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## **The Coming of Age of the European Legislator**

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## The Coming of Age of the European Legislator

Wim Voermans\*

### 1. Europe's constitutional dilemma: can the Federalist Papers help us on our way?

After the 'No' votes in the French and Dutch referenda on the *Treaty establishing a Constitution for Europe* (hereafter: European Constitution), the European Union seems to be stranded in political deadlock. Since all Member States need to ratify the European Constitution before it can enter into effect, the future prospects of the Constitution seem quite grim. The Dutch 'no' especially seems to leave very little room for manoeuvre<sup>1</sup> and the Dutch government seems ever more inclined to pull the plug on the constitutional project altogether. On the other hand, 18 Member States did already ratify the Constitution by January 1<sup>st</sup> 2007. Add to this that the EU Commission, the European Parliament and some influential political leaders<sup>2</sup> are reluctant to give up on the hard-fought European Constitution, and the stalemate is complete. So much so that the one-year reflection period decided on in 2005 will be extended by at least one year.<sup>3</sup> This will buy some time and maybe get the constitutional project past the voting posts in France and the Netherlands. The political landscape in other Member States may change too. The extra reflection time can be used to hammer out the details of alternative scenarios that may prove acceptable to most Member States.

### 2. Intermezzo – Scenarios to resolve the constitutional crisis

There are – at present<sup>4</sup> – approximately five different scenarios under consideration to resolve the constitutional dilemma. These scenarios for alternative solutions were discussed by a true insider, Dr. Paolo Ponzano, present Director of the Secretariat-

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<sup>1</sup> The Dutch rejected the European Constitution on 1 June 2005 with a 62% majority (turnout 63%). A poll held in the last week of May 2006 shows that – a year after the referendum – 68% of the Dutch population opposes the European constitution. These figures evaporate any hopes of the European Constitution – if properly submitted to a, better informed, Dutch population – being ratified in a second referendum (sometimes referred to as the 'Danish' scenario).

<sup>2</sup> E.g. the German Chancellor Angela Merkel. She expressed the intention to relaunch the European constitutional process during Germany's forthcoming Presidency in the first half of 2007, although by the end of May the German position seems to have shifted somewhat. The German foreign minister Frank-Walter Steinmeier announced during the 27-28 May Vienna EU-conference of foreign ministers that Germany could live with a new Treaty that does not bear the name 'Constitution'

<sup>3</sup> During the EU summit 15 June 2006 the European Leaders decided to extend the reflection period until 27 March 2007 when a new summit under the German Presidency is held.

<sup>4</sup> June 2006.

General and Director of the Task Force on the Future of the Union and Institutional Matters of the European Commission. In his speech ('Does Europe Need a Constitution?') delivered at the Conference '*Resolving Europe's Crisis: Stability, Democracy and the Future of the European Constitution*', organized by the Leiden-Oxford program at Leiden University on 23 May 2006, he outlined five different scenarios. These scenarios preceded the Vienna conference of EU Ministers of foreign affairs on 27-28 May who decided upon yet another course of action that was submitted to the EU-summit in June 2006. The scenarios are interesting anyway, because they show different alternatives as a result of different interests and motivations. Since Dr. Ponzano's written speech will not be published in the short term, I will use quite a few literary quotes from his text, because they are – I think – quite interesting.

A. The *first scenario* – mainly advocated by the countries that have already ratified – is to push on, on the basis of the existing text 'leaving it up to the countries that have rejected the Treaty to suggest a solution to overcome their voters' "no" vote (without excluding the possibility, if necessary, of holding a new referendum in a different political "context" but on the same "text"). This standpoint is defended mainly (but not only) by the German Government which fears that changes will be made to the provisions that it considers most important (particularly the new system of majority voting based on population) in the event of new negotiations, or that some provisions will be implemented in advance.' A variation on this theme is Chancellor Merkel's proposal to add a social protocol to the Treaty (thus reassuring voters who are concerned by the overly "liberal" nature of the current Treaties); a solution that would not require further ratification by the countries that have already approved the Treaty (and that is inspired by the solutions used for the Maastricht Treaty for Denmark and the Treaty of Nice for Ireland). It seems to us – Ponzano states – 'that there is very little chance of this option being put into practice, as it would mean asking French and Dutch voters to vote a second time on the same text without there being any guarantee that the other countries in which ratification by referendum is planned (United Kingdom, Denmark, Poland, etc.) would vote in favor of it (and neither would it be possible to require the United Kingdom Government to call a referendum on a text that is unlikely to enter into force in its current state).' This scenario seems to have been overtaken by recent developments (May 2006) now that the period of reflection has been extended and the Member States seem to be inclined to some form of renegotiation.

B. The *second scenario* entails the idea of a (constitutional) vanguard made up of the Euro zone countries that would be willing to extend enhanced cooperation into additional areas, a plan which has been (re)floated by the Belgian Prime Minister Guy Verhofstadt, and has lately also been voiced by the Italian Prime Minister Romano Prodi. A similar proposal was made by the French President, Jacques Chirac, who again suggested the idea of 'pioneer groups' of countries willing to participate in new specific projects, some (though not all) of which would be outside the institutional framework of the Treaties. According to Ponzano this vanguard scenario cannot be considered a valid alternative, since, while it might be

possible for the 12 countries with a single currency to have more ambitious integrated economic and, perhaps, social policies, it would be difficult for them to have a common foreign, security and defense policy with sufficient credibility on the international scene.

C. The *third scenario* involves ‘cherry-picking’, i.e. to eliminate or dissociate disputed parts of the Constitution and to submit a new document – whether or not labeled ‘constitution’ – for ratification (by way of referendum) to the Member States. The French Interior Minister, Nicolas Sarkozy, for one, suggested the idea of drafting a new Treaty that is limited to the ‘institutional’ provisions and subject to parliamentary ratification only. The former President of the European Convention, Valéry Giscard d’Estaing, proposed to dissociate the first and second parts of the European Constitution (which will be ratified via a referendum in the countries having chosen such procedure) from the third part which would be ratified, after the appropriate changes, through a parliamentary procedure. Such a solution should, according to Ponzano, be matched with other elements, namely, incorporating into the first part a more precise description of the EU’s powers (so as to avoid an indirect extension of the powers listed in the third part); and possibly revising some of the provisions of the third part so as to respond to the concerns of a section of the electorate (e.g. the social provisions and/or the provisions concerning public services).

Another alternative and quite radical solution, suggested by Ponzano, is to make a number of changes to the text of the European Constitution and to submit the new text to a popular vote at a European level in June 2009 in concomitance with the European Parliamentary elections.

Cherry-picking is controversial and will prove to be difficult because it involves re-negotiating the text and presupposes some form of agreement on what exactly the ‘cherries’ are.

D. The *fourth scenario* is the European Commission’s alternative. The Commission advocates the use of the so-called ‘Plan D’ (from dialogue) which encourages communication on the added value of the European project. In the Commission’s opinion, (according to Ponzano) the most important problem in Europe does not lie within its institutions but relates to the political commitment and vision of the common interests and goals. According to this opinion, political dynamism and economic success will create the conditions for institutional reforms. The Commission aims first of all to explain the added value of the European project and wants to improve the economic and social context before submitting the Constitutional Treaty to the ratification procedure. This may boil down to a lengthy, possibly an indefinite reflection period.

