purely functional and instrumental: it is an association of states and not a national community with an intrinsic right of self-determination under public international law. In both cases, the entity has no real territory. The confederation has a territorial base which does not belong to it (since it is not recognised as having rights and obligations) but is the sum of the territories that its member states have acquired exclusively. The "territory" that can be deemed to delimit the spatial competence of an international organisation does not belong to it either since the organisation, made a subject of international law by its founders, is a non-territorial legal entity: the relevant territory does not determine a group of individuals' membership of a public community. An international organisation is no more "territorial" than a local social welfare centre⁹, whose spatial sphere of competence is defined by the municipal territory.

What are the essential differences then?¹⁰

From a legal standpoint, the **confederation** is a structure of permanent, institutionalised cooperation enabling its member states to present a coordinated point of view on the international scene and to establish harmonised, even uniform, legislation on certain internal issues. Although this may restrict the

⁶ On this question, see part D below.

⁷ However, this does not apply to either the Benelux or the European Union.

⁸ It is international law which governs relations between the members of a Confederation (J.F. AUBERT, *Traité de Droit constitutionnel suisse*, Neuchâtel, Ides et Calendes, 1967, t. I, p. 198, in note i; L. WILDHABER, *Treaty-making Power and Constitution*, Basle and Stuttgart, Helbing and Lichtenhahn, 1971, p. 256 etc.).

⁹ Such as the "Centres publics d'aide sociale" (CPAS), local public establishments in Belgium.

¹⁰ See also P. HAY, *op. cit.*, in particular pp. 18-29 and 80-89.

states' freedom of action, it is the result of their own volition and it is in "the very exercise of sovereignty" that they consented to it without losing either the power of having the last word (*Kompetenz-kompetenz*) or their "international immediacy" (*Völkerrechtsunmittelbarkeit*), even in part.

The **international organisation** is not a group of states but a body distinct from its member states on which the latter have conferred autonomy and, usually, separate legal personality, authorising the development of "internal law" proper to that organisation. The purpose is to assign the permanent task of multilateral cooperation to a specialised international administrative entity, whilst ensuring that there is no infringement of the sovereign equality of the States which have instituted it. The simplest framework is one which respects the strictest equality among states, thereby averting any commitment to interstate integration, although there is nothing to prevent states from adapting the rules of collective management governing their common entity according to the majority principle or from extending such management to broader fields, to achieve a form of sectorial integration. This is how what are now commonly called "supranational" organisations have emerged.

D. Considerations on the definition of a confederation

It is clear that both "supranational" organisations and confederations are ruled by international law, derived from an integrative (ie federal) approach by States instituting them through treaties. Although the pursuit of integration may require States to modify their constitutional law, this does not make them disappear from the international stage. According to our analysis so far, the two models seem to be distinguished by the personality acquired by a "supranational" organisation, in contrast to a confederation, and by the nature of the interstate method of integration, in particular the direct effect of legal rules set by the organisation.

In practice, legal commentators have never fully agreed on the two following aspects which continue to divide contemporary writers:

- the international legal personality of the confederation;
- the indirect nature of the relationship between the "local" populations and the confederation, whose central body must rely on the member states to implement its decisions.

Without having had the opportunity to re-read all the authors who have contributed to shaping the concept of confederation¹¹, we have gleaned the following variations on these two themes.

1. Is the Confederation a subject of international law?

For L. LE FUR, the Confederation is "an association of sovereign states in which there is a central authority with legal personality and possessing permanent organs"¹²; as far as J. de LOUÏER is concerned, it is "a plurality of states which is clearly an international legal entity while the 'state' character of its members remains intact and undeniable"¹³. J.H.W. VERZIJL describes it as a "new legal entity" or a "compound international person"¹⁴. P. Hay maintains that the Swiss Confederation and the North-American Confederation have been recognised as subjects of international law but he does not conclude that the coexistence of the member states' personality and that of the Union is a criterion for distinguishing between the federal structure and the confederal structure¹⁵.

For M. SIOTTO-PINTOR however the central body does not exercise its international powers as personal rights. "It merely represents one way which the members have chosen to exercise rights belonging to them individually. As the members remain subjects of public international law, the confederation can be the subject of specific rights only exceptionally when direct and exclusive power is assigned to it"¹⁶. Similarly, P. LABAND writes that "the confederation of states is a 'legal relationship' between states and not a 'subject of law' [...] The will of the Confederation is merely the expression of the common will of its members [...] Even though, in international law relationships, the confederation

¹¹ See contributions by Professor G. MALINVERNI and Professor M. FORSYTH. Adde J.L. KUNZ, *Die Staatenverbindungen*, Stuttgart, W. Kohlhammer, 1929, pp. 442-456.

