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**The Constitutional Relationship between the European Union
and the European Community:
Consequences for the Relationship with the Member States**

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Abstract

This contribution addresses the question of the complex legal relationship between the European Union the European Community and their member states. It is argued that the legal order of the Communities forms a part of the Union's legal order. In that sense there *is* a single legal order of the Union, which may even be perceived in terms of a constitution. This constitution may be seen as overarching everything that goes on within the Union, on the basis of both the Union and the Community treaties. Through the unity of the Union's legal order, the member states do not stand in another relation to the Union than to the Communities. With the Treaty on European Union they established a new international legal person, the organs of which on the basis of decision-making procedures are made competent to adopt decisions and to act on behalf of the member states. As the Union constitution is based on an interdependence of all norms in the European Union (including those based on the Community treaties), it becomes increasingly difficult to make a strict separation between the three parts of the Union.

Although this paper was originally written in reaction to a paper by Prof. Werner Schroeder, entitled *The Constitutional Relationship between the European Union and the European Communities*, it can perfectly be read on a *stand alone* basis as the arguments used by Schroeder are repeated.

The Constitutional Relationship between the European Union and the European Community: Consequences for the Relationship with the Member States

Ramses A. Wessel

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I. INTRODUCTION

After more than ten confusing years during which the legal structure of the European Union (EU) proved to be an almost inexhaustible source for academic writing and political discord, we are now witnessing a period in which even the toughest taboos are broken. Who could have ever imagined that issues such as the legal personality of the Union or the merger of the pillars would be discussed in the open, with a fair chance of being accepted by all member states?¹ Of course, to some of us this is only a confirmation of what we claimed from the outset.² Nevertheless, one cannot deny that something has changed since the signing of the Maastricht Treaty in 1992. The term ‘European Union’ has replaced the ‘European Community’, not only in the media, but increasingly by the EU itself as well.³ The legal personality of the Union has proven to be not at all frightening, as the signing by the Union of international agreements with some third states has not resulted in terrible disasters. And, last but not least, practice revealed that it was not too easy for the Union to separate strictly what belonged to the first pillar and what to the other two. Apart from the institutional entanglement, material overlaps were apparent from the outset. After all, visa and immigration policy is closely related to the free movement of persons in the internal market and foreign policy often includes development and human rights issues as well as economic measures.

It thus seems more and more accepted that the Union is a legal entity and not just a virtual framework for cooperation. Although it is still fair to differentiate between its composing

¹ See the Final Report of the Working Group on Legal Personality of the European Convention (Doc. CONV 305/02, 1 October 2002) at par. 1 and 3: “It emerged from the discussions that there was a very broad consensus (with one member against) that the Union should in future have its own explicit legal personality. It should be a single legal personality and should replace the existing personalities. [...] Following a merger of the legal personalities and, if necessary, of the Treaties, it would be anachronistic to retain the current ‘pillar’ structure. It therefore considered that to do away with this ‘pillar’ structure would help to simplify the architecture of the Union considerably.”

² In particular: A. von Bogdandy/M. Nettesheim, *The Fusion of the European Communities into the European Union*, *ELJ*, 1996, 267. But also R.A. Wessel, *The Legal Status of the European Union*, *EFA Rev.*, 1997, 109-129; and *Revisiting the Legal Status of the EU*, *EFA Rev.*, 2000, 507-537. See for an overview of the literature and arguments for instance W. Schroeder, *The Constitutional Relationship between the European Union and the European Communities*, paper presented at this conference.

³ Illustrative are the ‘Council of the European Union’ and the ‘Official Journal of the European Union’.

parts, the Union's unity forced itself upon us through the practice of the Union as well as through theoretical argumentation.⁴ The pillars have clearly influenced each other.⁵ In that sense the Union's legal order is coming of age. From something existing in the margin of the European Communities, the Union has blossomed into the overarching structure capturing the Communities as well as the other two areas of cooperation. The notions of a 'layered organization' or an 'operational unity' indeed seem to explain this complex relationship between different legal orders better than the classic metaphor of the Greek temple.⁶

With the coming of age of the European Union new questions arise. In his contribution Werner Schroeder deals with the theoretical problems emerging out of the relationship between legal orders within one international organisation. At the same time the unity of the Union's legal order may tell us something about the relationship between this order and the legal orders of the member states. On a more practical note we are witnessing an increasing interdependency between the pillars, which may have an effect on the development of European Union law. The discussion in the European Convention – as well as during this conference – indicates that a constitutional process may be taking place in which the constitutional relations between all legal entities involved (Union, Communities, member states and individuals) are being restructured. The present contribution aims to highlight some of the theoretical and practical issues that present themselves in this process. Using the operational unity of the Union and the Communities proclaimed by Schroeder as a starting

⁴ See for arguments for instance I.F. Dekker/R.A. Wessel, *The European Union and the Concept of Flexibility. Proliferation of Legal Systems within International Organizations*, in: N.M. Blokker/H.G. Schermers (Eds.), *Proliferation of International Organizations*, Den Haag: Kluwer Law International, 2001, 381-414.

⁵ Cf. Schroeder, see note 2, 32.

⁶ The concept of a 'layered organization' was already introduced by Schroeder in an earlier publication: *Die Rechtsnatur der Europäischen Union und verwandte Probleme*, in: W. Hummer/M. Schweitzer (Hrsg.), *Österreich und das Recht der Europäischen Union*, Wien, 1996. See also Chr. Trüe, *Verleihung von Rechtspersönlichkeit an die Europäische Union and Verschmelzung zu einer einzigen Organisation – deklaratorisch oder konstitutiv?*, Universität des Saarlandes: Vorträge, Reden und Berichte aus dem Europa-Institut, No. 357, 1997. The notion was adopted by D.M. Curtin/I.F. Dekker, *The European Union as a Layered International Organization: Institutional Unity in Disguise*, in: P. Craig/G. De Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, 1999, 83-136. The notion of the 'operational unity' is used in Schroeder's contribution, 24-28.

point, it shall particularly focus on the legal relationship between the Union and its member states.

