

**"IN THE NAME OF THE UNION CITIZENS!" - ART I-1 OF THE CONSTITUTION AND THE EUROPEAN COURT OF JUSTICE**

by  
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*I. "The citizens and the States of Europe"*

Three queens, two kings, one grand-duke, plus 18 presidents and one government were, as the preamble goes, "*GRATEFUL to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe*".<sup>1</sup> They designated as their plenipotentiaries some presidents, prime ministers, chancellors, foreign ministers and one teoiseach, who, having exchanged their full powers, found in good and due form, have agreed as follows:

"ARTICLE I-1, Establishment of the Union

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it."

Reading these lines one cannot help but wonder whose will is reflected – or else: in whose name the Constitution<sup>2</sup> has been created. Obviously this kind of question has been posed many times on the national level as well as on the European level, with a plethora of possible answers, according to the constitutional approach you choose<sup>3</sup>.

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1 Treaty Establishing a Constitution for Europe, JO C 310, December 16, 2004, p. 1 (3).

2 With regard to the terminology of the "Constitution" or "Constitutional Treaty", I side with the representatives of the Commission in the Convention, when they said that "*we know a constitution when we see one*", António Vitorino/Michel Barnier, A Constitution for Europe: consequences of a political choice, in: A new Constitutional Settlement for the European People, G.Dimitrakopoulos/G.Kremlis (Eds.), Brussels 2004, p. 17, at 18.

3 For an overview Armin von Bogdandy/Jürgen Bast (eds.), Principles of European Constitutional Law, Oxford 2005.

Few interventions<sup>4</sup> however trace the conventions work in this specific regard and discuss two remarkable facts: first that as a compromise between the factions the text now positions the citizens and the States of Europe on the same level so that it appears that States could have different wills than citizens.

The second surprise is that the constitution mentions citizens, not a people or various peoples. This was at least partly due to a proposal by members of parliament rejecting the text of the presidency which mentioned "the will of the peoples and the States".<sup>5</sup> Accordingly, it is consistent that during the final work of the secretariat, the wording of Art. I-20 was modified so that in the future the European Parliament will represent the citizens and no longer the peoples of Europe (Art. 189 EC)<sup>6</sup>. In this context it is worth to mention that the Union is established by the Constitution – and not "by the High Contracting Parties" as proposed by a British member of the convention.<sup>7</sup>

The starting point of the quest for legitimacy is thus the fact that according to both the preamble and the Art. I 1 of the Constitutional Treaty the citizens and the States of Europe are to be held responsible. I will limit this gloss to one possible repercussion and argue that the reference to the citizens – and not the peoples – is of decisive value for the ECJ in one area: the jurisprudence of the Court in the area of Union Citizenship. Reference to the will of the citizens of Europe clearly fosters the ECJ's jurisprudence in this field since the Court might perceive itself as another institution directly endowed by the citizens with a view to safeguard their rights and protect them against narrowly construed redefinitions of their role. The suggestion would be that its far reaching jurisprudence in the field would enjoy more public and academic assent than is apparent today.

4 But see *Ingolf Pernice*, *European v. National Constitutions*, 1 *European Constitutional Law Review* 2005, p. 99 and *Jörg Gerkrath*, *Representation of Citizens by the EP*, 1 *European Constitutional Law Review* 2005, p. 73 ff.

5 See the suggestion for amendment of Article 1 by Elmar Brok and others, [http://european-convention.eu.int/Docs/Treaty/pdf/1/Art\\_1\\_EPP/pdf](http://european-convention.eu.int/Docs/Treaty/pdf/1/Art_1_EPP/pdf). They proposed as well to call the EP "House of citizens".

6 See Ingolf Pernice, *A Constitution for Europe – Amendments and legal make-up to the Convention's Draft*, in this volume p. \*\*. Already in 2003, the French Conseil Constitutionnel claimed that MEPs represent the citizens "les membres du Parlement européen élus en France le sont en tant que représentants des citoyens de l'Union européenne résidant en France", *Décision n° 2003-468 DC* of April 3, 2003 - *Loi relative à l'élection des conseillers régionaux et des représentants au Parlement européen ainsi qu'à l'aide publique aux partis politiques*, *Recueil*, p. 325 - *Journal officiel* du 12 avril 2003, p. 6493, considérant 37.