¹² *Etat fédéral et Confédération d'Etats*, Paris, Marchal et Billard, 1896, p. 495 (quoted in French by M. FORSYTH, *op. cit.* p. 138).

¹³ *Le droit international public positif*, Oxford University Press, Vol. I, 1920, pp. 205-206 (translation).

¹⁴ *International Law in Historical Perspective*, Leiden, A.W. Sijthoff, Vol. II, 1969, p. 159 and note 23.

¹⁵ *Op. cit.*, pp. 22 and 87-88.

¹⁶ "Les sujets du droit international autres que les Etats", *R.C.A.D.I.*, 1932, vol. 41, pp. 252-362, at p. 308 (translation).

of states is regarded as a collective power, even though it has a collective name, even though it can appoint common plenipotentiaries, etc., it nevertheless remains, in accordance with its legal nature, a society of states"¹⁷.

This last analysis seems the most valid. Unless it is reduced to being a mere international organisation, the confederation can give rise to a new international personality only by encroaching on the very substance of its member states' sovereignty. Judicial doctrine and practice consider that confederate states retain full sovereignty and that treaties concluded by the central body confer on them direct and exclusive rights and obligations. Thus, on 4 July 1978, the Swiss Federal Court ruled that a treaty concluded by the Swiss Confederation before the Federal state was founded (1825-1826) bound and continues to bind the cantons on whose behalf it was concluded¹⁸. Consequently, if the confederate members remain directly subject to the treaty law established by the confederal body in conjunction with foreign states, it is difficult to see what rights and obligations the confederation could hold in its hypothetical capacity as a subject of international law.

2. Can the confederation exert direct jurisdiction over individuals?

The traditional definition of a confederation is that it constitutes a group whose members are states, not human beings, such that the central authority does not maintain direct relations with the nationals of those states.

L. LE FUR noted however, back in 1896, that "there is clearly nothing to prevent confederate states, when assigning a given function to the central authority, from conferring on it the right, in connection with that function, to bind their nationals; and, in fact, it will be observed that this is what happens to varying degrees in all confederations of states without exception"¹⁹. Similarly, J.-F. AUBERT notes that there are a number of counter-arguments to the claim that there is an absence of direct relations between the confederation and the populations of confederate states²⁰. M. FRENKEL observes that the

¹⁷ *Le droit public de l'Empire allemand*, Paris, V. Giard and E. Brière, vol. I, 1900, pp. 100-101 and 104 (translation).

¹⁸ *Elmar, Schwald & Cie*, 4 July 1978, ATF 104 III 68, 69-70; *A.S.D.J.*, 1979, p. 163.

¹⁹ *Op. cit.*, p.507 (quoted by M. FORSYTH, pp. 139-140).

²⁰ *Traité de droit constitutionnel suisse*, Neuchâtel, Ides et Calandes, 1967, vol. I, No. 525, p. 200.

and the populations of confederate states²⁰. M. FRENKEL observes that the treaty establishing a confederation can bind individuals directly, which is increasingly frequent in modern economic confederations²¹; and J.H.W. VERZIJL acknowledges that a form of political organisation, "half-way between confederation and federation", can be identified when central organs are invested with direct legislative or judicial authority over the individuals within the member states' jurisdiction²².

The above considerations lead to the conclusion that the use of the legal model of a "supranational" organisation for federalist ends has the following advantages:

- it is a simple means to confer the status of subject of international law on the structure which incorporating the member States;
- it makes it possible to achieve more extensive integration in a wider range of areas than in 19th Century confederations, while also fundamentally preserving the international independence and "immediacy" of States.

II. EUROPEAN INSTITUTIONAL ARCHITECTURE

One hesitates to point out that the European Communities are, in law, three separate international organisations with joint organs. What has been labelled the European Union, which does not have international personality, is quite simply the formalisation of cooperation between the member States in fields falling outside the jurisdiction of the Communities, with the help of the Community organs; nonetheless, the Union may also be seen as a system of concentric circles encompassing both the European Communities and the machinery for intergovernmental cooperation in common foreign and security policy, justice and home affairs. This is how it will be understood in what follows.