II. THE UNION'S UNITY UNVEILED

1. The Organisational Structure of the Union

In his contribution Schroeder provides an impressive overview of the different arguments in the discussion concerning the relationship between the Union and the Communities. The main reason behind his analysis is that the questions concerning the relationship between the new Union and the existing Communities and the legal relationship between the EU Treaty and the (now) two Community Treaties remain unanswered. In his view, the practice of the existing Community institutions after the entry into force of the Maastricht Treaty even increased the uncertainty concerning the legal status of the Union.⁷ All models that were developed since the signing of the EU Treaty have their own flaws.⁸ Thus, the temple model does not offer a satisfactory solution because it does not reveal how the organisations and institutions, described in the EC Treaty, relate to one another. The model of the 'intergovernmental platform' ignores that the Treaty on European Union intends to create legal autonomy of the Union towards its member states and recognises its international rights and duties. Likewise, the notion of the Union and the Communities being completely separate organisations does not take the institutional and material relationship between the two into account. On the other extreme we have the theory which claims that the Union and the Communities have merged into one single organisation. However, this theory in turn disregards the fact that the Treaties still recognise three different organisations, with different legal personalities. The notion of the 'layered organisation', finally, seems the best candidate for explaining the complex structure of the Union, but even this theory does not answer the question of how the relationship between each layer of the Union should be legally arranged.

⁷ Schroeder, note 2, 2.

Schroeder's answer to the lack of an explanatory model is found in a combination of the theory of *dédoublement fonctionnel* and the operational unity of the Communities.⁹ According to the first theory, institutions can have a double functionality as they can serve two different legal orders. This in fact happened with the merger Treaty in 1965, which did not merge the Communities, but rather formed an operational unit of the institutions, administrations and budgets. A comparable situation seems to have developed on the basis of the 'single institutional framework' shared by the Union and the Communities.

I do agree with this analysis, but I am inclined to go one step further, in particular where the unity of the Union's legal order and the legal status is concerned. In my opinion there is not only an *operational* unity, but also a *legal* unity within the legal order of the European Union – which, by the way, comprises the legal orders of the Communities as well as the smaller legal orders within the Communities (e.g. the European Investment Bank or the European Central Bank). Schroeder seems to equate the unity of the Union's legal order with a merger of the organisations.¹⁰ This is not necessarily true; the different organisations and their legal orders can continue to exist even when one is prepared to accept the existence of an overarching legal order of the European Union.¹¹ The foundation for this conclusion can *inter alia* be found in the provisions in the Treaty on European Union that are common to all Union areas, and which for instance relate to common objectives (Articles 1 and 2), a single institutional framework together with a requirement for consistency (Articles 3 and 5), common values (Article 6) and common rules of change (Articles 48 and 49). Moreover, the establishment of the European Union through the Treaty on European Union points to the

⁸ Ibid., 6-8.

⁹ Ibid., 23-27.

¹⁰ Cf. Ibid., 25: "Therefore, for the present, the Union has not merged with the Communities. They only form an operational unit". Also at 28: "This leads to the question whether or not it is possible to see a systematic unity in the relationship between Union and Community law, deduced from a uniform creative power of the Union institutions. If this were the case, the theory of separated legal personalities of the Union and the Communities would even be more dubious." And, at 34: "The osmotic relationship between Union law and Community law shaped by different techniques of reference and adaptation does not create a single legal order. These techniques are also used to implant norms from one legal order in another legal order".

existence of a Union legal system, since it may be asserted that the conclusion of a treaty implies the creation of a legal system, in the sense of a system of valid legal norms derived from the competence of states to conclude international legal agreements. While this may very well be one single system, the possibility of sub-systems existing within the framework of the treaty is not excluded. It may be argued that the norms in the TEU are not merely to be seen as a loose ‘set’, but indeed form a system with mutual dependencies. Hence, the entry into force of the Treaty on European Union marked the coming into being of a new legal system, comprising a number of sub-systems (the different ‘pillars’ of the Union as well as the sub-legal systems developed within these areas).

The consequences of viewing the European Union as a *legal* unity – apart from a mere *operational* unity – are at least twofold. A first consequence is that the norms in the unitary legal system of the Union are inter-related. This in turn implies that the different parts of the Union cannot be viewed as isolated regimes, but that the interpretation of the norms should take into account their setting within the legal system of the Union, which reveals the necessity to establish a hierarchy of norms within the legal system of the European Union. The second consequence is related to the external relations of the European Union. When the Union is qualified as a legal unity that is capable of acting within the international legal system, this implies that its external policy be consistent in the sense that it does not ‘blow hot and cold at the same time’. In other words: the internal unity should also ‘be worn inside out’. In their legal relations with the Union third parties must be able to rely on the fact that they have one counterpart only.

A distinct stream of literature on the legal unity of the European Union seems to take account of the fact that both the internal and the external dimension of the unitary nature of the Union call for an interpretation of any EU, EC, CFSP and PJCC provision in the context of the overall

¹¹ See also Dekker/Wessel, note 4, and the references there.

order as presented in the TEU.¹² Admittedly, this order at certain points hints at a hierarchy between its norms in favour of the *acquis communautaire*, but examples can also be pointed out in which an unconditional preference for the Community rules would simply neglect key provisions in the other areas.¹³ In that sense, Schroeder is only partly right when he claims that the single institutional framework implies that there is no hierarchy between Union and Community in the sense of the Union.¹⁴ It is true that Union norms are not by definition supreme to Community norms, but at the same time the overall legal order of the Union may contain norms fixing a hierarchy of norms. It is also true that the requirement of consistency may be superfluous if one would accept a ‘clear organisational assignment’ between Union and Communities as suggested by Schroeder,¹⁵ but this argument can also be used the other way around: the presence of the consistency requirement may be an indication of the existence of a single legal order in which the different sub-orders stand in a specific relation to each other. As Trüe has stated: “Die grundsätzliche Gleichrangigkeit folgt aus dem Kohärenzgebot: Das Kohärenzgebot verlangt [...] nicht eine Anpassung des Rechts der einen Säule an das Recht einer anderen, sondern eine gegenseitige Abstimmung der Säulen”.¹⁶ The practice of Union decision-making – with institutions being increasingly active in all Union areas – seems to have confirmed this constitutional element.¹⁷

The main reason for Schroeder not to accept the unity of the Union’s legal order – although he accepts in general the possibility of “a legal unity created even from complex legal structures,

¹² See for references the publications in note 2. In contrast to their earlier focus on the ‘intergovernmental’ aspects of the non-Community areas of the Union, Koenig and Pechstein now also seem to have accepted the existence of a Union legal order (*Unionsrechtsordnung*); see M. Pechstein/Chr. Koenig, *Die Europäische Union*, 2nd ed., 2000, 45-46.

¹³ More extensively: R.A. Wessel, *The Inside Looking Out: Consistency and Delimitation in EU External Relations*, *CML Rev.*, 2000, 1135-1171.

¹⁴ Schroeder, note 2, 26.

¹⁵ *Ibid.*

¹⁶ Trüe, note 6, 61.

