

THE "CHECKS AND BALANCES" DOCTRINE IN  
MEMBER STATES AS A RULE OF EC LAW  
– The cases of France and Germany –

by

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EUSA 8<sup>th</sup> International Conference  
March 27-29 2003, Nashville Tennessee

# THE "CHECKS AND BALANCES" DOCTRINE IN MEMBER STATES AS A RULE OF EC LAW

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### I. INTRODUCTORY REMARKS: POWERS AND APPLES

Despite its fundamental role in modern western constitutionalism, the nature and the meaning of the separation of powers doctrine still remains obscure. What does the word “powers” mean? How many are they? Are they separated? And if so, what for? The profound analysis of these questions does not enter within the scope of our paper, yet some preliminary remarks seem necessary in order to ground our argumentation.

*Hansjörg Seiler's* approach is very helpful in this sense. Apparently inspired by *Ludwig Wittgenstein's* teaching, he compares the research on the meaning of powers to the methods someone could apply when looking for apples in the market. One could start from searching objects labelled as “apples”, a method extremely dangerous, due to its mechanical character: he would risk either passing certain apples over, for they have been submitted to manufactured treatment or being particularly vulnerable to sellers that by fault or bad faith would present as “apples”, objects completely at odds with what the word stands for. For these reasons, a second method would appear preferable: the man should fix from the beginning the criteria defining an object as an “apple”. Then, all objects meeting those criteria should be selected. The problem though with this method, stems from the possible impertinent definition of the criteria: apples are “red”, “round” and “juicy” objects, but so are tomatoes. The crucial issue in consequence is the careful selection of those criteria, which would permit the selection of *all* apples and yet *only* apples<sup>1</sup>.

The same goes for the “separation of powers” doctrine. We can either search for “powers” – in a juridical, political or social meaning – and examine their possible juxtaposition or interrelation<sup>2</sup> or set *a priori* the elements that attribute the quality of “power”. For the needs of our paper and from the constitutional standpoint, the powers are what the Constitution says they are. And if the “Constitution is what the judges say it is”<sup>3</sup>, we should

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<sup>1</sup> H. Seiler, *Gewaltenteilung – Allgemeine Grundlagen und schweizerische Ausgestaltung 1994* (Stämpfli 1994), p. 3.

<sup>2</sup> See, for example: K. Loewenstein, *Die neue Dreiteilung der Staatsfunktionen* (Mohr 1959), p. 39; N. Gehrig, *Parlament – Regierung – Opposition: Dualismus als Voraussetzung für eine parlamentarische Kontrolle der Regierung* (Beck 1969), p. 233; G. Brunner, *Kontrolle in Deutschland – Eine Untersuchung zur Verfassungsordnung in beiden Teilen Deutschlands* (Markus 1972), p. 67; H.D. Jarass, *Politik und Bürokratie als Elemente der Gewaltenteilung* (Beck 1975), p. 8; A. von Bogdandy., *Gubernative Rechtsetzung : eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik* (Mohr Siebeck 2000), p. 164.

<sup>3</sup> Justice Charles Evans Hughes, quoted by A. T. Mason & D. G. Stephenson, *American Constitutional Law – Introductory Essays and Selected Cases* (Prentice Hall 1999), p. 42.

take into account that the constitutional judge – at least the national one, the French<sup>4</sup>, German<sup>5</sup> or American<sup>6</sup> – still argues in terms of “Legislative”, “Executive” and “Judicial”. On this basis, the separation of powers assures a descriptive function, rendering state *power* (“*Macht*”) intelligible through distinguishable *powers* (“*Gewalten*”).

This methodological choice shows no indifference to political or social powers standing outside the system of constitutionally defined powers. As a matter of fact, the social and political context could not be ignored. Montesquieu’s political thought, considered as the keystone of the modern constitutional theory, explicitly apprehends “powers” in both a legal and social way<sup>7</sup>. Nevertheless, the radical evolution of social structures since the 18<sup>th</sup> century impedes the application of the aggregated constitutional and social-oriented separation of powers paradigm. However, the social context is not totally excluded from the problem of the separation of state powers. Whereas Hegel’s thought calls for a clear distinction between State and Society, the behavioural approach considers constitutions as the necessary framework of political behaviour<sup>8</sup>. From this point of view, the separation of powers develops an *integration* function: political conflicts and social demands are framed and expressed through constitutional process. The efficiency of the separation of powers depends on its capacity to rationalize and channel these politico-social phenomena.

As for the implementation of EC Law in national legal order, the descriptive function of the separation of powers doctrine is considered as a prerequisite. On the one hand, article 234 of the EC Treaty explicitly mentions national “courts” and article 39 § 4 refers to “public administration”; on the other hand, ECJ case-law has in several occasions referred to national legislative, administrative and judicial organs<sup>9</sup>.

Besides its descriptive function, the separation of powers has a normative one<sup>10</sup>. Indeed, the creation of organs, their attributions and their interrelation constitute the legal criteria which make possible the identification of “powers” and the concrete meaning of their “separation”. However, EC Law’s interest on national normative separation of powers is acuter. Actually, and without reinventing the separation of powers legal doctrine, EC Law requirements contribute to a reconsideration of the relations between powers (III), relations that could be conceived as a *sui generis* circumstantial control system (IV), developed in parallel with the constitutional model elaborated in Member States (V) and whose features remain – in a Darwinian way – in full evolution process (VI).

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<sup>4</sup> L. Favoreu & L. Philip, *Les grandes décisions du Conseil constitutionnel*, 10<sup>th</sup> ed., (Daloz 1999), p. 718 ; M. Fromont, “La séparation des pouvoirs selon la jurisprudence du Conseil constitutionnel”, in B. Börner, H. Jahrreiß & K. Stern (eds), *Einigkeit und Recht und Freiheit* (Carl Heymanns 1984), p. 589.

<sup>5</sup> See B. Sinemus, *Der Grundsatz der Gewaltenteilung in der Rechtsprechung des Bundesverfassungsgerichts* (Peter Lang 1982); B. Ehrenzeller, *Legislative Gewalt und Aussenpolitik – Eine rechtsvergleichende Studie zu den parlamentarischen Entscheidungskompetenzen des deutschen Bundestages, des amerikanischen Kongresses und der schweizerischen Bundesversammlung im auswärtigen Bereich* (Helbing & Lichtenhahn 1993), p. 6.