E. The *fifth scenario* is quite simple: dump the European Constitution altogether and proceed on a quite pragmatic basis revising the Treaties only where and when strictly necessary. This solution however will be increasingly difficult in the Europe

of 27 or more and will often result in Nice-like trade-offs and subsequent poor results.

The Foreign ministers of the EU have – in May 2006 – set themselves a deadline of 2009 to come up with a solution. One thing is sure: a new Treaty – still necessary to tackle the problems that may cripple a Union of 27 or 28 – will most likely no longer be called ‘Constitution’; the common feeling by now being that to label the proposed treaty ‘constitution’ was a mistake. But that is all the Member States seem to be able to agree upon at this moment. A coalition of states, led by Germany, is not ready to renegotiate the substance of the Constitutional Treaty, while, on the other hand, France and the Netherlands will not be satisfied by a simple change to the title of the document. After the ‘No’ votes in the referenda they are under domestic pressure to come up with substantial changes to the text and ensuing renegotiations.<sup>5</sup> In this latter camp – backed by the UK and Poland – there is, however, no clear-cut plan (or common ground) on what the changes to the text of the constitution should be. While nobody seems to want an indefinite reflection period, a clear strategy on how to arrive at a result is missing at this moment. (Extra) ‘time-out’ is most welcome.

On the other hand, one can say without exaggeration that the silence in the ‘reflection pause’ of the past year has been deafening. As many commentators have pointed out, it was mainly a pause with very little reflection. In the Netherlands there was – except for statements amounting to ‘no = no’ and a poll held by the junior Minister of European Affairs<sup>6</sup> – virtually no debate at all, notwithstanding big plans for an all embracing public debate on Europe in the immediate aftermath of the events of June 1<sup>st</sup>, 2005. The flame of the constitutional debate seems to have definitely died out.

This comes as no surprise. Traditionally, since the nineteenth century, the climate for constitutional debate in the Netherlands has been barren and forbidding.<sup>7</sup> This is why the editor of this book came up with the thought-provoking idea of mirroring the underlying ideas and text of the European Constitution with the constitutional concepts and ideas put forward in the *Federalist Papers*. If not for anything else, this might spur a more fundamental debate on the topical issues for Europe’s constitutional future, a debate that up until now has been held hostage by practicalities (how to proceed with a compromise Constitution, void of a common European ideology or an appealing European idea) and has featured isolated discus-

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<sup>5</sup> In the Netherlands a vast majority of the population (83%) indicated – in a poll held in May 2006 – that they want another referendum if the constitution text is revised.

<sup>6</sup> The poll was held on the Internet, more than 97,000 people participated. The outcome of the poll (May 2006) shows that the Dutch still believe in the European Union and EU cooperation, that they want to be better informed (and educated) on the actual operation of the Union, its policies and its institutions, that the pace of deepening integration – except for a common asylum policy – and changes is too high, and that, according to the Dutch the Union has reached its maximum size (no new Member States – except Norway – should be allowed to accede). See ‘Nederlandineuropa.nl’, Eindrapport Ministerie van Buitenlandse Zaken, May 2006.

<sup>7</sup> See the introduction of H. te Velde, in: *De Grondwet*, Amsterdam 2006.

sions and debates such as on the ‘demos-theory’<sup>8</sup>, the state-form (federation or Treaty organization?), and debates on the label ‘Constitution’.<sup>9</sup> These discussions, to some extent, have shadowed topical questions that are prominent in the *Federalist Papers*: ‘What are the proper relations between the state and its citizens?’ ‘What is the proper balance between the principle branches of government (legislative, executive and judiciary)?’. The *Federalist Papers* may serve here as a sort of measuring rod for our present day debates on Europe’s constitutional future and may enlighten us even after more than two hundred years.<sup>10</sup>

### 3. The Federalist Papers comparison-experiment

When reading the *Federalist Papers* with modern European eyes, many discussions at first glance have a familiar ring. The *Federalist Papers* deal with the truly classic questions of the proper relation between government and citizens, the origin and legitimacy of governmental power, the importance of freedom, the balance of government powers, and the optimal relationship – in the sense of offering the most guarantees – between a federal government and federal states. These questions are also topical in a present-day European Union where we are still debating the issue of a possible European Constitution, or – in whatever form or shape – a post-Nice constitutional arrangement that will address the realities of a European Union of the twenty-seven. The parallels between the discussions at the end of the eighteenth century and the current ones are, even for those not prone to wishful thinking, manifold and – one might argue – instructive for modern Europeans. That is also the idea behind this book.

On the other hand, there is also much that hampers a constructive comparison between the world of the *Federalist Papers* and the present discussion on the constitutional future of the EU. One of the most important differences – in my view – is this: the American discussion on the organization of a federal constitutional system was, to some extent, influenced by outside threats. The United States had just broken away from the British Empire and was under pressure to unite in order to form a durable front against possible renewed foreign rule. A new state organization had to be realized within a short period of time since the old system had ceased to exist.

In today’s Europe there is no comparable circumstantial pressure. The continent has experienced almost fifty years of peace and prosperity, and the political and constitutional institutions of Member States, especially older ones,<sup>11</sup> constitute cherished national heritages developed over the course of centuries.

Furthermore, modern government activity and governance in Europe differs enormously from those in eighteenth century U.S.A. From the *Federalist Papers*,

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<sup>8</sup> Some scholars have argued that the path of further political European integration is blocked by the absence of a European ‘demos’, i.e. a people that shares certain political, cultural or other values.

<sup>9</sup> Only after the 2003 European Convention and the 2004 and 2005 events more fundamental constitutional questions are being raised. Maybe the Constitution is ahead of its time, or academic study of constitutional law is lagging behind.

<sup>10</sup> I do realise that, according to some, this line of thinking puts me in the leper colony of ‘new constitutionalism’. So be it. I think the new constitutionalism approach is very rewarding even when it comes down to understanding and interpreting constitutional law.

<sup>11</sup> I.e. the fifteen ‘established’ Member States which formed the EU before 1 May 2004.

government emerges as the ultimate, natural menace to individual freedom. A truly 'good' government should – in the eyes of the *Papers*' authors – limit itself to elementary action aiming for peace and optimal freedom. The theme of the discussion is in particular what a government must *not* do, i.e. what a government must be *restrained* from doing. All this to safeguard the vulnerable freedom of citizens. A restricted and reluctant government of this nature was thought to offer the citizens (of a then unbelievably large country) infinite possibilities for personal development, i.e. to maximally exploit their opportunities and talents in a free egalitarian market economy. The *Federalist Papers* sketch an eighteenth century highway for the pursuit of happiness.