¹⁷ See in particular, Curtin/Dekker, note 6, 104-131. On the hierarchy of norms in relation to constitutional questions also H. Gaudin, *Amsterdam: l’échec de la hiérarchie des norms?*, *Revue trimestrielle de droit européen*, no. 1, 1999, 1-20. Gaudin in particular pointed to the question as to what extent the Union constitution is bound to the ‘supra-constitutional’ principles referred to in Article 6 TEU.

composed of different legal persons, organisations and constitutional backgrounds”¹⁸ – is that “there is no common legal instance with final decision-making power to coordinate the different fields of law.”¹⁹ The first argument Schroeder presents in this regard – the fact that the procedures and forms of action differ widely between Union law and Community law – is a challenging one. After all, even within the Community decision-making procedures and types of decisions still differ considerably. Furthermore, the exclusion of jurisdictional powers is a feature of most international organisations; yet, we do not always question the unity of their legal order. The fact that the European Court of Justice bases some of its rulings on the existence of a Union legal order – as indeed was the case in *Commission v. Council* or *Hautala*²⁰ – seems to point to an impossibility of viewing Union and Community law as being completely separate. Principles of Community law can indeed be seen a *leges generales* to the EU and be applied to the law of the Union, as long as there is no direct contradiction with provisions of the EU Treaty (Schroeder, p. 33). But, this interlinkage – or maybe even interdependency – of norms makes sense only when one is willing to accept the existence of a Union legal order of which the Community legal orders form a part.

A final point in this respect concerns flexibility. Schroeder warns us that the provisions on closer or enhanced cooperation may harm the development of a single Union legal order.²¹ I would rather turn the argument upside down: the strict requirements for establishing and implementing closer cooperation all point in the direction of an already existing unity. In other words: the rules on flexibility *strengthen* the notion of the unity of the Union’s legal system rather than that they weaken it.²²

¹⁸ Schroeder, note 2, 30.

¹⁹ Ibid., 30.

²⁰ Ibid., 31-32.

²¹ Ibid., 34-36.

²² See more extensively Dekker/Wessel, note 4.

2. The Legal Status of the Union

Similar to almost all other international organisations, the Union's legal personality was not laid down in an explicit treaty provision. Schroeder rightfully claims that it is dubious whether the legal personality of the Union can be refused on the basis of an historical interpretation. Indeed, the fact that member states during the Intergovernmental Conferences could not reach an agreement on an *explicit* reference to legal personality in the treaty cannot conceal the fact that they were ready to accept numerous *implicit* references.²³ Much has already been written about the autonomous competences of the Union as well as about the practical reality (by now there are three treaties to which the European Union as such is a party²⁴) and it has become increasingly difficult to hold on to the view that the Union is not a legal person. In my opinion, however, in theoretical analyses the emphasis is laid on the competencies and actions of the Union in the international legal order. Although there cannot be any doubt that these arguments are important, the legal personality of an international organisation can first of all be based on the distinct position it occupies *vis-à-vis* its own member states. Schroeder also draws attention to this point when he states that the Union, as a body of public international law, has members and institutions that are capable of articulating their intentions in a self-determined manner.²⁵ It is indeed this 'corporate identity' that separates the international organisation from the international conference and by 'lowering the corporate veil' international organisations can be viewed as existing in distinction from their creators.²⁶

In that analysis, the concept of legal personality is used to explain the relationship between

²³ Ibid., 10-17. See for an overview of arguments also Wessel, note 2.

²⁴ On 30 September 2002, the Council decided to approve the text of the Agreement between the European Union and Bosnia and Herzegovina on the establishment of the EU Police Mission (Decision 2002/845/CFSP, *OJ EC*, L 293, 29.10.2002). In 2001 we could already witness agreements between the EU and Yugoslavia and Macedonia on the activities of the EU Monitoring Mission (resp. *OJEC* L 125 and L 241).

²⁵ Schroeder, note 2, 14.

²⁶ Cf. I.F. Dekker/R.A. Wessel, *Lowering the corporate veil*. Het recht der internationale organisaties vanuit de institutionele rechtstheorie, in: M.A. Heldeweg/R.J.P. Schobben/W.G. Werner (eds.), *De Regel Meester. Opstellen voor Dick W.P. Ruiter*, Enschede: Twente University Press, 2001, 5-22.

the organisation and its own member states.²⁷ In that respect legal personality is nothing more (or less) than the independent existence of an entity within the international legal order. After all, possessing legal personality is the same as being a legal person, which according to most legal doctrines boils down to being capable of having legal rights and/or duties. One consequence of this assumption is that it does not make sense to talk about a ‘partial legal personality’ or ‘a large measure of legal personality’.²⁸ Legal personality is a binary phenomenon, either you have it or you don’t. On the basis of this argumentation, one may even go as far as stating that international organisations are by definition legal persons, since this feature is precisely what distinguishes them from international conferences.

The question, however, remains how to recognise an international legal person. Three characteristics seem to be decisive here.²⁹ First of all, decision-making procedures are needed to turn the separate wills of the distinct members into one single will of the institution. Secondly, the organisation must have a competence to act externally, both *vis-à-vis* its own members and *vis-à-vis* third states and organisations. A third, more practical, characteristic is that other international actors (members, third states, international organisations) must accept the legal personality in order for the organisation to be effective. However, “a legal person is a fictitious entity to which decisions made and acts performed by other subjects can be imputed”.³⁰ This means that in the end natural persons are needed to act on behalf of a legal person. To prevent legal persons to become dependent on specific natural persons, the constituting treaties of international organisation normally choose to create organs to act on behalf of the international legal person. The organ thus has a pivotal position in an international organisation and there seem to be two ways in which natural persons are related

²⁷ Cf. the *Reparation for Injuries* Advisory Opinion of the International Court of Justice (ICJ Rep., 1949, 179): “[...] the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality?”

²⁸ Cf. *ibid.*, in which the Court held that the United Nations Organization has a “large measure of international personality”.

to an organ:

“First, it is possible to lay a legal connection between a natural person and an organ of a legal person by virtue of which the natural person can decide and act for the organ. In such cases the name of the organ is frequently employed as a title of the natural person acting for it. For instance, holders of the office of mayor are called ‘mayor’. By virtue of the legal connection between the organ of mayor and the natural person, decisions made and acts performed *ex officio* by the latter are imputed to the organ. [...] Secondly, it is possible that more subjects are assigned the task of deciding and acting jointly on behalf of the organ. The legal connection of each of these subjects to the organ can be characterised as ‘membership’”³¹

In international organisations we come across these two types as well. An example of the first category (the ‘simple organ’ or ‘office’) is the function of Secretary General / High Representative for CFSP. The Council of the European Union forms an example of the second type (‘complex organ’). Hence, in a formal sense organs cannot be equated to the states or persons by which they are formed and the difference between an international organisation (a legal person) and an international conference becomes clear. One can *participate* in an international conference, but one can only become a *member* of an international organisation.