²⁰ *Traité de droit constitutionnel suisse*, Neuchâtel, Ides et Calandes, 1967, vol. I, No. 525, p. 200.

²¹ *Federal Theory*, Australian National University, 1986, No. 308, p. 77.

²² *Op. cit.*, vol. II, p. 160.

The main instruments for the implementation of Community policy, primary law and secondary law, establish rules which, as the member states intend, must be applied directly or indirectly by all state bodies to all entities, private or public, addressed by those rules.

The Treaty of 7 February 1992 on European Union significantly extends the fields in which the Community can take action; among them, monetary policy can be regarded as one of the most important. Alongside this extension of its "exclusive" powers, the Community has been granted powers to be exercised "conjointly" with those of the member States²³ *"if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community"* (principle of subsidiarity, Article 3b of the Treaty establishing the European Community).

The Union itself - and not the European Community - is gradually being granted certain state powers of "sovereignty" or "authority", sometimes referred to as "regalian"²⁴, namely defence, foreign affairs, justice and public order, to be managed through intergovernmental cooperation²⁵, even though "gateways" to the European Community are provided²⁶.

In this way, the Union-Community now handles a wide variety of state activities, albeit to a more or less limited degree.

The institutional structure of the European entity consists, without a doubt, of *intergovernmental* components: the Council of Ministers and the European Council; the Monetary Committee (with advisory status) and the Economic and Financial Committee; the Political Committee for matters of common foreign

²³ *It should not be forgotten that this distribution of powers between the Community and the member states is quite different from the distribution of legislative or administrative powers within a federal or regionalist state. Each state retains control over the transfer of power to the European Community; to recover exercise of that power, it "simply" has to withdraw. A federal state, however, has conferred on its federate bodies a substantive part of its powers, and constitutional reform is necessary to modify this purely internal distribution.*

²⁴ S. CASSESE, *op. cit.*, p. 218.

²⁵ Titles V and VI of the Treaty on European Union.

²⁶ *In the fields of justice and home affairs (Treaty on the European Union, Art. K.9; E.C. Treaty, Art. 100c, para. 6).*

and security policy; the Coordinating Committee for matters of justice and home affairs; COREPER and the General Secretariat of the Council²⁷. Even the European Parliament, in the final analysis, fits at least into an interstate, if not intergovernmental, framework²⁸.

The Commission and, to a degree, the Court of Justice represent the "*supranational*" components of the structure. The Commission consists of members offering every guarantee of independence *vis-à-vis* the member states and takes decisions by a majority voting procedure²⁹. It may indeed have lost its exclusive power of initiative both in areas within the Community domain and in "extra-Community" sectors, but the Treaty on European Union has broadened its field of action by broadening that of the Community; moreover, it has left intact the organisation of the Commission, in particular its many committees through which it has managed to weave an extremely dense network of contacts with national administrative departments.

Through the Court of First Instance, the Court of Justice pursues its task of reviewing the lawfulness of the acts of Community institutions but does not review the exercise of powers conferred on the Union (Treaty on European Union, article L). However, its functions may be extended to the fields of justice and home affairs if conventions adopted by the members states in these fields so provide (article K.3, paragraph 2, final sub-paragraph).

The Treaty of 7 February 1992 also establishes or consolidates entities similar to the "independent administrative authorities" that have emerged recently in several member states. Neither intergovernmental nor supranational, these institutions enjoy extensive autonomy *vis-à-vis* states, the Commission and the European Parliament. They include the European Monetary Institute, the European System of Central Banks (ESCB), the European Central Bank³⁰, the European Investment Bank³¹, the Court of Auditors³² and the Ombudsman³³.

²⁷ *Treaty on the European Union, Art. D, J.8, para. 5 and K.4, para. 1; E.C. Treaty, art. 146 and 109j, para. 2, art. 100d, 109c and 151.*

²⁸ *See below, section III, A.*

²⁹ *E.C. Treaty, Arts. 157 and 163.*

³⁰ *E.C. Treaty, art. 4a and 105 et seq.*

³¹ *E.C. Treaty, art. 4b, 198d and 198e.*

³² *E.C. Treaty, art. 188a et seq.*

In this complex, multifarious structure, the standard-setting function is shared chiefly between the Parliament and the Council, with a distinct emphasis on the latter despite the consolidation of the Parliament's powers. The Council's decisions frequently require unanimity³⁴ but may be taken by absolute or qualified majority in many cases³⁵.