7 Peter Hain: <http://european-convention.eu.int/Docs/Treaty/pdf/1/Art1Hain/pdf>.

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## II. A constitution in the name of the Union Citizens

The factual authors of the Constitution as such were in principle twofold: the 125 members of the convention in the first hand, who were called upon by the declaration of Laeken on the future of Europe of December 15, 2001, to integrate via a forum "all citizens" and "organisations representing civil society"<sup>8</sup> - a courageous call given that few people know what exactly the term civil society means.<sup>9</sup>

The convention delivered the draft constitution upon which the heads of state united in the Intergovernmental Conference deliberated - and which was, after amendments and secretarial work, signed in Rom on October 29, 2004. Everybody involved at least claimed to represent a specific polity: national peoples, national states, the European demos, etc. They unanimously concluded on the principle of a dual legitimacy, namely that the convention acted "on behalf" of the citizens and the states and that the Constitution reflects the will of both.

Mentioning the Member States however might appear at first hand to be tautological because the term "Member States" could be conceived of as simply meaning "the peoples or citizens of each country organized in and represented by the state"<sup>10</sup> But in view of the peculiar nature of the Union and especially the factor that the main legislator - the Council - acts through representatives of the governments and not through representatives of the citizens, it is certainly wise not to loose sight of the Member States: they are not only here to stay, and rightly so, but most decisively will decide on the evolution of the Constitution (Art. IV-443)<sup>11</sup> as well on the future composition of the Union due to the clauses on withdrawal (Art. I-60).<sup>12</sup>

Be that as it may, we have to state that the Union claims that its powers are derived from the citizens if the *pouvoir constituant* of the Union is made up of both citizens and states. As the original legitimating force, citizens come into play for the first time in the textual history of the constitutional development of the Union. This step, although not providing the final answer to the question where the Grundnorm or ultimate source of legitimacy lies, does signal a shift to an independent European polity. The shift was already heralded by the Commissions White Paper on Euro-

8 See <http://european-convention.eu.int/pdf/LKNEN.pdf>.

9 For all *John Keane*, *Despotism and Democracy - The Origins and Development of the Distinction between Civil Society and the State 1750 -1850*, in: Keane (ed.), *Civil Society and the State*, London 1988, p. 35.

10 See *Pernice/Mayer/Wernicke*, *Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the light of Multi-level Constitutionalism*, 12 *Kings College Law Journal* (2001) p. 60 et seq., idem *Philipp Allott*, *Epilogue: Europe and the Dream of Reason*, in: *European Constitutionalism beyond the State*, Weiler/Wind (eds.), Cambridge 2003, 202 (at 219).

11 See *Bruno de Witte*, *European Treaty Revision: A case of multilevel constitutionalism*, in this volume p. \*\*\*.

12 See *Jean-Victor Louis*, *Union Membership: accession, suspension of membership rights and unilateral withdrawal*, in this volume p. \*\*\*.

pean governance of 2001 which was destined to address "the question of how the EU uses the powers given by its citizens".<sup>13</sup> At the time, this premiss was clearly wrong, a classic *petitio principii*, because the constitutional narrative of the Communities and the Union has always been one of indirect, multilevel legitimation. So why did the Commission choose to stress the powers given to it by the citizens? The answer seems obvious: It was done to slowly create a legal position which could enable it to argue that the EU and especially the Commission represents the will of the Citizens. The European Union should be perceived of as being steered by the will of its citizens - which the Commission has the legal obligation to preserve (Art. 211 EC), thereby cutting off claims that the Commission represents the government of the Member States as represented in the Union. The Union should be more than an assembly of Member States. However, the citizens in many member states not only have never been asked directly, let alone under deliberative minimum standards, but their full representation and participation is incomplete as such: The symmetric relationship between national political decision makers and the recipients of political decisions already is an "illusion"<sup>14</sup>. Representation of whole societies by the government accordingly appears as a "fraudulent conception of 'representation'"<sup>15</sup>.