<sup>6</sup> L.H. Tribe, *American Constitutional Law*, 3<sup>rd</sup> ed., vol. 1, (Foundation Press 2000), p. 124; see also T. Georgopoulos, “De la compétence des Etats fédérés américains pour prendre des contre-mesures internationales-A propos de l’arrêt *Massachusetts v. National Foreign Trade Council* de la Cour suprême des Etats-Unis d’Amérique”, (2000) 9 *L’Observateur des Nations Unies*, p. 155.

<sup>7</sup> See Y. Kawade, “Montesquieu”, in D. Boucher & P. Kelly (eds), *Political Thinkers – From Socrates to the Present* (Oxford University Press 2003), p. 224; P. Kondylis, *Montesquieu und der Geist der Gesetze* (Akademie 1996), p. 75.

<sup>8</sup> M.J.C. Vile, *Constitutionalism and the separation of powers*, 2<sup>nd</sup> ed. (Liberty Fund 1998), p. 328.

<sup>9</sup> See Case 106/77, *Simmenthal* [1978] ECR 629.

<sup>10</sup> G. Zimmer, *Funktion – Kompetenz – Legitimation : Gewaltenteilung in der Ordnung des Grundgesetzes; Staatsfunktionen als gegliederte Wirk- und Verantwortungsbereiche – Zu einer verfassungsgemäßen Funktions- und Interpretationslehre* (Duncker & Humblot 1979), p. 198.

## II. GENEALOGY OF A PRINCIPLE

Despite its origins (A), the separation of powers doctrine has not identically evolved on both sides of the Atlantic. The American constitutionalism opted for a dynamic interrelation of the “Holy Trinity” (B), whereas in Europe, and mainly in France, the separation of powers has been apprehended in a rather static way (C).

### A. The Common Heritage

It is common ground to consider Charles Louis de Secondat, Baron Montesquieu as the father of the contemporary<sup>11</sup> separation of powers doctrine. The famous Chapter VI of the 11<sup>th</sup> Book of the “*The Spirit of the Laws*” is largely accepted to be the cornerstone of modern thought on separation of powers. Though his political thought is largely inspired by authors like Locke and Bodin, and based on a rather idealistic consideration of England’s political system<sup>12</sup>, its great merit consists in the introduction of the idea of moderation of state power through its distribution among distinct “powers”, the Legislative, the Executive and the Judicial. No individual liberty could be assured by means of concentration or confusion of these powers. Their separation guarantees their limitation : “*le pouvoir arrête le pouvoir*”. It seems, further, that Montesquieu was conscious of the fact that a strict separation of powers could lead to stagnancy and interminable conflicts. Thus, he was favorable to a model of flexible separation that would permit cooperation and interaction of powers<sup>13</sup>. Besides, the term “separation” is absent from his work.

Apart from their theoretical value, Montesquieu’s ideas on separation of powers expressed contemporary historical aspirations, a fact which partially explains their success. Both the American and French Revolution have been particularly receptive to such political concepts. The Fathers of the American Constitution explicitly admit Montesquieu’s thought as a guideline for the construction of the American government system<sup>14</sup>. And article 16 of the 1789 Universal Declaration on Human Rights affirms the separation of powers as a *sine qua non* element of any society organised as a state.

However, different political configurations formed two distinct conceptions on the meaning of separation of powers.

### B. The French Democratic Doctrine

In post-revolutionary France, the emphasis was put on popular sovereignty, as an infallible voice of what is wrong or right. The political thought of Jean-Jacques Rousseau,

<sup>11</sup> For discussion of the “archeology” of the principle see T. Tsatsos, *Zur Geschichte und Kritik der Lehre von der Gewaltenteilung* (Carl Winter 1968); M. Rostock, *Die antike Theorie der Organisation staatlichen Macht – Studien zur Geschichte der Gewaltenteilung* (Hain 1975); A. Bleckmann, *Vom Sinn und Zweck des Demokratieprinzips – Ein Beitrag zur teleologischen Auslegung des Staatsorganisationsrecht*, (Duncker & Humblot 1998), p. 181; W. Heyn, “Das Konzept der Gewaltenteilung in seiner verfassungsgeschichtlichen Entwicklung”, in C. Starck (ed.), *Staat und Individuum im Kultur- und Rechtsvergleich*, (Nomos 2000), p. 95.

<sup>12</sup> M.J.C. Vile, *Constitutionalism and the separation of powers*, op.cit., p. 88.

<sup>13</sup> J. Chevallier, “La séparation des pouvoirs”, in *La continuité constitutionnelle en France de 1789 à 1989* (Presses universitaires d’Aix-Marseille & Economica 1990), p.119 ; W.B. Gwyn, *The Meaning of the Separation of Powers – An analysis of the Doctrine from its Origin to the Adoption of the Unites States Constitution* (Martinus Nijhoff 1965), p.104.

<sup>14</sup> J. Madison, *The Federalist Papers*, n° 47 (Mentor 1999), p. 269.

based on an unconditional trust on Parliament<sup>15</sup>, dominated French political aspirations, as is testified by the revolutionary constitutions. Instead of a mutual control of state powers, the French “Constituant” placed the Parliament at the centre of the French political system. The powers were separated but there was no question of contesting legislative acts. The separation of powers was based on a strict hierarchical articulation, reflecting a respective qualification of state will: only parliamentary acts could authentically express general will<sup>16</sup>. Thus, the distinction upheld was the one between legislation and execution: whereas the former belongs to the Parliament, the latter was attributed to executive and judicial organs.

It has been argued that the Fathers of the French revolutionary constitutions interpreted the separation of powers doctrine in a rather restrictive way, so as to establish a model of a strict-separated government. It appears though that this is a more doctrinal analysis than a constitutional reality<sup>17</sup>. Revolutionary and later Constitutions have not opted for a pure separation of the departments and a certain interaction between the Legislative and the Executive has always been present. The weak development of controls between the departments stemmed from the incontestable superiority of the Legislative, which banned any possibility of an Executive veto or a judicial review of legislative acts. The unconditional trust to the Parliament results in a static separation of the powers’ system.