The current discussion about the future of the EU is tuned in a rather different key. The future constitution of the EU also paves a highway for the pursuit of happiness, but the threats and obstacles to be removed from that highway are different from those in the eighteenth century. To be sure, government power still threatens freedom and thus the opportunities of its citizens, but in a free market economy other forces also stand in the way of fair and equal chances. Freedom in a market economy is also threatened by cartels, monopolies, other abuse of economic power, poverty, illiteracy, handicaps, etc. A modern constitution must also protect citizens against such threats. Traces of that line of thought are manifest in current European constitutional law and the European Constitution that codifies large parts of the already existing constitutional law of the European Union.

There is, of course, much more that is incomparable between the world of the *Federalist Papers* of Hamilton, Madison and Jay and the world of the emerging European Constitution. But that still does not make a comparison meaningless. I hope to be able to demonstrate that in this contribution.

#### 4. US 1788: legislator as threat – EU 2003: legislator under threat

In the *Federalist Papers*, Hamilton, Jay and Madison picture – to the modern mind – an unfamiliar image of the legislative branch of government. In the eyes of Madison < Jay, and Hamilton,<sup>12</sup> the legislator constitutes a threat to the constitutional liberties of the people. Referring to incidents in Virginia and Pennsylvania, Madison illustrates how legislators – exposed as they are to the whim of the day – have more than once violated their State Constitution in the (then) recent past. 'It appears', as Madison establishes in the case of Pennsylvania, 'that the Constitution had been flagrantly violated by the legislature in a variety of important instances'<sup>13</sup>.

The other branches of government powers are under threat from the powerful legislator as well. To avert such dangers, the authors of the *Federalist Papers* recommend a watertight demarcation, inspired by Montesquieu, of the powers of government. The legislator must only have limited powers to prevent it from outstripping the executive. And the independent judiciary – as a sort of intermediary be-

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<sup>12</sup> James Madison, Alexander Hamilton and John Jay, *Federalist Papers*, originally 1788, modern Penguin edition, London 1987, (edited by Isaac Kramnick) see in particular number XLVIII and number LXXVIII.

<sup>13</sup> *Federalist Papers*, p. 311.

tween legislator and people – will see to it that the constitutional guarantees are observed by the executive, but certainly by the legislator.<sup>14</sup>

The debate preceding the European Convention, which eventually resulted in the European Constitution,<sup>15</sup> was tuned in a very different key. The threat emanating from the legislator itself was not under discussion there, but the feared immobilization of the European legislator due to over-complex, non-transparent and undemocratic procedures<sup>16</sup> occupying central stage.<sup>17</sup> The solutions which the European Constitution has chosen in order to tackle the problems of the bogged-down European legislative procedures cannot boast a long theoretical pedigree; they have a mainly practical and technical character. In the eyes of the Convention, the problem endangering European legislative processes was procedural complexity, resulting in non-transparency and incomprehensibility, and consequently a lack of democratic legitimacy. In the eyes of Working group IX of the Convention, simplification is the remedy, which – on its own accord – would contribute to enhancing the legitimacy of European legislative processes. In the words of Working group IX:

‘To simplify therefore firstly means ‘to make comprehensible’, but also to provide a guarantee that acts with the same legal/political force have the same foundation in terms of democratic legitimacy. The democratic legitimacy of the Union is founded on its States and peoples, and consequently an act of a legislative nature must always come from the bodies which represent those States and peoples, namely the Council and the Parliament. Procedures must therefore be reviewed to ensure that they respect this simple principle: acts which have the same nature and the same legal effect must be produced by the same democratic procedure. This brings us directly to a clearer hierarchy of legislation, which is the consequence of a better separation of powers. This is not with the aim of paying tribute to Montesquieu, but out of concern for democracy.’

*Sancta simplicitas* or technocratic naivety? In any case the discussion in the Convention about the position and task of the European legislator in the constitutional framework of the European Union forms a poor and stark contrast with the way in which the legislative power, as one of the three branches of government power, is

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<sup>14</sup> In a lecture at Leiden University, spring 2004, Justice Kennedy, member of the American Supreme Court, pointed out that the eighteenth century debate on the constitutional arrangement of governmental power was influenced by the popular interest in mechanics and engineering during that era. The drafters – in Kennedy’s view – perceived the elaboration of the Constitution more or less as engineering work, whereby the cogwheels of the mechanism should properly engage one another as in a clockwork. A most interesting theory.

<sup>15</sup> *OJEU* 16 December 2004, C 310.

<sup>16</sup> This problem analysis – adopted by the Convention – had already been made in the White Paper European Governance, COM (2001) 428 final.

<sup>17</sup> Working group IX of the Convention (Simplification) has in particular discussed the position of the European legislator. The work of the working group was especially aimed at simplifying and ordering the existing legal instruments and associated procedures and by doing so at enhancing the transparency. The final report of the working group was presented on 29 November 2002, CONV 424/02, document no. 13. The views in the working group about the solutions were relatively in unison. The discussion further to the proposals made by the Convention about the simplification of legal instruments and procedures was – apart from the point of the QMV decision-making rule – also fairly calm.

discussed in the *Federalist Papers*. Even if we take into account that in the *Federalist Papers*, compared to the other subjects, the legislative power is dealt with in a step-motherly fashion. What can be the reason for this disregard for one of the true novelties in the European Constitution?

## 5. Focus on the European legislator

We must establish, I believe, that so far there have been rather few fundamental orientations on, and discussions about, the significance of the European legislators in the EC and EU treaties. The new *European legislator* under the European Constitution – which I take as the point of departure for this contribution – has met with the same lukewarm reception in political and academic discussion.<sup>18</sup> That is quite a deficiency, since in recent decades very radical developments have taken place, particularly with regard to the position and significance of those European legislator(s).

From a jumble of decision-making procedures, stemming from international-law traditions, whereby under the EEC and EC treaties originally only the Council and the Commission had the authority to enact legislative acts (i.e. EC regulations and directives), a European legislator has emerged in the (failed) European Constitution, on the basis of a uniform and fully-fledged legislative procedure, in which, in virtually all cases, the European Parliament acts as co-legislator in concert with the Council on the Commission's initiative. This development took place in less than twelve years and is, at the very least, remarkable. Still – certainly in Europe – relatively little attention has been paid to this European legislator which becomes ever more influential and energetic.

The gradual way in which, from the Treaty of Maastricht onwards, the scope of the co-decision procedure<sup>19</sup> in the Treaties of Amsterdam and Nice has step-by-step widened, has perhaps contributed to the situation that the legislator(s) has (have) escaped notice. The result is a common and a pan-European misunderstanding of the European Parliament's legislative influence: still it is often experienced as an expensive debating club with little political clout.<sup>20</sup> Nothing could be further from the truth: the European Parliament has proven to be a very active co-legislator over the last decade.

## 6. Assessing the European legislator: characterization of the procedure

What kind of legislator would the European Constitution have established? Under the European Constitution the European legislator is foremost a procedure in which the Council and the European Parliament (EP), on a proposal from the European

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<sup>18</sup> Due to a uniform ordinary legislative procedure laid down in Article 396 of the European Constitution, the European Constitution has also given birth to the European legislator. See W.T. Eijsbouts, 'The emergence of a legislator' (in Dutch), *RegelMaat* 2003, pp. 207-223.

<sup>19</sup> The procedure laid down in Article 251 of the EC Treaty.