The amalgamation of such diverse components, held together by a delicate balancing act between sometimes conflicting interests, has produced a somewhat hybrid, multiple structure that should now be identified in relation to the legal concepts described earlier.

III. THE LEGAL NATURE OF THE EUROPEAN EDIFICE

The European edifice is "federal" in the broad sense because it satisfies the conditions established in Anglo-Saxon legal doctrine³⁶, by integrating states which remain independent. It is not, or barely, federal in the strict sense because it often establishes uniformity without taking account of national diversity (cf. debate on subsidiarity) and because no big member state in the group would agree to forgo its international sovereignty in order to build a veritable European federal state. Only three definitions of the legal nature of the European Union and its components are therefore possible: a supranational organisation or organisations, an integrated confederation, or a *sui generis* institution with a distinct system of law.

A. Developments

1. Factual developments

As far as the factual situation is concerned, the interaction between the policy of Community institutions and that of its member states has taken on an "internal" dimension that has replaced traditional approaches to international cooperation. It is characterised by growing interdependence between the

³³ E.C. Treaty, art. 138e.

³⁴ This is so in fields falling within the jurisdiction proper of the Union (Treaty on European Union, art. J.8, para. 2 and K.4, para. 3).

³⁵ For the weighting of votes for the purpose of calculating a qualified majority, see art. 148 of the E.C. Treaty.

³⁶ See above, section I.A.

two levels of authority and by full dovetailing of their respective powers. In practice, therefore, the effectiveness of Community decisions depends on a delicate balance between seeking integration and taking account of national interests.

This "internal" dimension presupposes a European "environment" which, for want of a better word, will be described as "supranational". The free movement of goods, persons, services and capital in a geographical area without internal borders is the most obvious manifestation of such an environment.

Is the situation of the states within the Union affected by this development? The consolidation of the role of Community institutions and the removal of internal borders are indications that this may be so.

2. Legal developments

Another way of asking the same question is to examine what is vaguely termed "the two legitimacies", that of the states grouped together in the Community and that of the peoples - or people? - electing the European Parliament.

The Maastricht Treaty based European citizenship on citizenship of the Union. If citizenship is taken to mean "nationality" - which in the French tradition of public law is inaccurate - then European citizenship is a concept expressing an individual's allegiance to a political entity that is neither a state nor a recognised member of the international community in legal terms, but simply a group of states which retain individually the right to determine who are their nationals and accept all the consequences with respect to internal law and private international relations.

However, the Edinburgh European Council decided on 11-12 December 1992 that "the provisions [...] relating to citizenship of the Union [...] do not in any way take the place of national citizenship". The same European Council also took note of the unilateral declaration by Denmark that "Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-State". Citizenship of the Union therefore signifies, first and foremost, the recognition of a number of rights throughout the integrated area in which these citizens enjoy free movement. Such rights (and obligations) are henceforth attached to the status of European citizen and are no longer the by-product of the (negative or positive) obligations

on each state³⁷. It is a guarantee of equal treatment on the territory of other member states. The same phenomenon occurred when the first genuine federal states were formed.

On a political level, citizenship of the Union means recognition of the right to vote and to stand as a candidate in elections to the European Parliament in the member state of residence, under the same conditions as nationals of that state³⁸. The Treaty provision guaranteeing this right³⁹ could be seen as the implicit embodiment of the existence of a "nation" of European citizens able to appoint their representatives in whichever member state and to express the political will of this "nation" at European level through political parties⁴⁰. This forward-looking view, however, cannot prevail over the interstate logic underlying the European Parliament as an institution, insofar as it continues to consist of "representatives of the peoples of the States brought together in the Community"⁴¹.

B. Tentative legal description

1. Internal viewpoints

One way to approach the question of description is to refer to the constitutions of the member states which, after all, remain the founders of the European Union and the Communities.

In the coordinated Belgian Constitution, article 34, originally incorporated in 1970 as article 25bis, states that the entities which may be granted the exercise of given powers emanating from the Belgian nation are "public international law

³⁷ S. CASSESE, *op. cit.* p. 217. It can be deduced that a direct legal relationship now exists between the European Community and the nationals of the different member states.

³⁸ The right to vote and stand as a candidate in municipal elections, which has quite different implications, will not be discussed here.

³⁹ E.C. Treaty, art. 8b, para. 2.