Consequently, it will ultimately be only the ongoing process of ratification of the constitution<sup>16</sup> by a consolidated majority of citizens (not unanimity of Member States) that will foster the legitimacy of the Union by establishing a direct link to the citizens. Constitutionalism and democracy might gradually disentangle from the nation state. Although there seems to be strong resistance against a European wide referendum<sup>17</sup>, many national referendums will be held precisely on the acceptance of the constitution and constitute a first step. This aspect becomes more apparent when we see that some authors argue in favour of referenda even in Member States which do not offer such a procedure according to their national constitutional law.<sup>18</sup> Such a

13 European Governance: A White Paper, European Commission 2001.

14 *Miguel Poyares Maduro*, Europe and the Constitution: what if this is as good as it gets?, in: *European Constitutionalism beyond the State*, op.cit., p. 74 (at. 84). For a debate on the problem of representation cf. *Renaud Dehousse*, Beyond representative democracy: constitutionalism in a polycentric polity, *ibid.*, p. 135 ff.

15 *Philipp Allott*, Epilogue: Europe and the Dream of Reason, in: *European Constitutionalism beyond the State*, op.cit., 202 (at 219).

16 Cf. *Stanislaw Biernat*, Ratification of the Constitutional Treaty and procedures in the case of veto, in this volume p. \*\*.

17 Cf. the Contribution submitted by several members, alternate members and observers: "Referendum on the European Constitution" CONV 658/03. For texts and statements on a European wide Referendum see <http://www.iri-europe.org> and *Alain Lamassoure*, The European Constitutional Referendums, in: *The European Constitution: Bringing in the People*, Filliez/Kaufmann (eds.), Swiss Department of Foreign Affairs, Bern 2004, p. 17.

18 For the debate already on the Maastricht Treaty cf. *Dietrich Murswiek*, Maastricht und der pouvoir constituant: Zur Bedeutung der verfassungsgebenden Gewalt im Prozeß der Europäischen Integration, *Der Staat* 1993, p. 161 ff.

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process will, if not yet create a European social contract<sup>19</sup> inevitably foster the identity of the Union as an autonomous political subject, not necessarily regrouped in social and political communities such as the Member States.<sup>20</sup> The Constitution cannot be thought of differently than as an expression of the will of the citizens. The pretence of a Constitution in the name of the citizens will thus be honoured through referenda.

### *III. Union Citizenship as the fourth pillar of the Rechtsgemeinschaft*

If Union citizens are one legitimating factor of the Constitution, their very definition will become a core aspect of the future development: who is a citizen of the Union? Who defines the precise status? Is it of significance that the Constitution does not talk of "Union"-citizens – but simply of citizens of Europe? Does nationality play a role? Every restrictive or inclusive approach the Court will take in outlining the very notion of "citizenship" will attain immediate fundamental constitutional value.

Union Citizenship is gradually developing into a cornerstone of the jurisprudence of the court, similar to the three well known pillars: the principles of primacy, direct effect and state liability, all of which were doctrines developed by activist but restrained Court and not to be found in the Treaties. The Courts jurisprudence in the field of Citizenship is still very insecure and its fate might entirely depend on changing majorities in the deciding chambers, despite the value of precedents. It is no wonder that most cases have been kept in the plenary or in the grand chamber and not, what could have been expected and what is common in other areas of law, referred to smaller chambers in view of a consensual framework that has been set. There simply is none yet.

Let me very briefly sketch the development.

Article 17 EC provides for citizenship of the Union, which supplements Member-State nationality and involves, in particular, under Article 18 EC, in addition to other rights and duties provided for by the Treaty, “the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”.

The leading case outlining the rights derived from these articles is *Grzelczyk*<sup>21</sup>. A French national studying in Belgium applied at the beginning of his final year of study for payment of the *minimex*, a minimum subsistence allowance. The fact that Mr Grzelczyk is not of Belgian nationality was the only bar to its being granted to

19 *Pernice/Mayer/Wernicke*, *Renewing the European Social Contract*, op. cit.

20 Even if this might be inconsistent with some national Constitutions, see *Cannizzaro*, *EU law and National Constitution: A pluralistic Constitution for a pluralistic legal order?* National Report Italy, XX FIDE Congress, London 2002, p. 243.