### C. The Liberal American Conception

The American “Checks and Balances” doctrine is based on the premise that the three branches of government should not be so far separated as to have no constitutional control over each other<sup>18</sup>. On the contrary, each department should be “able to check the exercise of power by the others, either by participating in the functions conferred on them; or by subsequently reviewing the exercise of that power”<sup>19</sup>. Thus, liberty is guaranteed by the moderation of state power<sup>20</sup>. The dynamic conception of the separation of powers does not refute the central placement of the Legislative power in the national institutional system. Nevertheless, the idea of a hierarchical articulation of powers with the Legislative at the summit is abandoned in favour of a systemic apprehension of powers. Obviously, the superiority of the Legislative is not justified on the basis of a “transcendent” quality, but comes as a result of its capacity to define the actions of the Executive and the Courts. This rather conjectural than doctrinal preponderance facilitates the idea of controlling the Legislative. Moreover, it is exactly this preponderance that renders control an imperative necessity. James Madison underlined the risk of encroachment on the fields of other departments, hidden underneath the general and abstract character of legislative acts. In the final analysis, the American constitutional model seems more faithful to Montesquieu’s political thought. The Legislative is a holder of public authority, and as such, it is susceptible to abuse. Thus, there is no doctrinal originality at this point, but only the solidification of prior premises. The proposition that the division of powers leads to moderation of the action of the authorities is common place in European doctrine and even in post-revolutionary France.

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<sup>15</sup> J.-J. Rousseau, *Du contrat social*, (Gallimard 1964), p. 200 ; see M. Morabito, *Histoire constitutionnelle de la France (1789-1958)*, 6<sup>th</sup> ed. (Montchrestien 2000), p. 21.

<sup>16</sup> The later French constitutional theory retained the same apprehension : see, R. Carré de Malberg, *La loi, expression de la volonté générale* (Sirey 1931).

<sup>17</sup> M. Troper, *Pour une théorie juridique de l’Etat* (Presses universitaires de France 1994) p.226.

<sup>18</sup> J. Madison, *The Federalist Papers*, n° 48, op.cit., p. 276; B. Manin, “Frontières, freins et contreponds – La séparation des pouvoirs dans le débat constitutionnel américain 1787”, *RFSP* 1994, p. 257.

<sup>19</sup> E. Barendt, *An Introduction to Constitutional Law* (Oxford University Press 1998), p. 15.

<sup>20</sup> H. Seiler, *Gewaltenteilung*, op.cit., p. 26;

The American doctrine's major contribution is related to the conscience that the balance promised by Montesquieu could never be more than a chimera without substantive control of powers. Whereas Montesquieu's proposition relied on the idea that powers should be separated, no concrete illustration has been offered concerning the question of the effective guarantee of this separation. Especially the modest position that he reserved to the Judicial offered no sustainable solution to the risk of blockage in case of conflict between the Legislative and the Executive. The distinction between the "*faculté de statuer*" and the "*faculté d'empêcher*"<sup>21</sup> could not offer a sufficient way of overcoming the crisis in case of conflict. Taking into account the tendency of the authorities to abuse their powers, the system of separation would lack in effectiveness. Which authorities could control the action of other departments was a matter of choice. As were the conditions under which this control power could be deployed.

Whatever the concrete answers to these questions are, the American model on the separation of powers together with the division of powers and their functional blending, provides the necessary weapons for each department, including the Judicial<sup>22</sup>. The scope of these weapons is two-fold<sup>23</sup>: they either look to protect the prerogatives of one department against encroachments on behalf of the others<sup>24</sup>; or, more generally, they seek to prevent or to correct a deficiency in the actions of public authority<sup>25</sup> as the judicial review of unconstitutional statutes. The American "Checks and Balances" model is born...

### III. THE ELABORATION OF A PRINCIPLE OF EC LAW FOR THE MEMBER STATES

The evolution of the ECJ case-law related to the obligations of national authorities in the implementation of EC Law has been largely and sufficiently analyzed by the doctrine. If one tries to locate the main common features of these various obligations, he observes that the respect of EC Law is based on the triptych suspicion-contestation-sanction. National authorities are placed under the surveillance of other national organs, which are obliged to take measures in order to protect the European legality of national law, whoever the editor of the illegal national act might be.

#### A. Full Effect of EC Law vs. Institutional Autonomy of Member States

The myth of institutional autonomy of Member States seems anything but incontestable face to the demand of full effect of EC rules. The qualification of institutional national as "autonomous" implies its limits. The communitarian doctrine seems particularly "cunning" in this sense. Instead of speaking of a complete and unexceptional parallelism of European and national powers – where the former would rule over substantial law and the latter would fix the modalities of national execution – the EC legal order *recognizes* national law as "autonomous".

Nevertheless, national autonomy can be subject to exceptions, whenever the European legal order considers it preferable to intervene and indicate what national proceedings should be like. The method appears to be infallible: a first barrier is the national one. EC Law demands that national procedural guarantees should be maintained and applied whenever

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<sup>21</sup> Montesquieu, *De l'esprit des lois*, (Flammarion 1979), p. 298.

<sup>22</sup> S.M. Griffin, *American Constitutionalism – From Theory to Politics* (Princeton University Press 1996), p. 90.

<sup>23</sup> E. Magill, "The Real Separation in Separation of Powers Law", (2000) 86 Va. L. R., p. 1130.

<sup>24</sup> A. T. Mason & D. G. Stephenson, *American Constitutional Law*, op.cit., p. 94.

<sup>25</sup> For discussion of the redundancy principle in the separation of powers theory, see M. Landau, *La théorie constitutionnelle et l'organisation des pouvoirs aux Etats-Unis*, in J.-L. Seurin (ed.), *Le constitutionalisme aujourd'hui*, (Economica 1984), p. 81.

communitarian law is concerned. The application of the principle of non-discrimination in national proceedings is, however, turned down when EC Law is badly served. The axiom of “minimal effectiveness” is a second barrier, based on European standards, and fixes the limits of the famous “institutional” autonomy of national law. According to a steadfast case-law of the ECJ, even if the structure and the procedure of national institutions are necessary instruments for the application of EC Law, they should not in any case stand as an obstacle to the realization of the objectives pursued by the Community<sup>26</sup>. The application of national norms being concretely evaluated on the strict basis of its consequences on EC Law, does not permit any general conclusions about the status of one national organ face to that of another.

But this is exactly the revolutionary impact of EC Law upon the relations between public authorities: they are not defined on the basis of a hierarchical or functional separation but shaped on the criterion of effective application of EC Law. The key of this reconsideration lies in the principle of loyal cooperation, as defined by article 10 CE<sup>27</sup>. Member States must fulfill a double obligation: on the one hand, they should refrain from acts that could undermine the effectiveness of EC Law; on the other hand, they should take all possible measures in order to promote the realization of the objectives of EC Law. Thus, a state organ should react in the case of violation of EC Law committed by another national authority. A climate of mutual “suspicion” is established – or at least confirmed – among state powers.