⁴⁰ E.C. Treaty, art. 138a.

⁴¹ As observed by M. SEIDEL and A. PLIAKOS (*R.T.D.E.*, 1993, p. 221). See E.C. Treaty, art. 137.

institutions"⁴². Title XIV of the French Constitution, introduced before the ratification of the Maastricht Treaty, states in article 88-1 that the European Communities and the European Union, in which the French Republic participates, "consist of states which have chosen freely, under the terms of treaties, to exercise jointly some of their powers". The new Article 23, paragraph 1 of Germany's Basic Law authorises the Federal Republic to participate "with a view to establishing a united Europe, in the development of the European Union [to which] the Federal state may [...] transfer rights of sovereignty".

It will be observed that national Constitutions favour the theory of the interstate character of the European Union, on which its founders have conferred public authority prerogatives in an area of competence determined by them. The constitutional case-law of some member states confirms and reinforces this interpretation.

According to the French Constitutional Court decision 92-308 DC of 9 April 1992, France participates, without its national sovereignty being infringed, in "the establishment or development of a permanent international organisation having legal personality and decision-making authority obtained by the transfer of powers granted by the member states"⁴³.

On 12 October 1993⁴⁴, the German Federal Constitutional Court ruled that "the treaty is the foundation of a group (*Verbund*) of European states" (reasons, C) "destined to develop" (C, II.2, d 2), "with the aim of creating an ever closer union among the peoples of Europe" (C,II) but "originating in the member states and respecting their national identity" (Reasons, C). This "community of states may carry out acts of sovereignty and has been granted the exercise of sovereign autonomous powers" (C, 1.2, a); that exercise, however, "is based on authorization conferred by states which remain sovereign" (C, 1.2, c).

⁴² On the "validation" of founding treaties in Belgian constitutional law, see P. WIGNY, *Propos constitutionnels*, Brussels, Bruylant, 1963, chap. V; N. VALTICOS, "Expansion du droit international et Constitutions nationales", in *Hommage à Paul De Visser*, Paris, Pedone, 1984, pp. 9 et seq.

⁴³ *J.O.* (Official Gazette), 11 April 1992, p. 5354.

⁴⁴ 2 BvR 2134/92 and 2 BvR 2159/92. A partial French translation appears in *R.U.D.H.*, pp. 286-292; see also the note by C. GREWE on pp. 226-231.

The German Constitutional Court considers that the purpose of the treaty is not "membership of a European state" (Reasons, C). "In any event, the institution of a 'United States of Europe', comparable to the founding of the United States of America, is not currently being considered [...] Community power derives from the member states and may only have binding effect on German territory by virtue of a decision ordering its application in Germany. Germany is one of the 'masters of the treaties' concluded with a view to permanent membership but from which it could withdraw by a decision to that effect. In this way, Germany retains its status of sovereign state by virtue of its own law and the principle of sovereign equality with other states" (C, II.1, a).

The German Constitutional Court also considers that article F, paragraph 3 of the Treaty, according to which the Union shall provide itself with the means necessary to attain its objectives and carry through its policies "does not confer jurisdiction on the Union to decide questions of jurisdiction". It is a political "declaration of intent" (C, II.2, b6), a general policy provision relating to joint action by the member states and not to "an independent subject of law endowed with its own powers" (C, II.2, b1). Moreover, the states have always expressed their desire to confine the European institutions and organs to the exercise of functions and powers specifically delegated to them (C, II.2, b3, b6 and c). At the European Council in Edinburgh, the Heads of State and Government "confirmed the member states' general conception that the states themselves would remain 'masters of the treaties' and subsequent developments thereof" (C, II.2, b6). Hence, the states alone retain jurisdiction to decide matters of jurisdiction.

2. The Community point of view

The matter takes on a very different complexion from the standpoint of the case-law of the European Court of Justice. Opinion 1/91 of 14 December 1991⁴⁵ considers that "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. [...] the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals"⁴⁶. This standpoint had, for the most part, already been

⁴⁵ (1991-1992) 9 D.J.I. 537, p. 538.