21 Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECR [2001] p. I-6193.

him. It was undisputed that the case is one of discrimination solely on the ground of nationality. However: assistance given to students for maintenance and training fell at that time in principle outside the scope of the EC Treaty. The issue therefore was to decide whether the given situation was within the scope *rationae materiae* of Community Law. The Court held that Art. 12 and 17 EC preclude entitlement to a non-contributory social benefit, such as the *minimex*, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling under exceptions not expressly provided for in primary or secondary law.<sup>22</sup> In general terms: "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."<sup>23</sup>

The potential implication of the case resides in the systematic approach to use citizenship as a "trigger norm" in order to include persons, who would have regularly fallen outside the scope of community law *ratione personae* or *ratione materiae*. Plus: all exceptions have to be clear and foreseen in the treaty itself or secondary legislation. To move and reside as a Union Citizen in another Member State allows consideration of one's situation "as being governed by community law and triggers the application of the prohibition of discrimination on grounds of nationality under Article 12 EC."<sup>24</sup> Union Citizenship suffices: You have to move in order to receive the full protection of EC-law, mainly the interdiction of discrimination by Art. 12 EC. But not only do fundamental freedoms come into play: potentially even fundamental rights might be activated due to movement as a citizen "movement would simply become a trigger for activating the Charter"<sup>25</sup>.

The impact of this dogmatic approach is highlighted in the *Baumbast*<sup>26</sup> case, in which the Court evaluated the fact that a right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it

22 Such an exception was Article 1 of Directive 93/96 in that Member States may require of students who are nationals of a different Member State that they have sufficient resources. But this has been the case when *Grzelczyk* took up his studies; the fact that his financial position changed with the passage of time might have been due to reasons beyond his control.

23 Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 31.

24 *Christiaan Timmermans*, Lifting the Veil of Unions Citizen' Rights, in: *Une Communauté de Droit*, Festschrift Rodrigues Iglesias, Berlin 2003, p. 195 at 200. *Christian Tomuschat* once dubbed this as "*radical equality*", in: *Radical equality under Article 12 of the EC Treaty? The case of Martinez Sala*, CMLR 2000, p. 449.

25 *Piet Eeckhout*; *The EU Charter of fundamental rights and the federal question*, 29 CMLR (2002), p. 945 at 971. The same result might be reached if the Court follows a very recent jurisprudence of one chamber according to which fundamental rights apply even if the Treaty is not applicable as such due to the applicability of the *Keck*-doctrine (Judgment of March 25, 2004, *Karner*, C-71/02, nyr).

26 Case C-413/99, *Baumbast et R*, [2002], ECR I-7091, para 81.

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effect. The Commission most notably submitted that the right to move and reside established by that article was entirely conditioned by the pre-existing rules, both primary and secondary. The Court held otherwise:

Mr. Baumbast is a German national who lives in Britain and is working for German companies in third countries. The British Secretary of State refused to renew Mr Baumbast's residence permit and the residence documents of his spouse and children because he could not derive a right to reside in the UK as a migrant worker. The Court underlined that although, before the Treaty on European Union entered into force, it had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of the fundamental freedoms, it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States. It went on to cite the *Grzelczyk* judgment and concluded, against the opposition of two intervening governments, that "[a]s regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC."<sup>27</sup> The refusal to grant the residence permission for him and his family would have amounted to a disproportionate interference with the exercise of his rights as a Union citizen.

Consequently, Article 18 EC is directly applicable and any link with the exercise of the right of free movement appears to be sufficient to bring the case within the scope of the treaty.<sup>28</sup>

Although this approach appears to be consistent with the fundamental status of Union Citizenship, some judgments do not fit: For example, in *Carpenter*<sup>29</sup>, the right of residence in a Member State of a spouse who is a national of a third country was derived from the fact that her husband was selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals and travelled to other Member States for the purpose of his business and thus fell under Art. 49 EC. Even the Commission submitted that such a situation is rather to be classified as an internal situation. Despite the obvious possibility to refer to Union Citizenship, the Court relied on the freedom to provide services, an allusion which in this case could well appear as being rather volatile and far-fetched. Lastly, movement might be conditioned upon having minimum means to move: In *Trojani*<sup>30</sup>, a case involving a person working for the Army of the Lord the Court mentioned that minimum means of subsistence can be claimed as a condition

<sup>27</sup> Ibid, para 84.