<sup>20</sup> Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament*, fourth edition, London 2000, p. 7 and pp. 293-294.

Commission, jointly adopt European laws and framework laws.<sup>21</sup> Parliament's involvement in this co-decision procedure gives a formal democratic legitimacy to the decisions – European laws and framework laws – which are its products. The Council's role in the legislative process guarantees that the interests of the Member States get a voice.<sup>22</sup> Both Parliament and Council have the right of amendment which, certainly on the part of the European Parliament, is used intensively.<sup>23</sup>

The co-decision procedure consists of (the possibility of) different stages called 'readings'. The article III-396-procedure is initiated by a Commission proposal for a European law or framework law submitted to the European Parliament and the Council. Parliament and Council consider this proposal during the first reading. The end-result of Parliament's deliberation on the proposal is the adoption of its (so-called) position – including possible amendments to the Commission's proposal – after which the Council discusses the proposal and Parliament's position. If the Council agrees with Parliament's position, the act is thus adopted as a law or framework law. If the Council does not agree with Parliament's position, it can either reject the position (meaning the act is not adopted) or propose amendments to Parliament's position – the so-called common position – and forward it to the Council and the Commission to learn their opinion (i.e. the second reading). During this second reading the European Parliament deliberates on the common position of the Council and can then do one of three things: a) approve the Council's amendments of the common position<sup>24</sup> (and hence the act concerned is adopted), b) reject the Council's position, or c) – in its turn – propose amendments to the Council's common position. This second reading is not a mere repetition of the first reading since at the second reading it is not the Commission proposal, but the common position that is the topic of Parliament's deliberation. If Parliament does propose amendments to the Council's common position, the Council in its turn can: a) approve all the amendments and the act will be deemed to have been adopted, b) reject one or more of Parliament's amendments, causing the conciliation procedure to take effect. That procedure implies that a Conciliation Committee, composed of representatives of the European Parliament and representatives of the Council,<sup>25</sup> will try to arrive at a compromise between the Council's and Parliament's position. The Conciliation Committee convenes within 6 weeks (which may be extended by two weeks on the initiative of either institution) after the Council's second reading. The Committee has 6 (or 8) weeks from the date of its first meeting to draw up a compromise text (called 'joint text'). If, within that pe-

<sup>21</sup> See Article III-396 in conjunction with Article I-33 European Constitution.

<sup>22</sup> Article I-46 of the European Constitution establishes that the functioning of the Union is founded on the principles of representative democracy. According to this principle European citizens are represented at Union level in the European Parliament and Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves in their turn democratically accountable either to their national Parliaments or to their citizens.

<sup>23</sup> It is no exception that at the first reading dozens of amendments to a Commission proposal are proposed. The European Parliament – certainly in the past two legislatures – is very active.

<sup>24</sup> Failure to take a decision within the period will also count as approval. See Article III-396, paragraph 7, point a, European constitution.

<sup>25</sup> The Conciliation Committee is made up of twenty-five Members of the Council or their representatives and an equal number of representatives from Parliament which makes up the EP delegation.

riod, the Conciliation Committee approves a joint text, European Parliament and the Council each have a period of six weeks in which to adopt the act in question in accordance with the joint text (without any possibility of amendment). If they fail to do so, the proposed act is deemed not to have been adopted. Council and Parliament need to take a positive decision within the allotted period. Failure to take a decision within that period will be considered as a rejection.

## 7. Assessing the European legislator: democracy

This – on the face of it – complicated legislative procedure in the European Constitution (a copy of the co-decision procedure in the EC Treaty) is not an example of the transparency or simplicity which the European Convention felt so strongly about. For many European citizens it will contribute to the image of a Byzantine, bureaucratic European Union which takes far-reaching decisions and adopts legislation without European citizens being involved in it or being able to influence it.

It cannot be denied that the European Union is still weighed down by a democratic deficit. The low turnout at European elections, and the relative lack of interest of some national parliaments in European legislative proposals (which their national governments pass on to those parliaments), are tell-tale signs of this deficit, as is the negative outcome of the Dutch referendum on the Constitution. The questions we have to ask ourselves, however, are whether this deficit is (a) a structural consequence of defects in the European cooperation and the resulting organization of the legislative procedures; and is (b) permanent.

In my opinion the current democratic deficit, *insofar as* it concerns the European legislator, is a problem that can be overcome. While the legislative procedure under the European Constitution may seem incomprehensible, the co-decision procedure, on which the new legislative procedure has been grafted, works well in general, as appeared from evaluations carried out for the Convention.<sup>26</sup> It appears to be a flexible instrument that makes it possible to arrive at results in a rapid and legitimate way in a complex environment like the European Union. Since its creation in 1992, the success of the co-decision procedure has exceeded many somber expectations.<sup>27</sup>

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<sup>26</sup> The procedure filters fairly well, the Convention noted in 2002. About 32% of the proposals are adopted at the first reading, in some 40% of the cases the second reading is conclusive, and 28% is dealt with in conciliation. See the Convention document 'Legislative procedures (including the budgetary procedure): current situation', CONV 216/02, July 24 2002.

<sup>27</sup> It has, however, proved difficult to measure EP's influence in the co-decision procedure. The American political scientist George Tsebelis has argued that one of the effects of the new co-decision procedure I (i.e. during phase I from 1992 Maastricht up to 1996 Amsterdam) was that the agenda-setting power of the EC – due to the co-decision procedure – moved to the Council, to the effect that the EP actually lost influence and power during this period if one compared it to the situation under the former cooperation procedure. See George Tsebelis, 'The Power of the European Parliament as a Conditional Agenda Setter', *American Political Science Review* 88, 1994, pp. 128–142. Only in the co-decision II-period (the period from 1997 onward) the agenda-setting power is equally shared by the EP and the Council. See George Tsebelis and Geoffrey Garrett, 'Legislative Politics in the European Union', *European Union Politics* 1 (1), 2000, pp. 9–36. Impact studies on how the EP influences decision-making processes in the Union by introducing amendments show that the influence of Parliament is increasing at the expense of the Commission's influence. Amie Kreppel, 'Moving Beyond Procedure: An Empirical Analysis of European Parliament Legislative Influence', *Comparative Political Studies* 35, 2002, pp. 784–813.

The problem is that the procedure is not yet widely known to the public or, for that matter, to national politicians in the Member States. Perhaps that is a matter of time: for this process has given the European Parliament a powerful means of making headway as co-legislator and, through its amendments, of attempting to act as the voice of the European population. More than any national parliament, the European Parliament lacks a Europe-wide media platform that allows it to communicate directly with the European people. The European Parliament is little known and therefore a little loved or unfamiliar parliament. The fact that interruptions are not allowed on Parliament's floor contributes neither to the popularity, nor to the ease of comprehension of the debates.

Parliament's involvement in the legislative processes by way of amendments is therefore tangible and, for its members, proof of Parliament's influence.<sup>28</sup> As has been manifest in recent years, via its contribution to legislative processes, Parliament tries to enter into a dialogue with the electorate. The question is whether that will, in the future, bridge the gap of the democratic deficit. Perhaps more far-reaching measures are still needed for this.