“Membership differs from representation in that the decisions of the members of an organ are not the decisions imputed to the organ itself. The members of an organ are only collectively, not separately, competent to take decisions on its behalf.”³²

²⁹ See D.W.P. Ruiter, *Legal Institutions*, Dordrecht: Kluwer Academic Publishers, 2001, 102-103.

³⁰ *Ibid.*, 103.

³¹ *Ibid.*, 103-104.

³² *Ibid.*, 104.

At the same time it becomes clear that decisions are the result of an institutionalised process. The term ‘vote’ is used to refer to the decisions of individual members that are at the basis of the decisions taken by an organ. ‘Seat’ is used to indicate the members of an organ. Thus, it makes sense to differentiate between *state* and *member state* en between *agreement* and *decision*.

In his contribution, Werner Schroeder provides all the arguments to follow this line of reasoning. Yet, he seems very careful in accepting the consequence: the European Union is an international legal person, not only when one takes its external relations into account, but even in the relation towards its own member states.

III. THE CONSTITUTIONALISM OF THE EUROPEAN UNION

1. The ‘Personification’ of a Treaty Relationship

As stated above, Schroeder’s analysis regarding the relationship between the Union and the Communities could also be used to point to the unity of the Union’s legal order, as well as to the international legal personality of the Union. In the framework of the current conference this is indeed important as it only makes sense to discuss the constitutionalisation of the Union when one is ready to accept the existence of a European Union legal order.³³

In order to comprehend what happened in this constitutionalisation process, the developments in the area of political cooperation may be illustrative. At one moment in time the external identities of the current member states of the European Union started to coincide partly with the external identity of, what we now call, the European Union. This moment may have been the entry into force of the Treaty on European Union, but one may even argue that this moment can be located earlier in time, for instance with the entry into force of the Single European Act in 1987 or even earlier during the European Political Cooperation that largely

³³ See for arguments in this respect the literature referred to in notes 2 and 4.

took place on the basis of custom and subsequent codification.³⁴ The political cooperation that took place between the members of the European Economic Community during the 1970s and 80s could not be regarded a formal treaty relationship. Nevertheless, (codified) custom surely reflected a contractual legal relation between the participating states.³⁵ The procedural agreements laid down in Declarations, and later on in the Single European Act reflected the emergence of a constitution that increasingly posed procedural restraints on the participating states.³⁶ Indeed, *participating* states; as it is generally believed that they only became *member* states after the entry into force of the EU Treaty.

From that moment on there could no longer be any doubt about the fact that there exists a legal system in distinction from the legal systems of the member states in the area of foreign affairs. The possibility of viewing the European Union as a legal person was the result of – what Ruitter calls – a ‘legal operation of personification’.³⁷ Where ‘natural personality’ is a feature of human entities, personification is not only possible of non-human entities, but even of ‘incorporeal’ things, that is ‘mental constructs’, like ‘states’ or ‘international organisations’. Modern law systems allow wills to be imputed to these incorporeal things through a legal act of personification.

In order to be able to understand what exactly happens when we allow an international organisation like the European Union to act externally, that is *vis-à-vis* its own members or third parties, it is helpful to see how this modification from ‘contractual relationship’ to

³⁴ The debate, of course, started earlier. See R.T. Griffiths interesting analysis *Europe’s First Constitution: The European Political Community, 1952-1954*, London: Federal Trust, 2002. It remains interesting to note that the originally envisaged “supranational European Community” was explicitly regarded to have legal personality (art. 4 of the Statute of the European Community, 1953), and had a clear ‘foreign policy’ dimension.

³⁵ See more extensively: R.A. Wessel, *The European Union’s Foreign and Security Policy: A Legal Institutional Perspective*, The Hague: Kluwer Law International, 1999, Chapter 1.

³⁶ In this respect it is interesting to take a renewed look at Weiler’s remarks made in 1985 regarding the European Political Cooperation: “Even if federations have a unitary external posture [which the EPC lacks according to Weiler - RAW], it is arguable that the federal principle may vindicate itself in the *internal process of foreign policy-making*”. This leads Weiler to conceive of EPC in 1985 already as “a new experiment of a non-unitary foreign policy process and foreign posture which may veritably be called the federal option [as an organisational principle] of foreign affairs”. J.H.H. Weiler, *The Evolution of Mechanisms and Institutions for a European Foreign Policy: Reflections on the Interaction of Law and Politics*, *EUI Working Paper* No. 85/202, 1985, at 3.

‘association’ takes place. Ruiter defines an association as “a personified multilateral contractual legal relation”.³⁸ But, how is a contractual legal relation turned into an association that is capable of entering into legal relationships with third parties? After all, contractual relations only regard parties to the contract, which implies that no party can enter into transactions with third parties on behalf of the others. Ruiter claims that, what we do is in fact ‘personify’ the contractual relation by making three adjustments:³⁹

“1. Contractual consensus is abandoned in favour of collective choice processes whose outcomes are no longer conceived of as resulting from concordant expressions of the individual wills of all participants.

2. The abandonment of the idea of decisions as founded on contractual consensus is accompanied by the construction of a *generalised* will imputed to the legal institution itself: the association. By imputing a will to it, the association is accorded legal personality. The fundamental legal relation between the newly created legal person and the parties to the original contract are the rights of the latter to participate in the collective choice processes.

3. An association with legal personality is treated on a par with natural persons (capacity for rights), is capable of performing legal acts (legal capacity), and is responsible for behaviour flowing from the will imputed to it (legal liability).”

This means that:

“The original multilateral legal relation between parties to the contract is thus transformed into a bundle of bilateral relations between the association and its members. By virtue of these relations the association can deal with third persons according to the aggregate will of its

³⁷ D.W.P. Ruiter, ‘Forms of Legal Institutions’, internal paper University of Twente, February 2002.

³⁸ *Ibid.*, 5.

members”.

Thus the external possibilities and competences of an association are closely linked to its internal legal structure. The complex (constitutional) relationship that forms the subject of this paper only announces itself when indeed the external relations of the member states are complementary to and at the same time governed by the body of procedural rules through which the external behaviour of the association is formed. The current Treaty on European Union reflects this situation, in which relations with third states and organisations are simultaneously defined at the national and the European levels, by international legal persons (the member states and the Union) that are separate, but at the same time inseparable.