⁴⁶ It will be noted that this last detail corresponds to an old definition of the federal state, which consists of two categories of members: the nationals and the federate states (see R. CARRE de MALBERG, *Contribution à la théorie générale de l'Etat*,

expressed in the *Van Gend & Loos* judgment of 5 February⁴⁷ and, in another form, in the *Costa v. ENEL* judgment of 15 July 1964⁴⁸. In other words, the umbilical cord linking the European Communities to the member states has been cut and the latter have lost a part of their sovereignty, i.e. a part of themselves. Such an analysis, which has allowed the Court of Justice to transpose gradually the exigencies of the state based on the rule of law to this "Community based on the rule of law"⁴⁹, is tantamount to acknowledging the "irreducibly specific nature of the Community's legal structure"⁵⁰, a non-state entity independent of the States which have established it and which accordingly generates law which is neither international nor national.

As in most aggregative federal systems, the Court of Justice (which is an organ of the "central authority") has pursued a centralist policy. It formulated the doctrine of the pre-eminence of Community law back in 1964 (*Costa v. ENEL* judgment) and, in the interests of consolidating the authority of Community law, it sought to introduce a series of legislative consequences of this pre-eminence into the member states' systems of national law⁵¹.

Paris, Sirey, 1920, vol. I, p. 119).

⁴⁷ Case 26/62, *Rec.* p. 5, concl. K. ROEMER. This judgment however described the new legal system as being part of international law; it did not describe the treaties as a "constitutional charter of a Community based on the rule of law" and it referred to the limitation of the sovereign rights of states "in limited fields" only.

⁴⁸ Case 6/64, 15 July 1964, *Rec.*, p. 1143.

⁴⁹ D. SIMON, "Y a-t-il des principes généraux du droit communautaire?", *Droits*, No. 14, 1991, pp. 73-86, at p. 82.

⁵⁰ D. SIMON, *op. cit.*, p. 76.

⁵¹ National judges and all public authorities were required not to apply any contrary provisions of national law (9 March 1978, *Simmenthal*, case 106/77); national judges were required to suspend provisionally the application of a national measure until its compatibility with Community law had been established, even in cases where these judges did not have such authority under national law (19 June 1990, *Factortame*, case C-213/89, *Rec.* p. 2433); member states were required to ensure effective judicial review so as to allow those concerned to monitor observance of Community rules (15 May 1986, *Johnston*, case 222/84, *Rec.* p. 1676); individuals were granted the right to obtain compensation for the harmful consequences of a violation of Community law attributable to a member state, even if no corresponding basis exists in national law (19 November 1991, *Francovich and Bonifaci*, case C-6 and 9/90, *Rec.* p. 5357); member states were required to ensure observance of Community law by individuals and to provide "effective, deterrent, proportional

Whatever the pertinence of these inductions, they are difficult to reconcile with E.E.C. case-law, and one cannot have it both ways. *The first possibility* is that Community law and the different systems of national law form a single, integrated legal system which the states no longer control but rather to which they are subject. In this case, there is no need to proclaim the pre-eminence of one legal system over others; or, in the case of sub-systems linked by a federal structure, it is necessary to proclaim the equipollence of federal law and federate law: a hierarchy of legal rules within the unitary normative system or within the legal sub-orders coordinated by the "constitutional charter", would suffice. *The second possibility* is that Community law is a third system of rules, separate from the international system and from state legal systems. If this is so, it should not impose, outside its sphere of competence, obligations of conduct on its member states. Such obligations are only applicable insofar as the states act as subjects of the Community legal system. These states may of course impose on themselves the obligation to take measures in their domestic systems via agreements under traditional international law; but by proclaiming itself independent of the will of the states which conceived it, Community law has set itself up as an original source, logically stripping it of the right to impose obligations on national systems, which are just as independent.

The fact is that the European Community legal system does not come under the member states' systems, but nor does it include them. It is the internal legal order of an international organisation to which the founding states have opted to transfer the power to take certain decisions concerning them (secondary law). It is a distinctive system of international law produced by bodies expressing the will of one or more legal entities distinct from the states.

Individuals continue to fall within the jurisdiction of national States. In theory, it is only indirectly that they are subject to European Union law. As the addressees in national law of directly applicable Community rules, at most they can be considered secondary subjects of Community law in so far as they have their own rights and obligations in this system. As felicitously expressed by J. VERHOEVEN, it is the respective autonomy of the national and international legal systems that gives direct applicability its special character⁵²: without the pluralism of legal systems, the question of direct effect would not arise.

penalties, comparable with those applied for national law violations of comparable nature and magnitude" (2 February 1977, *Amsterdam Bulb*, case 50/76, *Rec.* p. 137).

⁵² "La notion d'"applicabilité directe" du droit international", *R.B.D.I.*, 1980, pp. 243-264, at p. 244.