Despite this rearrangement, the structural physiognomy and the particularities of each national legal order are maintained. EC Law by no means redefines constitutional powers. Although the notion of “national court” must respond to some standards defined by the EC case-law, these conditions have been developed with regard to the preliminary rulings’ procedure and not as an attempt of redefinition of what the term “court” stands for in national legal orders<sup>28</sup>. As the ECJ précised in the *Simmenthal* Case, national authorities are obliged to put aside national law, when contrary to EC rules, within the limits of their powers.

In the final analysis, the protection of individual rights conferred by EC Law is doubly-protected: the European legal order leaves intangible all powers of national authorities provided that they can contribute to this protection and rearranges the rest<sup>29</sup>. The role of national authorities is defined by this double postulate: on the one hand, they accomplish their mission in their ordinary configuration; on the other hand, the special demands of EC Law being in a “hibernation-state” oblige them to go beyond their traditional, constitutional attributes. A common element of these powers, attributed on national or communitarian grounds, is the amplification of control.

### B. Judicial vs. Statutory Government

Since the *Simmenthal* Case, the role of the national Judicial in the protection of EC Law has further evolved. The ECJ has based its reasoning on solid foundations built with

<sup>26</sup> Case 33/76, *Rewe* [1976] ECR 1989; Case 199/82, *San Giorgio* [1983] ECR 3595; Case C-208/90, *Emmot* [1991] ECR I-4269.

<sup>27</sup> V. Constantinesco, “L’article 5 CEE, de la bonne foi à la loyauté communautaire”, in *Du droit international au droit de l’intégration* (Nomos 1987), p. 97; T. Georgopoulos, *La responsabilité du législateur en cas de violation du droit communautaire* (Bruylant & Sakkoulas 2002), p. 95.

<sup>28</sup> Case 61/65, *Vaassen Göbbels*, ECR [1966] 377; Case 82/71, *Sail*, ECR [1972] 119; Case 246/80, *Broekmeulen* [1981] ECR 2311; Case C-24/92, *Corbiau* [1993] ECR I-1277; Case C-54/96, *Dorsch Consult*, [1997] ECR I-4961; Case C-9/97 & C-118/97 *Jokela and Pikeräntä* [1998] ECR I-6267; Case C-103/97, *Köllensperger* [1999] ECR I-551; Case C-416/97 *Eddine El Yassini* [1999] ECR I-1209; Case C-110/98 & C-147/98, *Gabalfrisa*, ECR [2000] I-1577.

<sup>29</sup> S. Prechal, “Community Law in National Courts : the Lessons from Van Schijndel”, (1998) 35 CMLR, p. 683.

persistence and care decades before the judgment of this case. However, the *Simmenthal* judgment has a special meaning for the impact of EC Law on the separation of national powers, for two major reasons. Firstly, the Court confirmed what since then had only been a presumption: the national courts are obliged to control the communitarian legality of national legislation, whatever its form, and to put it aside if it is an obstacle to the full effect of EC Law. Secondly, and in more general terms, the Court puts an end to the uncertainty concerning the intensity of EC Law's demands. It rejected the idea that a distinction between substantial and procedural national provisions should be upheld that would allow the judicial control of the former only when the latter could permit it. Full effect but also uniform application of EC Law oblige national courts to effectively control statutes presumed contrary to communitarian rulings, provided that they are directly effective<sup>30</sup>.

The power to control statutes, of parliamentary or executive origin, is by no means revolutionary. The mechanism of judicial review seems more or less attained in both French and German legal orders, as a corollary of the Rule of Law doctrine<sup>31</sup>. The major transmutation of the Judicial status concerns the end of the monopoly of constitutional justice to proceed to this control. From now on, legislator's acts are subject to control operated by *all* courts within the limits of their jurisdiction. Certainly, the distribution of judicial power between ordinary and constitutional jurisdiction has been preserved. The French *Conseil constitutionnel*<sup>32</sup> and the German *Bundesverfassungsgericht*<sup>33</sup> operated a clear delimitation of their jurisdictions and defined at the same time, the limits of the powers of the ordinary courts. Constitutional justice retains its privilege of controlling the conformity of legislative acts with constitutional norms, whereas ordinary courts are vested with the power to verify the compliance of national legislation with EC Law. The constitutional courts cannot encroach on the field of ordinary courts and vice versa. However, the significant change does not concern the relations between constitutional and ordinary justice, but those between the Judicial and Legislative. From this point of view, there is no doubt that the Legislative is subject to control exercised by all ordinary courts, a fact that diminishes its traditional superiority over them.

Moreover, the ECJ case-law has been very diligent in assuring the exercise of this special function under particularly favorable conditions for the courts. The access of individuals to judicial remedies offers the possibility to courts to effectively examine the compliance of national legislation with communitarian law. Besides, the postulate of an effective judicial protection as an element *sine qua non* of the European Rule of Law<sup>34</sup> permits the qualitative evaluation of the procedure before national courts. Finally, the "No New Remedies" doctrine in case of implementation of EC Law has been rejected<sup>35</sup>. The case-law on interim measures had already proved that the performance of the EC Law's standards

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<sup>30</sup> On the discussion of the condition of direct effect, see the critical approach of S. Prechal, "Direct Effect Reconsidered, Redefined and Rejected" and A. Ward, "More than an "Infant Disease": Individual Rights, EC Directives, and the Case for Uniform Remedies", in J.M. Prinssen & A. Schrauwen (eds), *Direct Effect – Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2002), p. 17 & 45, respectively.

<sup>31</sup> L. Heuschling, *Etat de droit – Rechtsstaat – Rule of Law* (Daloz 2002) p.159 & 417; K. Sobota, *Das Prinzip Rechtsstaat – Verfassungs- und verwaltungsrechtliche Aspekte* (Mohr Siebeck 1997), p. 44.

<sup>32</sup> Case 74-54 DC, *Interruption volontaire de grossesse*, Recueil des décisions du Conseil constitutionnel 1975, p. 19.

<sup>33</sup> BVerfGE 31, 145 (174); 82, 159, (191).

<sup>34</sup> Case 294/83, *Parti Ecologiste "Les Verts" v. European Parliament* [1986] ECR 1339; see J. Rideau, "Communauté de droit et Etats de droit" in *L'Humanité et le droit international – Mélanges R.-J. Dupuy* (Pedone 1991), p. 249.