For instance, the European Commission has the monopoly on drafting and submitting bills.<sup>29</sup> According to Combret, the European Parliament is about the only parliament in the world that has no right of legislative initiative.<sup>30</sup> The reason to grant the Commission this exclusive right to introduce legislation has to do with the position of the Commission as guardian of the Treaty. Whether this reasoning would still have held good under the European Constitution is in my opinion a point of discussion, certainly given the fact that the European Constitution also introduced the citizen's initiative.

It is also my view, for that matter, that the grounds for maintaining the non-interruption rule in the European Parliament have ceased to apply: recent debates – in which prime-minister Berlusconi and MEP Verheugen played a central role – have proved that interruption occurs, albeit through body language.

This shows that the democratic deficit is not necessarily the direct consequence of the system itself or its procedures, but perhaps due more to contextual factors. This insight, in its turn, raises the question of whether the deficit can be successfully combated by further changes and review of the legislative procedure.<sup>31</sup>

Is the democratic deficit permanent? Some people – like Corbett, Jacobs and Shackleton – point out that the experience with integrated European policy and the associated legislative procedures is still so young that it would show a kind of naive

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<sup>28</sup> Corbett et al., *The European Parliament*, p. 8.

<sup>29</sup> See Article I-26, paragraph 2, of the European Constitution.

<sup>30</sup> Christophe Combret, 'The Democratic Deficit of the European Union; Much ado about Nothing', *European Union Politics*, vol. 4 (1), 2003, pp. 101-120.

<sup>31</sup> In that perspective it is also the question whether the 'red flag' procedure of the constitutional protocol will be able to reduce the deficit. That procedure implies that, if in the opinion of a national parliament a legislative proposal of the Commission does not comply with the principle of subsidiarity, the said parliament may send a reasoned opinion about this to the chairman of the European Parliament, the Council of Ministers and the European Commission. The Commission will then have to take account of such opinion. See the Protocol on the role of the national parliaments in the European Union, in particular Article 3. The procedure may be an effective way to breathe new life into the principle of subsidiarity (now included in Article I-11, paragraphs 1 and 3, European Constitution). So far the legal effect of the principle has remained very limited.

impatience to expect that European citizens can already identify with it completely, as well as participate in it. Democratic legitimacy is – just like trust – something that must grow. Corbett and his co-authors expect the deficit to decrease in accordance with the success of the outcome of the procedures.<sup>32</sup>

There is undoubtedly much that speaks in favor of that position, but it is no law of physics that the success of the Union will also lead to greater legitimacy. The last forty years have indeed taught us that that does not have to be the case. It is not easy to predict whether the legislative arrangements adopted in the European Constitution will, as a matter of course, be able to reach the hearts and minds of the European population. Neither is there any evidence in this respect for the supposition on which Working group IX of the Convention seems to rely: more simplicity and transparency of the procedures will automatically give greater democratic legitimacy.

## 8. Assessing the European legislator: a legislator with limited power

The European legislator is not omnipotent. It has only limited power: the limits of its competences are governed by the principle of conferral. As set down in the European Constitution, this principle entails that the EU – and hence also its legislator(s) – can only act within the limits of the competences conferred upon it by the Member States in the Constitution and only in order to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.<sup>33</sup>

The European legislator under the European Constitution, like its predecessors under the EC Treaty, has competences only in the areas in which the Constitution has expressly attributed competences. In principle, the system of the European Constitution does not allow for any implied powers.<sup>34</sup> Furthermore, the European legislators' competences are, as with all Union competence, to a large extent governed by the principles of subsidiarity and proportionality.<sup>35</sup>

In the system of the European Constitution there are various categories of attributed powers, viz.:

- *Exclusive competence*, meaning that only the Union may legislate and adopt legally binding acts, and that Member States can only legislate if so empowered by the Union or if it is necessary for the implementation of Union acts. (The principle of subsidiarity does not apply to exclusive competences).<sup>36</sup>
- *Shared competence* meaning that both the Union and the Member States may legislate and adopt legally binding acts in that area, but that the Member States can only exercise their competence to the extent that the Union has not yet exercised it, or has decided to cease exercising it.<sup>37</sup>

<sup>32</sup> See also Corbett et al., *The European Parliament*, p 293. In the wake of David Curry they recommend not to be too worried about this: the awareness in respect of European policy must still settle in.

<sup>33</sup> Article 11, paragraph 2, European Constitution.

<sup>34</sup> The flexibility clause of Article I-18 of the European Constitution can have that effect, however.

<sup>35</sup> Article I-11, paragraph 1, European Constitution.

<sup>36</sup> Articles I-12 and I-13 European Constitution.

<sup>37</sup> Articles I-12 and I-14 European Constitution.

- *Competence to coordinate* economic and employment policies of the Member States.<sup>38</sup>
- *Competence to carry out supporting, coordinating or complementary action* in certain areas.<sup>39</sup>
- *Competence in matters of common foreign and security policy.*<sup>40</sup>

I will not discuss the precise scope of all of these areas of competence. But it is important to note that from Title III (Union competences) of Part II of the European Constitution, like in the *Federalist Papers*, a certain fear of a powerful legislator comes to the fore. Indeed, in the European Constitution the principle of conferral ties the legislator not directly to the Constitution itself, but to the will of the Member States as expressed in the European Constitution. It is, indeed, a striking feature that the principle of conferral refers to the Member States as the source of power ('competences conferred by the Member States in the Constitution') and does not invoke the Constitution itself as the primary source of limitation of government or legislative power. The European Constitution is not in any respect such a sacrosanct document as the American Constitution. In many respects it is more an intermediary of the will of the Member States, an intermediate stage in the development of European integration than an absolute and principal safeguard for European citizens against abuse of government power.

## 9. Assessing the European legislator: legal acts consisting of legislative and non-legislative acts

Under the European Constitution the European legislator not only has limited competences, but also a limited arsenal of legal instruments. This is in contrast to the EC and EU Treaties which display a wide variety of some 15 different legal instruments. The Constitution limits this to 7 instruments. Article I-33 European Constitution divides those legal instruments into legislative acts (European laws and European framework laws) and non-legislative acts (the European regulation, the European decision, the recommendation and the opinion). Of the non-legislative acts the European regulation and the European decision are binding, and the recommendation and the opinion are non-binding.

In this way the European Constitution also directly establishes a hierarchy between these acts: legislative acts, almost as a matter of course, take precedence over non-legislative acts. The European law is a legislative act of general application which is binding in its entirety and directly applicable in every Member State. A European framework law binds the Member States as to the result to be achieved, but leaves it to the national authorities to choose the form and means. The Member States should incorporate it into nationally binding rules. In principle European (framework) laws are made on a proposal from the Commission.

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<sup>38</sup> Articles I-12 and I-15 European Constitution.

<sup>39</sup> Articles I-12 and I-17 European Constitution.

<sup>40</sup> Articles I-12 and I-16 European Constitution.