2. What is the EU Constitution?

Accepting the existence of a legal identity of the European Union is one thing, but what is the value added of perceiving its basis in terms of a constitution? Indeed, for those active in international institutional law, the constituent treaty of an international organisation – a label that still fits the European Union – forms the ‘constitution’ of the organisation, defining the scope and content of the legal order created by it. This definition of a constitution comes close to a classic one presented by Verdross – one of the godfathers of ‘international constitutional law’ – in 1926: “Errichtung einer dauerhaften und stabilen Grundordnung, welche eine Rechtsgemeinschaft errichtet und institutionell ausstattet”.⁴⁰ A constitution of an international organisation thus, primarily, defines an institutional framework in which competencies are being divided among institutions in a way that cannot be changed over night. The word ‘Rechtsgemeinschaft’, however, seems to refer to a community based on the rule of law, with a judiciary to supervise the functioning of the agreed procedures as well as an inclusion of those that are ‘governed’ by the international organisation, member states and – less often –

³⁹ Ibid., 5-6.

citizens.⁴¹ It is in particular this latter notion that is usually regarded to give some substance to the primarily rather formal concept of constitution in international law. As said, in Schroeder's contribution, the absence of a Union-wide legal instance with final decision-making power forms a reason to deny the existence of a single legal order and hence of an overarching Union constitution.

These two approaches to the notion of 'constitution' as applied to international organisations – the 'neutral' definition as a legal system *vis-à-vis* the more value-oriented one – form the basis of the literature on the constitutionalisation of Europe. Whereas the term 'constitutional structure' is often used to analyse the competences of the institutions and the relationship between the organisation and its member states,⁴² a more substantive approach focuses on the way in which constitutional elements could be introduced to expose European governance to the checks and balances that we are familiar with in our own national legal systems. It is obvious that this latter approach is often far from 'value-free': much of the debate not only concerns the question of how constitutional elements are to be brought into the EU legal order, but many observers are even sincerely concerned about the lack of these elements in an international organisation that increasingly starts to look like a state.⁴³

An approach that seems to fit in between these two perspectives takes the more neutral definition of a constitution as a starting point, without neglecting the fact that the European Union indeed is a very special organisation the constituent treaty of which not only concerns the 'High Contracting Parties', but also the private persons and entities within the member

⁴⁰ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Wien/Berlin: Springer Verlag, 1926, Vorwort.

⁴¹ Although Verdross himself seems to approach the concept from a more positivist angle: "Rechtsgemeinschaft ist nur jene Gemeinschaft, die durch einen Kreis von Rechtsnormen als Einheit erfaßt und dadurch von anderen abgegrenzt wird" (p. 4). In that sense it should probably not be translated as 'legal community', but comes closer to 'legal system'.

⁴² An example of this approach can be found in G. De Búrca, *The Institutional Development of the EU: A Constitutional Analysis*, in: P. Craig/G. De Búrca, *The Evolution of EU Law*, Oxford University Press, 1999, 55-82.

⁴³ An example related to the subject of the present paper is E.-U. Petersmann, *The Moral Foundations of the European Union's Foreign Policy Constitution: Defining 'European Identity' and 'Community Interests' for the Benefit of EU Citizens*, *Aussenwirtschaft*, 1996, Heft II, 151-176.

states. In that sense it is the prime instance of what is sometimes referred to as an ‘integration organisation’. An essential feature of these organisations is that competences are transferred from the member states to the organisation or that new competences for the organisation are created, through which it becomes competent (sometimes exclusively, but often in competition) to set rules with direct effects within the legal orders of the member states.⁴⁴

Although states do not cease to exist by becoming a member of an international (integration) organisation, it becomes difficult to regard their national legal order as existing in complete isolation from the legal order of the organisation. The ‘constitutional setting’ in which they operate may for a great deal already depend on general international law, and at least clearly includes the arrangements they agreed on in the framework of an international organisation. And, *vice versa*, the international organisation has to deal with the Janus-faced identity of member states: on the one hand member states are constituent parts of the international organisation they created among themselves; on the other hand the states are the counterparts of the same international organisation in the sense that both occupy independent positions within the international legal order and even have obligations towards each other. This relationship is indeed somewhat schizophrenic, as one scholar once observed.⁴⁵

In that respect, Weiler’s remark that “Constitutionalism, more than anything else, is what differentiates the Community from other transnational systems and, with the Union from the other ‘pillars’” since “the Community behaves as if its founding document were not a treaty governed by international law but [...] a constitutional charter governed by a form of

⁴⁴ I.F. Dekker/R.A. Wessel, *Governance by International Organisations: Rethinking the Normative Force of International Decisions*, in: I.F. Dekker/W. Werner (Eds.), *Governance and International Legal Theory*, The Hague: Kluwer Law International, 2003 (forthcoming). *Cf.* also Pernice’s remarks regarding the direct relations between the people and the supranational institutions, through directly applicable rights and obligations for individuals: “Although the form of an international treaty is maintained, such treaties can be regarded [...] as a common exercise of constitution-making power by the peoples of the participating State”. I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, *CML Rev.*, 1999, 703-750 (717).

⁴⁵ J. Klabbers, *The Changing Image of International Organizations*, in: J.-M. Coicund/V. Heishanen (Eds.), *The Legitimacy of International Organizations*, Tokyo: UN University Press, 2001, 221-255 (227).

constitutional law”⁴⁶ seems to ignore the fact that ‘constitutionalisation’ as a process powered by the ‘Eigendynamik’ of the legal orders of international organisation is not exclusively to be found in the Community.⁴⁷ There are good reasons to apply the same concept at least to the other ‘pillars’ of the Union,⁴⁸ but maybe even to other ‘integration-organisations’ in the sense defined above. ‘Constitutional sedimentation’, as one observer has called it, is a much more general phenomenon.⁴⁹ Once a treaty relationship between states is converted into a new ‘legal institution’⁵⁰ through an act of legal personification, by which an ‘association of states’ is turned into a new separate legal entity, it becomes possible to see a ‘will’ of the new entity as opposed to the (collective) will of the original parties to the deal. This *volonté distincte* may be congruent to the collective will of the member states, but it may very well take its own course. The notion of ‘constitution’ as used in the present paper thus owes its distinguishing characteristic to the fact that it does not merely reflect the treaty-relationship between the states of an international organisation (although it is the result of this contractual process), but that it also encompasses the relationship between the newly created legal order of the organisation and the national orders of the member states, while including the legal subjects within the latter. The ‘european community’ (no capitals) is thus understood as comprising the states and their citizens as well as the ‘supranational’ institution created by them.⁵¹

⁴⁶ J. Weiler, Introduction: The Reformation of European Constitutionalism, in his *The Constitution of Europe*, Cambridge University Press, 1999, 221.