<sup>35</sup> R.C. Smith, "Remedies for Breaches of EC Law in National Courts: Legal Variation and Selection", in P. Craig & G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) p. 300.



could demand the existence of specific procedures before or during the examination of a case<sup>36</sup>. The actions in case of damages deriving from the violation of EC rights officially confirmed the demise of the autonomous state of the national remedies' system. Although the remedies in the case of state liability are established in both France and Germany, the regime imposed since the *Franovich*<sup>37</sup> and the *Brasserie du Pêcheur*<sup>38</sup> case-law largely overwhelms the strict conditions posed by national law and extends imperatively the liability remedies to breaches by legislative acts<sup>39</sup>. The judicial "immunity" of parliamentary acts, as elaborated by national law, is paralyzed for the benefit of communitarian law.

In general, we can affirm a clear emancipation tendency of the Judicial from the once indisputable legislative authority. Even if Montesquieu's idea that the Judicial power is nothing but "*la bouche des lois*"<sup>40</sup> had been progressively abandoned, ordinary courts have always been an ally to legislative action, their mission consisting in the implementation of the legislator's will, as reflected in parliamentary acts<sup>41</sup>. In the specific case of EC rights' protection, the mission trusted to national courts is radically different: they are the controllers of the communitarian legality of all national legislation, whatever the law-making authority.

### C. Administrative vs. Political State

Though the doctrine has largely examined the incidence of EC Law on the powers of national courts, little attention has been paid to the respective impact on the administrative authorities. ECJ case-law mainly concerns the Judicial, for the final word in the enforcement of EC Law belongs to courts. Thus, the development of the doctrine on administrative powers is rather atrophic. Certainly, the role of national administrations has been essential since the beginning of the European integration process. The application of EC Law goes through national administrative structures, with the European Commission in the role of a central coordinator<sup>42</sup>. But the decentralized administrative application of EC Law – especially in fields like Common Agricultural Policy, Competition Law or the various European policies – does not directly address the question of which stance the administration should adopt towards the other departments and mainly that of the Legislative.

Attention to the role of the national administrative powers has been drawn in the *Costanzo* Case. The ECJ confirmed the General Advocate's conclusions and aligned the status of administrative authorities with the regime already elaborated on for national courts. The administration is obliged to verify whether national law complies with European rules and eventually to put it aside<sup>43</sup>. However, if the obligation is identical to the one imposed onto national courts, the results appear to be much more surprising. Whereas the judicial review is practiced in national legal order, the control of legislative acts by the administration seems to

<sup>36</sup> Case C-213/89 *Factortame*, [1990] ECR I-2433.

<sup>37</sup> Joint Cases 6 & 9/90, *Franovich and Bonifaci*, [1991] ECR I-5357.

<sup>38</sup> Joint Cases C-46/93 & 46/93, *Brasserie du Pêcheur S.A. & Factortame III* [1996] ECR I-1029.

<sup>39</sup> T. Georgopoulos, *La responsabilité*, op.cit., p. 98 ; P. Senkovic, *L'évolution de la responsabilité de l'Etat législateur sous l'influence du droit communautaire* (Bruylant 2000), p. 216.

<sup>40</sup> Montesquieu, *De l'esprit des lois*, op.cit., p. 301.

<sup>41</sup> E. Zoller *La justice comme contre-pouvoir : regards croisés sur les pratiques américaine et française*, *Revue internationale de droit comparé* 2001 p. 572.

<sup>42</sup> C.-D. Ehlermann, *Ein Plädoyer die dezentrale Kontrolle der Anwendung des Gemeinschaftsrechts durch die Mitgliedstaaten*, in *Du droit international au droit de l'intégration*, *Liber Amicorum Pierre Pescatore* (Nomos 1987) p. 205.

<sup>43</sup> R. Hutka, *Gemeinschaftsrechtsbezogene Prüfungs- und Verwerfungskompetenz der deutschen Verwaltung gegenüber Rechtsnormen nach europäischen Gemeinschaftsrecht und nach deutschem Recht* (Ergon 1997), p. 81.

overturn the most classical apprehension of relations between statutes and administrative acts: the hierarchical superiority of the former upon the latter. In order to understand the logic of the ECJ, as displayed in the *Constanzo Case*<sup>44</sup>, it is essential to underline its common ground with the case-law on the respective obligations of national courts. In both configurations, subjective rights conferred by the European legal order are under threat, a fact that justifies the mobilization of control powers. The ECJ judgment has been motivated by the need to protect subjective rights and refrained from taking into account any formal criteria on the quality of organs or national norms. The reasoning of the Court seems closer to the German *Schutznormtheorie*<sup>45</sup> than to the French doctrine's conception of objective law<sup>46</sup> and reveals the features of ECJ case-law on protection of communitarian law within the national legal order. Since its first "legendary" decisions, *Van Gend en Loos*<sup>47</sup> and *Costa c/ E.N.E.L.*<sup>48</sup> the Court shown its indifference towards the hierarchical order or the special status of national organs, preferring to apprehend the protection of EC Law in terms of subjective rights. The autonomy of the European legal order facilitated this idea, for it permitted EC Law to form its particular demands towards the attitude of national authorities, disregarding national doctrinal obstacles.

Nevertheless, the indifference to the legal status of national organs is highly superficial. EC Law orders national organs to protect European subjective rights against violations committed by national law, within the limits of their powers. In consequence, national authorities are recognised as a *sine qua non* actor in the effective implementation of EC Law. This is true for both courts and administrative organs. As a result, the extension of communitarian standards to administrative action is the result of the special functions that administrative authorities exercise in national legal order. As a holder of public authority, the administration is obliged to protect EC rights, provided that they are directly effective<sup>49</sup>, and to put aside all national provisions standing as an obstacle to them. Executive regulations and parliamentary legislation are subject to the incidental control of administrative authorities.

Therefore, the articulation of powers between the Legislative and the Executive Departments has been inversed. Traditionally, administrative action is subordinated to legislative demands. The principle of legality is featured as the keystone of the administrative law, in France<sup>50</sup> as well as in Germany<sup>51</sup>. Administrative powers should never exceed the limits opposed to them by superior legal acts, and mainly by parliamentary statutes. The obligation of administrative organs to put aside national legislation incompatible with EC Law not only contests the placement of legislation as the borderline of the administrative action but also establishes administrative departments as "first-instance judges" of national law's compliance with communitarian norms. The ECJ in the *Constanzo* judgment underlined the parallel, and in a certain way, complementary role of administrative control with regard to

<sup>44</sup> Case 103/88, *Fratelli Constanzo* [1989] ECR 1839.

<sup>45</sup> H. Bauer, *Altes und Neues zur Schutznormtheorie*, (1988) 113 AöR p. 583.