A new concept in the European Constitution is the European regulation. This is a very different instrument from the EC Regulation we knew under the EC Treaty. According to Article I-33 of the European Constitution, a European regulation is an act of general application for the implementation of a European law or framework law and of certain provisions of the Constitution. It may be binding in its entirety and directly applicable in every Member State, or may bind them as to the result to be achieved, but leave the Member State free in choosing form and means. Its character depends on the parent-Act (the Constitution, a European law or a European framework law).

The definition of the European regulation indicates that there are various kinds of European regulations. The three most important ones are the *delegated European regulations*, the *European implementing regulations*, and what I would like to call the *European regulations with the character of organic law*.

The *delegated* regulation is the regulation which is made further to a delegation in a European law or framework law. Such delegation is made possible by Article I-36 of the European Constitution. A delegated regulation 'inherits' its character from the delegating European law or framework law. So, in future we can have regulations that are only binding as to the result to be achieved and which leave the Member States free in choosing the appropriate forms and means for this. This 'newspeak' will take some getting used to.

Besides the delegated regulations the European Constitution also has *implementing* regulations. The European Commission – and in a few cases the Council – can adopt such regulations where uniform conditions for implementing European laws, framework laws, regulations (!) or decisions are needed.<sup>41</sup>

The last category of regulations, the *organic* ones, consists of regulations which are based on a direct attribution in the European Constitution. For instance, by virtue of Article III-190, the European Central Bank can on its own accord adopt regulations to carry out its tasks.<sup>42</sup> On the basis of Article III-168, paragraph 4, the Commission can adopt regulations exempting from state-aid-reporting obligations. Article III-232 European Constitution attributes a similar power to the Commission to adopt regulations fixing counterbalancing charges.

## 10. Delegation of legislative authority

Article I-36 the European Constitution gives the European legislator the possibility to delegate legislative power in European laws and framework laws. Under the EC Treaty delegation of implementing powers was governed e.g. by Article 202 EC Treaty and the system of comitology based on it.<sup>43</sup> The aim of comitology is to

<sup>41</sup> See Article I-37, paragraph 2, European Constitution.

<sup>42</sup> In particular to carry out the tasks in accordance with Article 3, paragraph 1, under a), Article 19, paragraph 1, Article 22 and Article 25, paragraph 2, of the Statute of the European System of central banks and of the European Central Bank, as well as in the cases mentioned in the European regulations and decisions referred to in Article III-187, paragraph 4, European Constitution.

<sup>43</sup> The comitology procedure has been laid down in Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999, L 184 (comitology decision).

control delegated legislation. The current practice of comitology implies that the Commission needs to consult (representatives of) the Member States whenever it plans to enact delegated legislation.

Contrary to article 202 of the EC Treaty, the European Constitution distinguishes between the concepts of legislation by virtue of *delegation* and subordinated regulation for the sake of implementation. The matter is included in two articles, viz. Article I-36 and I-37 European Constitution. Article 36 European Constitution allows a European law or European framework law to delegate the further regulation of certain non-essential elements to the Commission. The latter can then adopt European delegated regulations on the basis of that power. Real committees, as we know from the current comitology procedures, would then no longer be needed, at any rate by the looks of it. Comitology is no longer needed since the need to keep grip on the adoption of rules via delegation is met in Article I-36, paragraph 2, European Constitution itself. That second paragraph provides for the possibility of including conditions for delegation in a European law or framework law which give the Council and Parliament the power to withdraw a delegation (if e.g. they do not like the draft of the delegated regulation), or to make the entry into force of such regulation dependent on the approval of the Council or the Parliament. In addition there is a hierarchy in the relation between European law or framework law and delegated regulation. The European law or framework law is the higher rule compared to the delegated regulation. A delegated regulation must of course not come into conflict with the European law or framework law on which it is based.<sup>44</sup>

Article I-37 European Constitution also contains a remnant (the ‘implementation’ part) of the old delegation Article 202 EC Treaty. As we already saw, implementation according to Article I-37, paragraph 1, of the European Constitution is in principle a matter for the Member States. The second paragraph of Article I-37 provides that, where uniform conditions for implementing legally binding Union acts are needed, implementing powers can be conferred on the Commission, or in some cases on the Council.

The second paragraph of Article I-37 European Constitution seems to introduce in so many words the possibility of the so-called Lamfalussy method or procedure into the European Constitution.<sup>45</sup> In short the Lamfalussy method implies that when laying down uniform implementation standards (i.e. uniform implementation conditions) the European Commission might seek advice from experts or specialized committees which do not necessarily have to be composed of representatives of Member States.<sup>46, 47</sup> Article I-37, paragraph 2, European Constitution makes the

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<sup>44</sup> Besides, delegated regulations are no legislative acts within the meaning of the European Constitution.

<sup>45</sup> Called after the Committee with the same name. See for the report of that committee *Final Report of the Committee of Wise Men (Lamfalussy Report) on the Regulation of European Securities Markets*, Brussels, 15 February 2001.

<sup>46</sup> Article 37, paragraph 3, European Constitution does in fact not imply that there is always and as a matter of course supervision by Member States. Paragraph 3 only states that rules and general principles will be laid down concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

<sup>47</sup> The Italian presidency in 2003 took a different view. In the declaration annexed to the final – December 2003 version – of Article I-35 European Constitution (now Article 36) the Lamfalussy procedure is expressly included in Article 35 (now 36) European Constitution. That is curious since the method

Lamfalussy procedure possible, but does not order it. The procedure itself is rather controversial since this form of 'technical' legislation has of course little democratic legitimacy.

A final word on comitology: although the system of Articles 36 and 37 of the Constitution seems to make the comitology procedure superfluous, it remains to be seen whether it will fade out or not, if it were to be accepted in the future. Comitology is a raw political reflex of Member States, rather than a well considered and accepted constitutional instrument.

Together with the rest of the Constitution, the provisions dealing with the European legislator were voted down by the Dutch electorate in the referendum of June 1, 2005. The Constitutional proposals regarding the European legislator were – with the exception of the part of the competences – hardly debated. The different procedures and instruments did not play any part in the discussions. These procedures and instruments, however, are truly important in allowing the Union of 27 to perform its legislative functions. I therefore expect that, if the ratification process grinds to a halt because more (than 5) countries fail to ratify the Constitution, these proposals still stand a good chance of being put forward again, be it piecemeal in a treaty or in another act (e.g. a regulation, amendment to the comitology decision).

## 11. The relation between the European legislator and the European administration

According to the pattern of what the Dutch call the 'Trias Politica',<sup>48</sup> coupled with the idea of checks and balances, a concept which echoes distantly in various manifestations – like the idea of institutional balance – in the European Constitution, the European legislator can attribute executive (in a more modern wording: 'administrative') powers to the European executive or administration. The European administration, in its turn, is bound by law: it can only act when European law allows as much. The principal constitutional question is: who exercises administrative authority in the European Union?

It is not easily explained who or which institution in the European Constitution can be considered as 'the Executive' or the chief administrative power. Under the current treaties this question is debatable, and the Constitution would make the situation any clearer.<sup>49</sup> In Article I-37 the European Constitution assigns the power to implement legally binding acts of the Union to the Member States. In a few cases the Commission can give support.<sup>50</sup> So, in the system of the European Constitution the Member States, represented through the Council of Ministers and the European Council, constitute 'the executive power' in the classical sense.