⁴⁷ This type of constitutional approach is often used by others. See for instance W. Sauter, The Economic Constitution of the European Union, *Columbia Journal of European Law*, Winter/Spring, 1998; or B. Fassbender, The United Nations Charter as Constitution of the International Community, *Columbia Journal of Transnational Law*, 1998, 529-619; J. Weiler, The Constitution of the Common Market Place, and F. Snyder, EMU Revisited: Are We Making a Constitution? What Constitution are We Making?, both in Craig/De Búrca, note 42. Cf. also the concept of ‘vertical constitutionalism’ used by Joerges in relation to the economic constitution. Chr. Joerges, The Law in the Process of Constitutionalizing Europe, paper presented at the ARENA Conference on Democracy and European Governance, March 4-5, 2002 (available at <http://www.arena.uio.no/events/Conference2002/documents/Joerges.doc>).

⁴⁸ See D.M. Curtin/I.F. Dekker, The Constitutional Structure of the European Union: Some Reflections of Vertical Unity-in-Diversity, in: N. Walker *et al.* (eds.), *Convergence and Divergence in European Public Law*, Oxford: Hart, 2002, 59-78.

⁴⁹ T. Eijsbouts, Constitutional Sedimentation, *Legal Issues of European Integration*, 1996, no. 1, 51-60.

⁵⁰ The concept is used here in the definition used in institutional legal theory (ILT) as: “distinct legal systems governing specific forms of social conduct within the overall legal system”. See Ruiter, note 29, 71.

⁵¹ Cf. Fassbender, note 47, 566-567: “In principle, there cannot be a community, understood as a distinct legal

IV. RELATIONS BETWEEN LEGAL SYSTEMS OF INTERNATIONAL ORGANISATIONS AND LEGAL SYSTEMS OF MEMBER STATES

1. Validity Relations between Legal Orders

The acceptance of the idea of a constitution brings about two distinct questions concerning the hierarchy between the legal orders that can be found at the two levels. The first question concerns the validity relationship between different legal orders; the second question deals with the supremacy of rules in one order over rules in another. Applied to the topic of the present paper these questions can be phrased as follows: Is the validity of norms issued by international organisations derived from another legal order, and if so what consequences does this have for the supremacy of norms of other legal orders over these norms or *vice versa* in case of a conflict between these norms? This question becomes relevant in particular in relation to the (direct) effect of decisions of international organisations in the legal orders of the member states and thus to the way in which both the Union and its member states (jointly or individually) may approach the ‘outside world’.

Regarding the first question, Kelsen pointed to the existence of different ‘basic norms’ as the ultimate ‘source’ of distinct legal orders, but he also argued that the source of two distinct legal orders could be the same when one order is based on the other.⁵² Kelsen argued that there are four conceivable (validity) relations between two distinct orders (or ‘norm systems’):⁵³ / both systems are completely divided (“*unabhängig*”) – that is: they have

entity, in the absence of a constitution providing for its own organs. Legal personality requires the actual ability to perform legal acts.”

⁵² H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beiträge zu einer reinen Rechtslehre*, Scientia Aalen, 1928/1960 at 105: “In der Einheit und Besonderheit dieses Ursprungs, dieser Grundnorm, liegt das principium individuatis, liegt die Besonderheit einer Ordnung als eines Systems von Normen”. Despite its age, this book still serves as one of the clearest interpretations of the concept of sovereignty and the relation between the international legal order and national legal orders (or ‘states’ in Kelsen’s line of reasoning).

⁵³ *Ibid.*, 104. Cf. also W. Werner, *Het recht geworden woord: over de geschiedenis van het rechtspositivisme en de mogelijke betekenis van het pragmatisme voor de toekomst daarvan*, Enschede: Universiteit Twente, 1995,

distinct sources of validity; 2 norm system A derives its validity from norm system B; 3 norm system B derives its validity from norm system A (“*über- und unterordnung*”); and 4 both orders are of equal value, they are (relatively) independent sub-systems, coordinated by an overarching superior order (“*Koordination*”). The above analyses on the personification of a contractual legal relationship shows that the *validity* of a treaty-based legal order is derived from the valid competence of states to establish these international orders. This, however, is not enough. States can only do this on the basis of a ‘third’ norm, which is not part of their own legal order. A national legal system as such cannot be a sufficient legal basis for the establishment of a valid *international* agreement between sovereign states. There has to be an external rule according to which the expressed will by a sovereign state counts as a valid way to be bound by an international agreement.⁵⁴

At the same time this relationship points to the unity of the international legal system. States are only connected to each other because they form part of an overarching international (or better in this respect: ‘supranational’) legal order. Returning to Verdross:⁵⁵

“Von einer einheitlichen Völkerrechtsordnung kann nur die Rede sein, wenn sämtliche Völkerrechtsnormen einen Verweisungszusammenhang, einen Delegationszusammenhang von berufenden und berufenen, von delegierenden und delegierten Normen bilden. Dazu ist vor allem erforderlich, daß eine oberste Norm oder ein oberstes Normengefüge, kurz eine *Grundnorm* in Geltung steht, auf die der geltungsgrund aller übrigen Völkerrechtsnormen unmittelbar oder mittelbar zurückgeführt werden kann. Bloß der bestand einer solchen Grundnorm, die die normative Grundlage für alle übrigen Völkerrechtssätze liefert, vermag die Einheitlichkeit des Völkerrechtes zu verbürgen, da die Einheitlichkeit jedes Normensystems nur dadurch möglich ist, daß alle seine Normen aus einem einheitlichen

158.

⁵⁴ See also Curtin/Dekker , note 48.

Brennpunkte ausstrahlen, über den und durch den sie zusammenhängen. Das Problem der Einheitlichkeit des Völkerrechtes steht und fällt daher mit dem Probleme der völkerrechtlichen Grundnorm.”

However, whenever associations of states (multilateral treaties) have been transformed – through a legal act of personification – into new legal entities, these international organisations would also form part of the supranational legal order. States can only create these new legal entities because a supranational legal order allows them – or makes possible – to do this. The acceptance of the existence of an overarching legal order, consisting of legal sub-systems (states and international organisations) depends on the acceptance of the unity of this legal system, in the sense that the *Grundnorm* of this system is at the same time the source of the norms in the subsystems. The consequence of this assumption is that once a norm is validly created anywhere in the international legal order, this *validity* cannot be denied in any of the suborders. This, in turn, causes problems for advocates of the classic dualist approach, which claims that the legal systems of international organisations and the member states are completely independent, separate from each other and from the overarching legal order, in the sense that they have different legal sources and different legal subjects.⁵⁶ In this approach the legal system of the international organisation provides rules for the member states (and for the functioning of the organisation itself), whereas the legal system of the member states regulates the activities of its citizens and other private persons (and the functioning of the state itself). In other words, legally valid rights and duties of individuals

⁵⁵ Verdross, note 40, 12.