<sup>46</sup> R. Chapus, *Droit administratif général*, 14<sup>th</sup> (Montchrestien 2000), p. 989 ; M. Fromont, "Les pouvoirs d'injonction du juge administratif en Allemagne, Italie, Espagne et France. Convergences", (2002) 18 RFD adm., p. 551.

<sup>47</sup> Case 26/62, *Van Gend en Loos* [1963] ECR 3.

<sup>48</sup> Case 6/64, *Costa v. E.N.E.L.* [1964] ECR 1141.

<sup>49</sup> The doctrine uses the term "administrative direct effect": B. de Witte, "Direct Effect, Supremacy, and the Nature of Legal Order", in P. Craig & G de Búrca (eds.), *The Evolution of EU Law*, op.cit., p. 188; S. Prechal, "Does Direct Effect Still Matter?", (2000) 37 CMLR, p. 1049.

<sup>50</sup> R. Chapus, *Droit administratif général*, op.cit.; G. Dupuis, M.-J. Guédon, P. Chretien, *Droit administratif*, 8<sup>th</sup> ed. (Armand Colin 2002), p ; 84.

<sup>51</sup> H. Maurer, *Allgemeines Verwaltungsrecht*, 12<sup>th</sup> ed. (Beck 1999), p. 106; H. Faber, *Verwaltungsrecht*, 4<sup>th</sup> ed. (Mohr Siebeck 1995), p. 88.

the judicial one. The administrative authority stands as a barrier to the legislator's breaches of EC Law.

In more general terms, it becomes apparent that the conflict between the Administrative and the Political State<sup>52</sup> takes on a brand new dimension. In fact, the national Political State does not enjoy of decision-making liberty in the formulation of the guidelines of national policy. Legislative acts and Executive law-making normally shape the general orientations of the state action. Law-making is not a pure process of creating norms. Above all, it is the illustration of more or less concrete political choices, whose implementation is trusted in the hands of administrative organs. Their decision-making power is defined by the precision of statutes. These ideas are, however, seriously revised in case of implementation of EC Law. European decision-making replaces the national one, and the national legislator either becomes an executive organ, or is even completely excluded from the law-making process in case of directly effective communitarian rights. The legislator cannot invoke any hermetically closed sphere of decision against administrative authorities. His political aspirations are subject to legal constraints, whose precision occasionally evaporates the slightest liberty of maneuver. In case of breach of EC Law, the administrative authorities do not undermine Political State's liberty; this liberty has probably already been taken away. But if such a liberty persists – for EC rulings have decided so – the control and the sanctions against the national legislator do not concern his political choices, but the violation of legal norms.

#### IV. CIRCUMSTANTIAL AND INSTITUTIONAL “CHECKS AND BALANCES” DOCTRINE

Despite its common elements with the American constitutional model, the communitarian doctrine of “Checks and Balances” converges only partially with it, due to the latter's circumstantial rather than institutional nature. Curiously, the same divergence should be confirmed for the EC Institutional system, a fact that reveals the *sui generis* character of the EC doctrine applicable to Member States' legal order.

##### *A. Comparison to the American Doctrine*

The features of the communitarian control system converge with the American premise that the attribution of a power has to be counterbalanced by another. In case of EC Law implementation, control prerogatives are multiplied, without suppression of the traditional prerogatives of the different organs. The Parliament holds its law-making power, mainly in case of implementation of directives, whereas the Executive and the Judicial are still obliged to enforce legislative acts; in other words, the Legislative poses the limits of the administrative and the judicial action, in the EC Law's implementation process. The innovation of EC Law concerns the particular case of the violation of EC rulings. The subordination of the administration and courts to the Legislative is transformed into a reaction against the illegality of national law-making. Thus, legislative predominance is not challenged by administrative and judicial controls in a monolithic way. EC Law fills the gaps of control, so that all authorities can, in the exercise of their functions, control the EC legality of other national authorities. In final analysis, the balanced government of the American constitutional model and the European premise of catholic control of national authorities' action are both edified on the idea that “*le pouvoir arrête le pouvoir*”.

Nevertheless, the resemblance between the two doctrines is to a great extent illusionary. The American ‘Checks and Balances’ obeys the logic of constitutional

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<sup>52</sup> A. von Bogdandy., *Gubernative Rechtsetzung*, op.cit., p. 148.

consistence. On the contrary, the EC Law's multiplication of national controls does not stem from the inherent in all legal orders need for definition of the center of gravity in the decision-making process. It mainly responds to the lack of trust on behalf of a distinct legal order face to national authorities, whose presence is necessary for the enforcement of EC Law. The attribution of new powers to national organs and the systematization of reciprocal control is certainly not accidental. It is however, not institutional either. Despite the pressure that EC Law exercises on national institutional structure, the hardcore of institutional autonomy is preserved.

The obligation of administrative and judicial authorities to block the implementation of legislation that threatens full effect of communitarian law should not be assimilated to the constitutional attribution of the Legislative to make law. National law-making authorities remain exclusively competent, according to national public law, to align legislation with communitarian standards. Administrative as well as judicial organs should only protect EC rights through administrative or judicial application of directly effective rights. Illegal national statutes remain valid, together with the obligation to correct the illegality by new edicts. Thus, the control exercised to legislative acts by the normally inferior national authorities does not stand out against law-making as a kind of decentralized veto during the legislative process or even afterwards. Besides, national regulations remain fully applicable beyond the strict configuration of EC Law. Even the "*dédoublement fonctionnel*" doctrine<sup>53</sup> that tries in vain to explain the strange transformation of national authorities from "sheep", to "wolves" does not deny the immutability of the institutional "genetic code" of national organs.

This circumstantial character of the communitarian rule of mutual controls is further confirmed, if we take into account that large areas of national activity have been totally spared from the revisionist force of EC Law. It is beyond any doubt that breaches of communitarian law committed by the national legislator could have been prevented if parliamentary procedures were also subject to EC constraints. However, no such interference has ever been operated by EC Law. Law-making conditions remain under the exclusive regulative sphere of constitutional law. The idea of building a balanced government based on the cooperation and the consent of different legislative and executive organs is a prerequisite for the constitutional identification of the State. The European checks and balances doctrine operates only delicate and rather marginal – from the institutional standpoint – interferences, motivated by the threat of subjective rights' violation. The difference is far from being just of quantitative character; on the contrary, it is qualitatively tremendous.