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in the proposals of the Lamfalussy Committee initially meant to simplify the process of uniform implementation conditions (so matters falling under Article 37 European Constitution).

<sup>48</sup> Translated to the European Union the Trias concept would better be labelled 'Tetras Politica', since the present European Union is based upon a quadripartite structure (European Commission, European Council, European Parliament and the European Court of Justice).

<sup>49</sup> See Amaryllis Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*, The Hague/London/New York, 2002.

<sup>50</sup> See Article I-37, paragraph 2 and 3, European Constitution.

That is not compatible, however, with the (continental) national concept of ‘administration’ where administration is commonly understood as a residual government function, i.e. all functions of the (central) government minus legislation and the administration of justice.<sup>51</sup> If we look at it in this way, the Commission and the other EU institutions also exercise many administrative powers in the EU. At a number of places, for instance, the European Constitution requires that the Commission take ‘decisions’.<sup>52</sup> Much in the same way the Council takes European decisions under the Constitution. According to Article I-33 European Constitution those European decisions are binding on those to whom they are addressed. Seen from a continental (i.e. Dutch) perspective, most of those European decisions would count as *administrative* acts. Thus, administrative power is scattered all over the present EU constitutional system. Sometimes it is attributed by the Treaties and maybe in the future the Constitution will also do so, but most of the time the European legislator(s) is(are) the source of administrative power.

An interesting consequence of this system is constitutional asymmetry. The European legislator passes laws that are – for a substantial part – executed by administrative authorities in Member States. These European, nation-based administrative bodies are not politically accountable to the European people’s representation (the European Parliament) for their performance in executing European laws. There is here, for a number of forms of European administration, an asymmetry in accountability. Administrative authorities in Member States actually render account for the implementation of European legislation to the European Commission and, in a very few cases, to their own parliament. This may lead to ‘white spots’ in the way in which the administration is politically accountable. The question is if this asymmetric ‘Trias’ will remain successful in turning the will of the European legislator into deeds in the Member States, through the requirement of loyal action by national administrations.

The possibility of ‘white spots’ emphasizes the vital role of the European judiciary (see the next section)<sup>53</sup> in the system of the European Constitution. The judiciary and the European Commission are the first institutions responsible for checking and controlling the way in which the administration implements Union law, rather than parliaments or the Council.

## 12. The relation between the European legislator and the European judiciary

The judicial power under the European Constitution is in the last resort – just as under the present Treaties – the providence of the Court of Justice (General Court and specialized Courts). It is up to the Member States – so the Constitution states – to provide remedies sufficient to ensure effective legal protection in the fields cov-

<sup>51</sup> See for instance the most used Dutch treatise on Administrative Law, H.D. Van Wijk, W. Konijnenbelt & R.M. Van Male, *Chapters of Administrative Law* (in Dutch), thirteenth edition, The Hague 2005, p 6.

<sup>52</sup> See e.g. Articles III-165, III-168, III-172 European Constitution.

<sup>53</sup> See Deirdre Curtin, *Mind the Gap: the evolving EU Executive and the Constitution*, Walter van Gerven Lectures, Groningen, 2004.

ered by Union law, whereas it is the task of the Court of Justice 'to ensure that in the interpretation and application of the Constitution, the law is observed.'<sup>54</sup> That is a rather general instruction to the Court which, if we read the provision closely, does not make the Court into a servile executor of the will of the European legislator.<sup>55</sup> The European Constitution does not legitimize a mechanical application of the Constitution, but rather attributes to the Court a power to assess whether or not the law is observed in the interpretation and application of the Constitution. This gives the Court some margin of discretion to decide on what the law exactly is. Unwritten law, legal principles and such, can play an important role in the Court's jurisprudence in the future.

In his 2003 book *Courts and Political Institutions* Koopmans distinguishes two kinds of models in the relation between legislators and judiciaries in modern states under the rule of law. The first model is the parliamentary model, in which the parliamentary legislator has the upper hand in the relation between legislator and judiciary. In such systems the voice of the parliamentary legislator is decisive and is not subject to judicial review. On the other side of the scale are the systems organized according to the constitutional model whereby the Constitution is the decisive factor for the relation between judiciary and legislator.<sup>56</sup> Such systems allow courts, or a Supreme Court, to test whether parliamentary laws are compatible with the Constitution.

The relation between legislator and judiciary in the European Constitution does, to some extent, fall within the scope of the constitutional model, a model that is also propagated in the *Federalist Papers*. The Court of Justice, for instance, does have the power to test the *legality* of European laws and framework laws.<sup>57</sup> Member States, the EU institutions, as well as natural persons or legal entities, can lodge an appeal against legislative acts of the Union. For citizens, however, the restriction applies that proceedings against an act are only possible if the act is of direct and individual concern to him or her, and the act does not entail implementing measures.<sup>58</sup> That is a rather big hurdle to take for a citizen, and will not easily lead to a large flood of appeals against European legislation. In view of these conditions, individual appeals against European framework laws seem to have no chance of succeeding.

The right of citizens, however, to submit European *legislation* to the European Court for review is, in my opinion, an important fundamental step in the European Constitution. Until now individual appeals were not possible. Member States and the EU institutions (Council, Commission, and European Parliament) were in fact

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<sup>54</sup> See Article I-29 of the European Constitution.

<sup>55</sup> Or, in the words of Montesquieu, to be found in *L'Esprit desLois*, 1748, book XI, chapter VI: 'Le principe selon lequel les juges ne sont que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur'.

<sup>56</sup> Tim Koopmans, *Courts and Political Institutions*, Cambridge 2003, p. 15 ff. and p. 35 ff.

<sup>57</sup> See Article III-365, paragraph 1, European Constitution which reads: 'The Court of Justice of the European Union shall review the legality of European laws and framework laws, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'

<sup>58</sup> Article III-365, paragraph 4.

the only ones who could ask the Court to test the legality of legislative acts of the EC/EU.<sup>59</sup> In most cases in which an appeal against the legality of EC or EU legislation was lodged, the appellant himself had been involved in the adoption of that legislation. In future this will no longer be the case. That means that the ‘hygiene’ as regards the legality of acts will increase, and the role of the European judiciary as a safeguard of the interests of citizens will become more prominent. It may also increase the legitimacy of the Court of Justice.

It is remarkable that under article III-365 of the proposed European Constitution the Court can test the legality of Union acts but not their constitutionality.<sup>60</sup> This formula has been taken directly from the EC Treaty, but in the context of a European Constitution it raises questions. Since, if a test against extra-constitutional law (e.g. unwritten legal principles) is made possible, we abandon the very foundations of that Constitution, especially the underlying principle of conferral. Like formerly under the EC and EU Treaty, the Court can continue to test whether unwritten fundamental legal principles are observed. That gives the Court of Justice a greater leeway than the American Federal Courts (including the Supreme Court), advocated in the model of the *Federalist Papers*. Under the European Constitution the Court of Justice is indeed a real constitutional court: it can give preliminary rulings about the correct interpretation of the European Constitution.<sup>61</sup>

Another important provision is Article 362 of the European Constitution: ‘If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.’ This provides for the long-awaited possibility to pursue a tit for tat policy in respect of overdue implementation, a still increasing problem in the European Union. This very power will contribute to the clout of the Court of Justice.