⁵⁶ See also I. Weyland, *The Application of Kelsen’s Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved*, *Law and Philosophy*, 2002, 1-37. Although dealing with Community Law, Weyland argues: “[...] and analysis based on Kelsen’s theory must reject a dualist conception and will lead to the assumption of only one basic norm of a unified set of norms, where the basic norm, either of the Community or of each Member State, validates both Community and national constitutional norms. The principle of the supremacy of Community over national constitutional norms may be fitted into either model”. Weyland thus does not see a basic norm in an ‘overarching’ legal order, but rather in either the national legal order or the legal order of the international organisation.

can only be created under the national legal system of the member states. Apart from logical problems,⁵⁷ simple empirical tests reveal the impossibility of upholding this notion. Many rules of positive international law purport to bind private persons directly, without interference from national law. Under general international law, obvious examples of such rules relate to the international criminal responsibility of individuals for international crimes. Other examples may be found in the legal system of the European Union providing a range of treaty-based rules, regulations and decisions directly creating rights and duties for individuals and other legal persons. As shown by the European Community – and increasingly by other parts of the Union – the legal order of the member states cannot claim to be immune to norms created in another legal sub-system of the international legal order.⁵⁸

In conclusion, both states and international organisations seem to be sub-systems of the overall supranational legal order, the existence of which is, in turn, determined by the fact that states and international organisations exist. Thus, this supranational order not only defines the existence of states, but also coordinates and makes possible the relations between these states.⁵⁹ The fact that states are allowed to conclude treaties and to create international organisations, and that they are bound by these agreements, implies the existence of a ‘higher’ legal order with the *pacta sunt servanda*-norm as its most obvious *Grundnorm*.⁶⁰

⁵⁷ At least when one accepts Kelsen’s ideas on the unity of a legal system with the basic norm as a common source of validity for norms of both states and international organisations, and the idea that state sovereignty can only be upheld on the basis of the notion that all states form part of one legal system which also provides the norm to respect the territorial sphere of validity of other states. *Ibid.*, 28.

⁵⁸ Curtin/Dekker, note 48.

⁵⁹ Cf. Kelsen, note 52, 204-5: “daß über den Staaten angesehenen Gemeinwesen eine Rechtsordnung steht, die die Geltungsbereiche der Einzelstaaten gegenseitig abgrenzt, indem sie Eingriffe des einen in die Sphäre des andern verhindert oder doch an gewisse, für alle gleiche Bedingungen knüpft; eine Rechtsordnung die das gegenseitige Verhalten dieser Gemeinwesen durch für alle gleiche Normen regelt, bei der einzelnen Staaten grundsätzlich jeden Rechtsmehrwert des einen gegenüber dem anderen ausschließt, und die, als eine Universalordnung, die zu besondern Rechtssubjecten personifizierten einzelstaatlichen Rechtsordnungen aus ihrer Isoliertheit (und damit aus ihrer Höchstwertigkeit oder Souveränität) heraushebt, um sie – nunmehr als Teilordnungen – zu einen Ganzen, zu einer ‘Gemeinschaft’ zu verbinden”.

⁶⁰ Verdross, note 40, 32.

2. Applicability, Effect and Supremacy of EU Law

The consequence of the view that the legal systems of international organisations and those of their member states are both part of one, overarching legal system, is that *valid* legal rules of international organisations have to be accepted as legal *facts* by the member states. In other words, states are not free to grant or to deny a valid legal rule of an organisation of which they are a member its *validity* in its own national legal system. The validity of the law of an international organisation can only be judged on the basis of the conditions set out in that same legal system (including the relevant rules of international law) and is not dependent on the (constitutional) law of the member states, even where it concerns its status in the national legal system.

However, it remains important to note that the unity of the legal orders of states and international organisations in terms of the validity relations of the norms, only tells us something about the *existence* of the norms within the respective orders. Hence, so far I have only focussed on one dimension of the constitution: its existence can be assumed on the basis of the unity of the legal system of which the ‘two levels’ form a part. At the same time it is underlined that the term ‘levels’ is not meant to present the relationship between states and international organisations in an hierarchical fashion. On the contrary, the point I tried to make was that it makes more sense to view states and international organisations (once the latter are established) as ‘living apart together’, but at least side by side within the overall supranational legal order (“Daher ist die Völkerrechtsgemeinschaft die alle positiv-rechtlichen gemeinschaften überspannende Rechtseinheit, die, gleich einer Kuppel, den ganzen großen Rechtsbau überwölbt”).⁶¹

The other dimension concerns the effect of norms created by the international organisation within the legal order of the member states. As claimed earlier, this dimension arguably introduces another element underlying the concept of ‘constitution’ since it brings in other

legal subjects than just the states that established the organisation. Does the fact that norms of an international organisation are valid in national legal orders as well (once it is established that they both are part of the same higher legal order), imply that norms created by international organisations are at least theoretically by definition supreme to national norms? The answer should be in the negative. Supremacy should not be equated with validity; on the basis of the considerations concerning validity nothing of value can be said regarding the supremacy of norms in one legal order over norms in another legal order. The two questions are of a different nature and should not be confused.⁶² Different norms may have the same validity source and still be conflicting and norms in ‘higher’ legal orders do not necessarily overrule norms in ‘lower’ orders. The only way of settling the supremacy-relation between norms of different legal sub-systems (like states and international organisations) is by introducing (or recognising) either a norm in the overarching supranational legal order (e.g. ‘individual citizens are responsible for violations of international humanitarian law’) or by agreeing on a certain *modus* in an international agreement between states or in the constituent treaty of an international organisation (e.g. art. 103 UN Charter). Again on the basis of the *pacta sunt servanda*-rule this *modus* would take priority over national norms.⁶³

Thus, while validity is a prerequisite, rules in the legal order of either the member state or the international organisation may provide for norms to be *applied* in relation to certain legal subjects only (e.g. EC Directives) or only after a transformation into national law. The notion of direct effect may be distinguished from this applicability in that it only becomes relevant when norms do not have the effect they purport to have and citizens wish to invoke a norm before a national judge. Even if a norm is directly applicable – in the sense that it has a function between the legal subjects within a national legal order – there may be reasons not to

⁶¹ Ibid., 9.

⁶² See in particular on the importance of a division between the different possible relations between legal orders: Werner, note 53, 156-159.