3. *The interstate, hence international, nature of the European edifice*

In reality, the German Constitutional Court's analysis⁵³ seems completely valid. The founding of the European Union and European Communities by treaty normally implies that they are subordinate in legal terms to their founders. The states have neither relinquished their sovereignty nor conferred jurisdiction to decide matters of jurisdiction on the Union or its interstate components. There is no doubt that "legitimacy" or sovereignty - that is: the ultimate source of authority in Community Europe - lies with the states. In legal terms, they have not definitively renounced the sovereign rights they conferred on special international organs placed at the head of administrations with legal personality and organisational and technical autonomy. The personality of these groups is "secondary" or "derived" to use H. MOSLER's terminology⁵⁴: such legal entities do not have a legal existence "by virtue of their own right" (*kraft eigenen Rechtes*) and their powers, even in respect of individuals, remain legally dependent on the joint good will of the member states.

The continued consolidation of the internal market, however, prompts public opinion in the states concerned to question the development of this political-administrative integration of states and demand the right to have a say, since Europe now affects individuals in their daily life. The European Parliament exists in theory to channel and express such opinion. It is the expression of Europe's human dimension whereas the Community edifice is that of the states, the Commission and technocracy.

The European Parliament takes the form of a congress⁵⁵ to which are delegated representatives of each "state people". It was therefore undoubtedly overstepping its powers when it drew up drafts for a European Union Constitution.

⁵³ See III.B.1 above.

⁵⁴ See, *inter alia*, "Die Erweiterung des Kreises der Völkerrechtssubjekte", *ZaöRV*, vol. 22, 1962, pp. 1-48.

⁵⁵ In history, this was the name given to the confederal body or the constituent assembly of a future federal state.

Indeed:

a. disregarding the flexibility of international terminology⁵⁶, in law a constitution is the founding instrument of a sovereign public community; the fact is that the European Parliament derives its powers from the Treaties which were concluded by the states; without a revolution, only the states have authority to conclude a merger treaty transferring power of the final word to a higher entity and establishing its constitution, which would give rise to a European state as soon as the organs of such a state had been set up, in application of the treaty, and had begun official activities⁵⁷;

b. usually, the exercise of an original, constituent power is barely hindered by legal limits but where Europe is concerned it should originate in an assembly that has received a mandate from each national electorate body⁵⁸; this is not the case, however.

Hence, it is essential to make good the "democratic deficit" by introducing, both at national and Union level, permanent parliamentary scrutiny of the European executive organs, be they intergovernmental or otherwise.

4. *The European Union is a confederation of states*

The most appropriate manner of describing the European edifice today seems to be as a confederation of states, clad at the outset in the "legal garb" of international organisations. The states remain fully sovereign but have created an integrated interstate area for which they have adopted new uniform rules and principles for the harmonisation of national legislations. Community law is the specific international law of a confederation, designed by the confederate states to govern their reciprocal relations in fields determined by the founding treaties. The reader will not be surprised by this description, if the following is considered:

a. historically, matters handled collectively by confederate states are not confined to joint security, defence and external relations, even though it is true to say that these are the prime concerns of such states; such matters frequently include internal issues (such as the armed forces, currency and finance);

⁵⁶ Does the ILO not, after all, have a "constitution"?

⁵⁷ See R. CARRE de MALBERG, *op. cit.*, vol. I, pp. 135-137.

⁵⁸ Cf. the founding of the United States and Switzerland.

b. only the most important decisions of the common organ of the confederate members require unanimity; a qualified majority is sufficient in other cases;

c. confederations may be integrated to differing degrees, provided that they continue to respect the international sovereignty of their members; they exercise the powers laid down in the treaties establishing them, which may grant the confederal organs direct control over the confederate states' territories and nationals, to avoid the instability that characterised the earlier forms of this type of group.

Despite the complexity of the European Union's architecture, it is not difficult to spot the distinctive features of a standard confederation. The restructuring of scattered elements into a single system, however asymmetrical it may be, undeniably simplifies the interpreter's task. The Union is founded on international treaties which, on account of their implications for the functioning of member states' institutions, frequently require modifications, to varying degrees, of national Constitutions. These treaties, concluded for an indefinite period⁵⁹, create bodies responsible for managing the member states' common foreign and security policy as well as organising an economic and monetary union while respecting the international sovereignty of those states. The European Council, the Council of Ministers and the COREPER bring together representatives of all the member states⁶⁰; through these bodies collective and, in theory, egalitarian management of joint affairs is possible⁶¹. The Court of Justice settles disputes among the member states and between the member states and the Community bodies within the scope of the treaties and the law deriving from them.