### *B. Comparison to the EC Institutional System*

It should normally be easier to find common features between the European Community's institutional system and the national-implemented control system. Communitarian and national actions are coordinated in order to achieve common political goals. This common political context is reflected and further stimulated by the legal interaction between the Community and the Member States. On the one hand, the States remain the "*Masters of the Treaties*"<sup>54</sup> participating in the European law-making through the Council and inspiring EC legal doctrine. On the other hand, EC Law penetrates national legal

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<sup>53</sup> O. Dubos, *Les juridictions nationales, juge communautaire – Contribution à l'étude des transformations de la fonctions juridictionnelle dans les Etats membres de l'Union européenne* (Dalloz 2001), p. 847.

<sup>54</sup> "Herren der Verträge" as the German Federal Constitutional Court stated in its Maastricht Decision: BVerfGE 89, 155, 190.

orders and redefines up to a certain point, the conditions of exercise of public power. The continuance deriving from this articulation of the EC and the national legal order could justify an analogy and even the alignment of the national "Checks and Balances" doctrine with the European system, at least, in the configuration of enforcement of EC Law by national authorities<sup>55</sup>. However, such an analogy does not exist.

First and foremost, we should underline that the communitarian system of national controls cannot be apprehended as an *extension* of the European Institutional System. The relation between the EC and the national legal orders is certainly close but the borderline remains distinguishable. With the exception of certain "corridors" that assure functional communication between communitarian and national legal procedures, there is no organic link between them. For instance, article 234 of the EC Treaty introduces the dialogue process between ECJ and national courts in functional terms. Nevertheless, the preliminary rulings do not affirm any kind of institutional relation between the European and the national Judicial. Besides, the ECJ insists on the clear separation of jurisdictions, as states in the *Foto-Frost Case*<sup>56</sup>. The organic parallelism between the two legal orders is confirmed, for EC institutions can by no means invalidate national statutes, administrative decisions or judgments.

The national "Checks and Balances" system does not *reflect* the European Institutional framework either. The emerging doctrine as examined here does not have more things in common with the European institutional system than with the American one. The reason is simple: in both American and EC Member States' cases, public authority is exercised through the classic state-edified structures. On the contrary, in the EC Institutional system, the distribution of powers is based on a hybrid institutionalized concept that stands between state and international organization. Despite the more or less successful essays applying the separation of powers theory to the case of EC<sup>57</sup>, only functional analogies can be really depicted<sup>58</sup>. From a doctrinal point of view, this element makes the harmonization of the national communitarian and the European Institutional separation of powers systems at least hazardous.

Inversely, the American "Checks and Balances" doctrine has at least one thing in common with the European conception of distribution of powers that is absent from the communitarian national control system: in both American and European configurations, the fundamental element is the continuing presence of institutions as an integrative receiver of social needs and political conflicts. The EC institutional framework has been progressively transformed from a regional structure of inter-state cooperation to a potential supranational Leviathan. The questions of democratic legitimacy, law-making process rationalization, transparency and legacy reintroduce in the political and scientific debate the old problem of government moderation. Whereas the institutional adjustments try to give answers to these questions, the role of national authorities in the implementation process is far humbler. The obligation of mutual control of national organs cannot overcome its circumstantial character and introduce a model of European government.

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<sup>55</sup> For discussion of the methodological problem of such a comparison see R. Dehousse, *Comparing National and EC Law: The Problem of The [sic] Level of Analysis*, EUO Working Papers 1994.

<sup>56</sup> Case 313/85, *Foto-Frost* [1987] ECR 4199.

<sup>57</sup> J. Jorda, *Le pouvoir exécutif de l'Union européenne* (Presses universitaires d'Aix-Marseille 2001) ; see also T. Georgopoulos & S. Lefèvre, "La Commission après le traité de Nice: métamorphose ou continuité", (2001) 37 RTD eur., p. 604.

<sup>58</sup> D. Simon, *Le système juridique communautaire*, 3<sup>rd</sup> ed. (Presses universitaires de France 2001), p. 258; K. Lenaerts "Some reflections on the separation of powers in the European Community", (1991) 28 CMLR, p. 11.

## V. "CHECKS AND BALANCES" IN THE IMPLEMENTATION OF EC AND NATIONAL LAW: BRIDGING THE GAP

Even if the introduction of a considerably different control system in parallel with the conventional one is justified on both a communitarian and constitutional level, it is embarrassing for the rationalization of public power to maintain this co-existence. The double role that administrative and judicial organs are called to play lacks in coherence. Moreover, in terms of protection of subjective rights, there is no doubt that EC rights' protection is by definition more advanced. In fact, as long as the control mechanisms elaborated by national law are entirely preserved and further perfected according to EC requirements, the control system applied to internal situations will remain atrophic. What was in the past evaluated by contrast to other national legal systems, is nowadays compared to a configuration solidly established in the same legal order.

### A. The German "Bridge"

The "Checks and Balances" concept as a model of government is successfully adopted by German constitutionalism<sup>59</sup>. Of course, the political complicity between the Executive and the Legislative that derives from the German parliamentary system<sup>60</sup> diverges from the strict separation, opted by the US-model<sup>61</sup>. Yet, the idea of control and balance in the exercise of public authorities seems to be the keystone of the modern German doctrine on separation of powers<sup>62</sup>. The *Bundesverfassungsgericht* constantly confirms the balance of powers as a fundamental element of the German legal order, assured by means of mutual control and limitations<sup>63</sup>. The German conception of separation of powers accepts the possibility to intervene in the field of another department, provided that the hardcore of attributed competencies of each department will be preserved<sup>64</sup>. From this perspective, in case of enforcement of EC Law there seems to be no major doctrinal objection to the idea of a generalized control of powers.

Despite the accusations of leading a rather "imperialistic" politic against EC Law, the *Bundesverfassungsgericht*'s case-law has succeeded in establishing a parallel model of enforcement of EC Law in comparison to the one elaborated within the national legal order. The recognition of the European Community as a new non-state public authority<sup>65</sup> facilitated the parallelism between the national and the communitarian exercise of public authority. Moreover, both administrative and judicial authorities have the possibility to examine the conformity of executive and legislative law-making<sup>66</sup>. The major difference between the German and the communitarian control system results from the fact that according to the former, incidental control of the constitutionality of legislative acts by ordinary courts or administrative authorities does not have major direct legal consequences. The constitutional justice is the final arbiter of law-making conformity with the Constitution<sup>67</sup>, whereas in the

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<sup>59</sup> B. Ackermann, "The New Separation of Powers", (2000) 113 Harv. L. Rev., p. 634.

<sup>60</sup> W. Zeh, "Die parlamentarische Kontrolle der Regierung durch Mehrheit und Minderheit", F. Hufen (ed.), *Bundestaat – Parlament – Opposition* (Nomos 2001), p. 41.