### 13. The position of the European legislator: a preliminary conclusion

A comparison of the European legislator – be it under the EC/EU Treaties or the European Constitution – with the federal legislator as outlined in the *Federalist Papers* is especially interesting because of the differences. The blueprint for the European legislator in the European Constitution is not the outcome of a constitutional theory put into practice, but it is the result of a practically-oriented development: the result of a piecemeal process of learning by doing; a process of predominantly treaty-based legislators linked to an integrated European legislator (conceived

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<sup>59</sup> Article 230 EC Treaty. Natural and legal persons are only entitled to institute legality-test proceedings ‘against decisions addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’ (Article 230, paragraph four).

<sup>60</sup> See Article III-365 paragraph 1, which reads: ‘The Court of Justice of the European Union shall review the legality of European laws and framework laws, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.’

<sup>61</sup> Article III-369 European Constitution.

in the Maastricht Treaty) and acting as an actual and distinct department of governmental power functioning in between the other branches of government.

The position of the legislator in the European Constitution is a new, practical step in a development process which has altogether not been studied sufficiently, and certainly deserves more attention – especially from quarters of constitutional law.<sup>62</sup> This development process will undoubtedly go on, even if the Constitution is never ratified. The European legislator (under the Treaties as well as under the Constitution) is an ever more powerful institution. To expect – like the Convention did – that this legislator will automatically be given great legitimacy by simplification of instruments and transparent procedures seems a little rash and is not supported by facts. The democratic deficit is not only caused by unfamiliarity with procedures, but by the very lack of transparency of the legislator as a whole and of by the lack of support for its functioning.

The European legislator also has a special, and still too little studied, relation to the other branches of government power in the European Union, viz. the administration and the judiciary. The relation of the European legislator to the administration is special in the sense that it cannot be directly captured in the classical chart of author and implementer of standards as we know it from the 'Trias Politica'. It is chiefly the Member States that are involved in the implementation and the policy of the European Union. Those Member States also have an important share in adopting the legislation. Where this mixture of legislative and executive tasks seems to have been a horror to the minds of the writers of the *Federalist Papers*, it is a very familiar pattern in modern parliamentary systems that administrations have a share in the elaboration of legislation which they themselves implement. That mixture of responsibilities fits in with a pattern of the spread of power which tries to seek the balance between the various powers via a system of checks and balances. In modern parliamentary systems, possible abuse of power by one department is precisely averted by the control and monitoring by a countervailing department.

The relation between European legislator and European administration in the Treaties, as well as in the Constitution, deviates here from the traditions of the national Member States to the extent that, for many of the administrative tasks carried out by the Member States, no account has to be rendered to the democratically legitimate body that directly partook in the adoption of this legislation. National administrative bodies do not have to render account to the European Parliament. That asymmetry may give rise to 'white spots' in accountability. Some forms of European administration elude supervision by the people's representation. In these cases there is only judicial supervision.

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<sup>62</sup> So far most studies into the operation of the co-decision procedure are conducted by political scientists coming mostly from outside the European Union e.g. the United States. See for an example the article by the aforementioned George Tsebelis, 'Conditional Agenda-Setting and Decision-Making Inside the European Parliament', *Journal of Legislative Studies* 1: 1995, pp. 65–93 and also G. Tsebelis, and G. Garrett, 'Legislative Politics in the European Union', *European Union Politics* 1(1), 2000, pp. 5–32. See further Torsten Selck, 'The European Parliament's Legislative Powers Reconsidered; Assessing the Current State of the Procedural Models Literature', *European Union Politics* 24 (2), May 2004, pp. 79–87.

In its relation to the European legislator the position of the European judiciary, and in particular the Court of Justice, would be consolidated under the rules of the European Constitution. The European legislator and the European administration, according to Pescatore, can increasingly be considered as *one* government power, because of their being interwoven.<sup>63</sup> The supervision of this joint legislative-administrative branch of government power is largely – and better – left to the judiciary, which is better capable of assessing in individual cases the legality of actions, than to the partial and indirectly operating monitoring and supervisory mechanisms of representative democracy. The individual appeal, the possibility of a legality review, annulment and actual sanctions reinforce the position of the Court vis-à-vis the European legislator compared to the situation under the current EC Treaty. It is fully to be expected that acceptance of the rules of the Constitution concerning the judiciary will increase the authority of the European Court, even as a constitutional court. If the Constitution is definitively halted at this point, this will definitely be a missed opportunity to enhance the legitimacy of the Union's functioning.

That brings us to a preliminary conclusion. The European legislator under the European Constitution is not really a new phenomenon. The true birth of this more or less unified legislator, one might argue, coincides with the conception of the co-decision procedure and its underlying quadripartite structure. What is really new is the constitutional context in which that unified legislator, in interaction with the European executive and the European Court of Justice, will be doing its work. This may provoke a new dynamic in these relations.

It is truly ironic that French and Dutch electorates on many occasion seem to have been motivated to vote 'no' in their referenda on issues that were not truly 'new' elements in the Constitution. A lot of resistance and discussion centered on topics that were already in the existing Treaties or were the result of the case law of the Court of Justice. The side effect of the total incorporation of all EC constitutional law into the Constitution is that a lot of the constitutional *acquis* seems to have been voted down and that the elements that really urgently needed to be dealt with, after the enlargement and the Nice-arrangement, sink with the rest of the ship without a true public debate. This does not only add to the problems of the present constitutional deadlock but also hampers necessary innovations.

Some of these innovations concern the European legislator, especially the modifications to the regime on review in EU-legislation, i.e. the right of a popular initiative, the new legislative instruments (esp. European laws and framework laws) and the new regime on delegation. These technical innovations on Union legislation were hardly controversial in the Dutch, or for that matter, in the French debate on the Constitution. This makes them suitable candidates, in the eyes of some, for 'cherry picking', i.e. the process whereby non-controversial elements of the European Constitution are singled out in order to improve the chances of speeding up the (parliamentary) ratification of parts of the Constitution.<sup>64</sup> But, however technically charming and politically convenient cherry-picking might be, it is at odds with

<sup>63</sup> See Pierre Pescatore, 'La légitimité du juge en régime démocratique', *Commentaire* 90, 2000, pp. 339.

<sup>64</sup> See scenario C (the third scenario) under the section *Intermezzo – Scenarios to resolve the constitutional crisis*.

the idea of the Constitution as a package deal. Furthermore it is likely to backfire; it can promote mistrust in the European Union and its institutions if it is, or is perceived to be, a mechanism to circumvent negotiations and national referenda.

Where does that leave the newborn European legislator? Is it stopped in its tracks? I don't think so. Chances are that the European legislator will mature into adulthood on its own accord. The experiences over the past decades inspire some confidence that the post-Maastricht legislator will prove to be up to the challenges of maturation with or without the umbrella of a European Constitution. A close watch from constitutional quarters, however, is strictly necessary: all adolescents benefit from that.