As it forms a particularly integrated confederation, the Union/Community has been granted by its founders the authority to establish legal rules that are directly applicable in all the member states to the individuals concerned. It

⁵⁹ EC Treaty, Art. 240.

⁶⁰ Such representation is effected respectively by heads of state or government, ministers, or delegates mandated by their governments. The European Parliament, for its part, represents more specifically the peoples of all the member states.

⁶¹ "The current pivotal role of the Committee of Permanent Representatives deserves particularly to be noted. Because of its permanency, its close links with the member states, and the "instructions" which pass to it from them, it is in some ways more analogous to the governing body of the customary confederation than any other body in the European Community" (M. FORSYTH, *op. cit.*, p. 185).

possesses a body, the Commission, consisting of members who perform their duties with complete independence - as desired by the confederate states themselves - and invested with powers of initiative and proposal. Lastly, it ensures the uniform interpretation and application of Union law through the Court of Justice.

Some characteristics of the Union are alien to the traditional physiognomy of confederations, but are not incompatible with it. These include the absence of centralisation with regard to general aspects of foreign policy⁶²; the extension of joint tasks to cover a great number of areas of state activity; the fragmentation and mutual autonomy of the bodies representing the states; the powers of joint decision and scrutiny granted to a parliament that is democratically elected by the peoples of the member states; lastly, the existence of monetary and financial authorities that are independent of the states and the Community institutions.

* * *

In the final analysis, from the experience of the European Union it is possible to identify it with all necessary caution, as an example of "contemporary concepts of confederation". It would appear that within a confederal union, the protection of the member states' international sovereignty can be reconciled with renouncement of a purely egalitarian system of managing joint affairs. It is also compatible with "supranational" organs, procedures and powers. And especially, it is possible partially to make good the confederation's democratic shortfall by subjecting the intergovernmental and supranational organs to scrutiny by an interparliamentary assembly to which are delegated the representatives of each "state people", in addition to the national parliaments' scrutiny of the ministers participating in the confederal decision-making organs⁶³.

⁶² *The European Community is only competent in matters of common commercial policy - with the notorious difficulties of determination which that entails.*

⁶³ *See D. NAGANT DE DEUXCHAISNES, "Le renforcement du caractère démocratique de la Communauté européenne", in La Belgique fédérale, Brussels, Bruylant 1994, pp. 440-458, esp. pp. 447 et seq.*

b. **NEW IDEA OF CONFEDERATION IN EUROPE**

Intervention by Mr Armando TOLEDANO LAREDO, Legal adviser of the European Commission

Mr President, I would like to make a few comments after the brilliant report by Mr Lejeune.

First of all, we are in a Seminar on the modern concept of confederation. Professor Lejeune spoke about the prospects of a new idea of confederation in Europe on the basis of the more specific experience of the European Union and he reached the conclusion, based upon various legal arguments, that the European Union is a Confederation.

In attempting to explain what the European Union is, I rather tend to explain what it is not. In effect, it is easier to state that it is neither a State nor an international organisation like any other than to describe it in the image of something close to a federation or confederation, particularly when one is addressing people who are not necessarily legal experts.

I very much appreciated the approach of Mr Lejeune, and I wish to congratulate him on the clarity of his treatment. But in considering the question of whether the Union might be regarded as a confederation or not, he did not speak of the place which is occupied by the citizen in this construction. I believe that this point should not be overlooked, and indeed that it deserves to be given some attention. In the list that Professor Malinverni established yesterday, what characterises a federation as opposed to a confederation is, particularly, the existence of a common federal citizenship, a federal territory, a Parliament elected by universal suffrage, a court of law at its centre, and the right to levy taxes.

It is well known that these elements are partially present in the European Union, but it is perhaps less known that the Union raises a certain number of taxes in the agricultural sector and that the levy imposed on the turnover of companies in the coal and steel sector is a tax. When the steel industry was faced with a crisis some years ago when the steel industry was becoming bankrupt, the European Community was in difficulty because it had these debts. A Recommendation of the Coal and Steel Community, duly transposed into the domestic legal orders of member States, provided that the levy in question was in the nature of a privileged credit.