<sup>28</sup> Christiaan *Timmermans*, *Lifting the Veil*, op. cit., p. 195 at 199.

<sup>29</sup> Judgment of July, 11, 2002, *Carpenter*, C-60/00, [ECR] 2002, I-6279.

<sup>30</sup> Judgment of September 7, C-456/02, *Michel Trojani contre Centre public d'aide sociale de Bruxelles (CPAS)*.

to allow for a residence permit; however, once such a permission is granted, for whatever reason, Union citizenship and thus the principle of non-discrimination applies.

Today, Union citizenship conditions the rules governing a person's surname like in the *Avello* case<sup>31</sup>, and frames the rules on nationality in special cases like in *Chen*, where a Chinese mother gave birth to a daughter in Belfast who attained, due to the automatic grant of Irish nationality and thus Union citizenship, a permission to reside in the Union.<sup>32</sup> Union Citizenship might play a similar role in the case of "D", in which the issue of tax discrimination between non-residents is in issue<sup>33</sup>, a situation hitherto not decided by the Court, or in *Bidar*, another case dealing with student scholarships and minimum means of subsistence. Whatever the outcome in these cases will be, one aspect becomes obvious: we can safely state that it was the Court that has developed Union Citizenship, at the time of its conception more an expression of the lack of a constitutional concept ("Ausdruck verfassungstheoretischer Konzeptionslosigkeit"<sup>34</sup>) than of any practical value, into a functional, constitutional right: it was accorded direct effect in the *Baumbast* case and is thus directly enforceable in national proceedings. To the right to move freely the Court added the - almost unconditional - right not to be discriminated against. Put in a different way: The ECJ used citizenship in a period of less than four years to create a systematic approach according to which the entire anti-discrimination jurisprudence applies due to the trigger norm<sup>35</sup> of Union Citizenship (Art. 17 and 18). Without this courageous

31 Judgment of October 2nd, 2003, not yet reported Case C-148/02, *Carlos Garcia Avello /Belgium*; the issue was whether a Spanish national, married to Belgian national, can claim to name his children, born in Belgium, according to the Spanish tradition and contrary to private international law in Belgium.

32 Judgment of October 19, 2004, C-200/02, *Kunqian Catherine Zhu et Man Lavette Chen v. Secretary of State for the Home Department*, nyr.

33 Case C-376/03, *D v. Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen*, pending. According to the circumstances of the case, D, a non-resident German citizen, due to a treaty avoiding double taxation with Belgium, is taxed differently in the Netherlands than a non-resident Belgium citizen would be.

34 *Martin Nettesheim*, Die Unionsbürgerschaft im Verfassungsentwurf - Verfassung des Ideals einer politischen Gemeinschaft der Europäer?, *Integration* 2003, p. 428.

35 On a more cautious note I will add, that recent academic literature even extends this reasoning in a hitherto unprecedented way: Union citizenship could become a trigger norm for the application of human rights as well – irrespective of Art. 51 of the Charter according to which the Charter only applies to EU institutions and Member States when they are implementing EU law. If a Union citizen stays in another Member State, thus falling within the scope of application of the Treaty, he or she could be able to invoke the protection of Union law, namely its human rights, against presumable violations by Member States: "movement would simply become a trigger for activating the Charter", Piet Eeckhout, *The EU Charter of fundamental rights and the federal question*, 29 *CMLR* (2002), p. 945 at 971.

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approach, citizenship would have probably remained of theoretical value only, giving rise to a tide of scholarly works but without any perceivable effect. But the Court, having already gradually reconstructed Union Citizenship way beyond what the Member States originally seem to have intended when they created the norm, now offers the constitutional background to refer to Union citizens as a crucial factor in legitimating the Union.