⁶³ Curtin/Dekker, note 48.

allow individuals to invoke it in a court of law (cf. WTO law in the EU member states). One of the dimensions of the EU constitution would be that it regulates the way in which the norms that are created on the EU level would have an effect on the level of the member states.

This means that we have to look for clues either in the international order, the national legal orders, or the EU legal order indicating the direct applicability, the direct effect and the hierarchical status of those EU norms that are not part of Community law. General international law, obviously, is silent about this issue and doctrine generally reflects the principle that states are free to decide on how they want to give effect to international law in their national legal orders.⁶⁴ The constitutions of the fifteen EU member states indeed differ in this respect. But, as became clear from the development of the European Community, this issue can authoritatively be settled by norms in the supranational order of an international organisation. The principles of direct applicability, direct effect and supremacy were recognised by the European Court of Justice (ECJ) as forming part of the ‘new legal order’ (or in the terms of this paper: the new constitution) regulating the relationship between the EC and its member states, as well as with the legal subjects within the states (natural and legal persons).

Unlike the EC, the non-Community parts of the Union largely fall outside the reach of the ECJ. This means that, for the time being, we cannot rely on authoritative interpretations of the Court regarding the status of other EU norms in the national legal orders. However, the Treaty itself is not completely silent in this respect. Curtin and Dekker claim that, in principle, Union law may be directly applicable in the national legal orders of the member states.⁶⁵ They base this conclusion on the fact that with regard to the new types of EU decisions introduced by the Amsterdam Treaty – the ‘framework decisions’ and ‘decisions – the Treaty explicitly provides that they “shall not entail direct effect” (Art. 35 TEU). This provision would only

⁶⁴ See for instance A. Cassese, *International Law*, Oxford University Press, 2001, Chapter 8.

⁶⁵ Curtin/Dekker, note 48, 11.

make sense when these types of decision could *in principle* have direct effect. Irrespective of the inherent danger in using *a contrario* arguments, its acceptance would provide an argument in favour of the direct applicability of EU norms in general, since exclusion of direct effect becomes relevant only in case of direct applicability.

Although this example is drawn from the provisions on police and judicial cooperation and not from the provisions on foreign and security policy, there is no compelling reason to differentiate between the two substantive Union areas in this respect. The direct applicability of CFSP norms would then result in the possibility – and even the necessity – of using these norms in the relationships between all legal subjects within the national legal order. Administrative as well as judicial organs could invoke them, but the same holds true for citizens and companies in their mutual relations. This is not the same as saying that all norms by definition could be invoked in national court proceedings. Just as with Community norms, this would depend on the nature of the norm (sufficiently clear and precise), which in this case would ultimately be decided by the national judge. Curtin and Dekker claim that Union norms, at least, could have an ‘indirect effect’, meaning that “all national authorities have the obligation to interpret national legislation and other measures as much as possible in the light of the wording and purpose of valid Union law”.⁶⁶ This, however, implies an acceptance of the supremacy of Union law over national law. After all, ‘indirect effect’ only becomes relevant in case of a (possible) conflict between an EU and a national norm. Curtin and Dekker, more or less implicitly, base this supremacy on the principle of loyalty, as laid down in Article 10 EC as one of the leading principles in the constitution of the *Union* entailing an obligation for national authorities to interpret national law as much as possible in conformity with these decisions (only limited by the restrictions imposed by the ECJ regarding the

⁶⁶ Ibid., 11. See on the principle of indirect effect for instance G. Betlem, *The Principle of Indirect Effect of Community Law*, ERPL, 1995, 1.

application of the principle of indirect effect⁶⁷).

It is probably too early to come with definite statements like these regarding the effect of EU norms in the national legal orders. Nevertheless, a direct applicability in the more limited definition presented earlier (using the norms in the relationships between all legal subjects within the national legal order) seems to follow from all of the above assumptions. Despite their validity in the national legal order, however, it is generally held that EU decisions are not directly effective, in the sense that they may be relied upon by national courts.⁶⁸

V. CONCLUDING OBSERVATIONS

In his interesting and valuable contribution, Werner Schroeder arrives at the conclusion that the relationship between the Union and the Communities does not create a *single* legal order. The two legal orders coexist and have only a few points of contact. In a material sense a relationship between Union law and Community law is created through reference or adoption (p. 34). Nevertheless, Schroeder seems to accept the existence of a Union constitution (“The constitution of the Union is being dominated by pluralism and fragmentation”). In his approach, however, the constitution of the Union should be separated from the constitution of the Communities.

The present contribution made an attempt to draw attention to another way of looking at the relationship between the Union and the Communities. It was argued that the legal order of the Communities forms a part of the Union’s legal order. In that sense there *is* a single legal order of the Union, which may even be perceived in terms of a constitution. This constitution may be seen as overarching everything that goes on within the Union, on the basis of both the Union and the Community treaties. It calls for all norms in the Union legal order to be interpreted in the context of that order. Thus, it becomes impossible to approach norms in any

⁶⁷ In particular the principle of non-retroactivity of criminal liability. See for instance P. Craig/G. De Búrca, *EU Law*, Oxford University Press, 2002, 211-220.

⁶⁸ See for instance D. Curtin/R.H. van Ooik, *Een Hof van Justitie van de Europese Unie?*, *Sociaal-*

of the three pillars in isolation. The limited competencies of the European Court of Justice in the non-Community parts of the Union are not decisive in this respect as the absence of judicial review is common to most other international organisation, despite the acceptance of their legal nature. And, one may even argue that if there is one Union-competence of the Court, it is its competence to watch over the entire Union (in order to protect the *acquis communautaire*).

Furthermore, the Union's legal status may also be explained on the basis of the relations with its member states. Through the unity of the Union's legal order (indeed best visible through the operational unity), the member states do not stand in another relation to the Union than to the Communities. With the Treaty on European Union they established a new international legal person, the organs of which on the basis of decision-making procedures are made competent to adopt decisions and to act on behalf of the member states. Schroeder is right in concluding that, due to the multitude of existing links between the EU Treaty and the Community treaties the discrepancies between the different legal systems can be minimised, especially by referring to the principles of Community law (p. 35). I would even go beyond this: as the Union constitution is based on an interdependence of all norms in the European Union (including those based on the Community treaties), it becomes increasingly difficult to make a strict separation between the three parts of the Union. The creation of the European Union made an end to the previously existing intergovernmental cooperation in the areas of foreign and security policy, and police and judicial cooperation. Together with the policies described in the Community treaties, these policies are now pursued on the basis of a new constitution, which at the same time rearranged the relationship with the member states and turned the Union into an 'integration organisation'. Whatever the next Intergovernmental Conference will decide in terms of the abolishment of the pillars will therefore largely be a

codification rather than a creation of a new legal situation.