#### *IV. Conclusion*

I suggest that the Court will not face a lot of resistance in a line of jurisprudence extending the scope of norms prohibiting discrimination to areas formerly not within the scope of Community Law once the constitution is ratified. Although some authors today violently attack the Court in the realm of Union Citizenship<sup>36</sup>, their arguments are either predominantly based on the presumed will of the member states or on apparent lacunae in the reasoning of the Court, something the Court could easily remedy. It will become rather difficult to confine this jurisprudence to selected areas of Union Law once the Court will be able to refer to the Constitution as embodying the will of the Citizens, Union citizens or other, and to claim the responsibility to protect the "we, the citizens" against external delusions.

The argumentation above could lead to a second conclusion: That judgments should be pronounced in the name of the Union citizens. "La Cour déclare et arrête" is written on the French judgments of the Court. The Court delivers a judgment - but in whose name? The text of the judgments is silent on this issue. This is a surprising fact, given that in most member states decisions of courts are handed down in the name of "some body" and not out of the courts own power. To state but a few examples: German Courts deliver judgments "Im Namen des Volkes", in the name of the people, in France "Au nom du peuple français" – a principle of constitutional

36 See Hailbronner, Die Unionsbürgerschaft und das Ende rationaler Jursiprudenz durch den EuGH?, NJW 2004, 2185 ff. and the literature quoted.

value according to which judges exercise national sovereignty.<sup>37</sup> In Luxembourg judgments are pronounced “Au nom du grand-duc”. In Ireland, judgments seem to be pronounced in the name of the constitution, which in itself the Irish people has given itself in the name “of the holy trinity”. Greek Courts do not refer to any legitimating body – unless it is necessary to enforce judgments: only then do they refer to the Greek people. In Finland judgments are simply pronounced without any reference: in the name of the law. Other Member States Courts refer explicitly or implicitly to the state, as in the Lithuanian Republic and other new Member States.

The quest for legitimacy<sup>38</sup> of the Court thus might have found a provisional answer in integrating the private actor<sup>39</sup>, the citizen. Consequently all the queens, kings and dukes – or else national peoples - rightly turn up in the heading of national judgments. But they should stay clear of ECJ judgments, even in constitutional theory, as should the Member States. In conclusion, it appears to be the most plausible result of the mentioning of Union Citizens in the preamble and Art. I-1 of the Constitution to read into the ECJ judgments the yet hidden text: “In the name of the Union Citizens”.

37 Conseil Constitutionnel of May 5, 1998. 5 mai 1998 - Décision n° 98-399 DC, Loi relative à l'entrée et au séjour des étrangers en France et au droit d'asile, Recueil, p. 245 - Journal officiel du 12 mai 1998, p. 7092. In his Avis n° 365 518, rendered by the Assemblée générale on February 1, 2001 the Conseil d'État stressed in the context of the envisaged community patent and its jurisdictional control that national Courts decisions should never be subject to a european appeal: “*En revanche, l'attribution d'une telle compétence à des juridictions nationales statuant, selon le droit national, « au nom du peuple français », et exerçant, de ce fait, des fonctions inséparables de la souveraineté nationale, ainsi que l'a retenu le Conseil constitutionnel dans sa décision n° 98-399 DC du 5 mai 1998, porterait atteinte aux conditions essentielles de la souveraineté nationale si les décisions de ces juridictions pouvaient faire l'objet d'un recours devant une juridiction autre que nationale, et, en particulier, une juridiction communautaire.*”

38 Legitimacy can be understood as the justification and the acceptance of authority and of the exercise of power, containing a social aspect (rooted in popular consent) and a formal or normative aspect (having observed the requirements of the law), cf. *Grainne de Búrca*, The quest for Legitimacy in the European Union, 59 *Modern Law Review*, 1996, p. 349 et seq. Legitimacy of an institution of the EU should be distinguished from the narrow aspect of “judicial legitimacy”, generated through the legal methods applied by the Court, see *Mitchel Lasser*, Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de Cassation and the United States Supreme Court, Jean Monnet Working Paper 1/03.

39 The private actors however do not only have rights: binding obligations exist as well. For an evaluation of the role of the private actor see *Stephan Wernicke*, *Die Privatwirkung im Europäischen Gemeinschaftsrecht*, 2001.

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