<sup>61</sup> D. Currie, "Separation of powers in the Federal Republic of Germany", (1993) 41 Am J Comp. L, p. 201.

<sup>62</sup> K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20<sup>th</sup> ed. (Müller 1999),

<sup>63</sup> BVerfGE 9, 268 (279): "die Organe der Legislative, Exekutive und Justiz sich gegenseitig kontrollieren und begrenzen"; see also BVerfGE 22, 106 (111).

<sup>64</sup> BVerfGE 9, 268 (280); 30, 1, (27 ss.).

<sup>65</sup> BVerfGE 22, 292 (295-296).

<sup>66</sup> J. Schmidt, "Inzidente Prüfung und Verwerfung von Normen im Range unter dem Gesetz durch die Exekutive", *BayVBl.* 1976, p. 3.

<sup>67</sup> BVerfGE 9, 268 (279); 34, 52 (59); 67, 100 (139); 68, 1 (87).

communitarian configuration, administrative and judicial organs are obliged to put aside national legislation themselves. As previously mentioned, the German Constitutional Court recognized ordinary courts as exclusively competent to protect EC Law, including directives<sup>68</sup>. Furthermore, in case of doubt, they are obliged to turn to the ECJ, in order to attain the necessary precisions on the interpretation or the validity of EC rules. The case-law of the Constitutional Court clearly states that the obligation of German courts to refer to the ECJ, in case of doubt on the validity of EC Law enactments, has also a constitutional basis: due process, which would be compromised without an effective dialogue between German Courts and the ECJ<sup>69</sup>. Thus, the "relation of cooperation" between the *Bundesverfassungsgericht* and the Court of Justice, as mentioned in the *Maastricht Decision*<sup>70</sup>, reflects more the idea of a parallel coexistence of two control systems and the need to respect the borderline separating them than a real dialogue between the two Courts.

This dichotomy is, however, largely artificial and in consequence fragile. The *Bundesverfassungsgericht*'s Decision on the Market of Bananas<sup>71</sup> sustained the main features of the *Solange II Decision*<sup>72</sup>: the protection offered by the EC control system of subjective rights must be "substantially comparable" to the German one. If this position marks the will of the German Court to declare its peaceful intentions to the EC legal order<sup>73</sup>, the problem is still present but from the opposite point of view: in the case of EC protection, whose performance outweighs the constitutional one. The guarantee of a less efficient protection system whenever pure internal situations are concerned, challenges the principle of equality of individuals before the law, as guaranteed by article 3 of the *Grundgesetz*. Briefly, the interaction between the two protection systems cannot be prevented by simple means of abstract theoretical structures.

### B. The French "Labyrinth"

The particular affection of French constitutionalism to parliamentary sovereignty makes the transposition of the EC "Checks and Balances" doctrine more problematic. Legislative acts in the Fifth French Republic maintain an exceptional place.

French institutions have evolved since 1958 in a rather peculiar way. The Constitution elaborated by the General de Gaulle stands as a revolutionary U-turn on France's constitutional confessions. The parliamentary domination of the 3<sup>rd</sup> and the 4<sup>th</sup> Republics has been a permanent factor of destabilization of the French political system and an obstacle to effective decision-making. The Fathers of the 5<sup>th</sup> Republic "abdicated" the Parliament from its "throne" and invested the Executive with major original law-making powers, together with the possibility for the President to freely dissolve the General Assembly. The President's direct election, since 1962, offers to the institution a wide legitimacy and allocates to his

<sup>68</sup> BVerfGE 75, 223; see J. Gerkrath, "Direct Effect in Germany and France", in J.M. Prinsen & A. Schrauwen (eds), *Direct Effect – Rethinking a Classic of EC Legal Doctrine*, op.cit., p. 145.

<sup>69</sup> K. Füsser, *Durchsetzung der Vorlagepflicht zum EuGH gemäß Art. 234 III EG – Integrationsfreundliche Tendenzen in der Rechtsprechung des BVerfG zu Art. 101 I 2 GG*, 116 (2001) *Deutsches Verwaltungsblatt* 1574.

<sup>70</sup> "Kooperationsverhältnis": BVerfGE 89, 155, 175; see H. Gersdorf, "Das Kooperationsverhältnis zwischen deutscher Gerichtsbarkeit und EuGH" (1994) 109 *DVB1*, p. 674.

<sup>71</sup> BVerfGE 102, 107.

<sup>72</sup> BVerfGE 73, 339.

<sup>73</sup> C. Grewe, "Le "traite de paix" avec la Cour de Luxembourg : l'arrêt de la Cour constitutionnelle allemande du 7 juin 2000 relatif au règlement du marché de la banane", 37 *RTD eur.* (2001), p. 1.

person the incontestable power to determine the general orientations of the State<sup>74</sup>. However, the decades that followed have shown how it is possible to “*change the Republic without changing a Republic*”<sup>75</sup>. On the one hand, the new prerogatives of the Executive, especially in the field of law-making power have been considerably moderated: the regulations have remained in practice subordinated to legislative acts<sup>76</sup>. On the other hand, the concern about further restraining of executive powers has led to the development of the judicial review of... legislative acts. The *Conseil constitutionnel*, originally planned to defend the Executive’s law-making prerogatives has been transformed to a constitutional judge of parliamentary acts. The possibility for a small group of deputies or senators to refer to it offers them a unique chance to efficiently stand up to the bloc formed between the Government and its parliamentary majority<sup>77</sup>.

These developments have greatly influenced the doctrinal perceptions of French public law. Talking about the “constitutionalization” of law and of political life in France<sup>78</sup> seems to have no theoretical significance in a doctrine that has embraced Hans Kelsen’s positivism. It illustrates, however, the total submission of powers to the Constitution and facilitates the development of mutual limitations. The apprehension and the critical approach of French institutions are not based on any parliamentary domination, but on the idea of balance. The notion of “*contre-pouvoirs*” is present in constitutional analysis<sup>79</sup>, and although it should not be assimilated to the rigid power-separated American doctrine of “Checks and Balances”, it introduces the concept of balance through control in French constitutionalism.

If this both institutional and doctrinal “acquis” gives to the French constitutional theory a more dynamic physiognomy, the distance separating the constitutional balance of government from the EC Law requirements remains significant. The major obstacle in the case of France is one of methodological order. There is a considerable difference in the level of analysis between the EC and the French conception of Law. The protection of EC Law through the decentralized control refers to the concrete protection of subjective rights, whereas the French legal doctrine is principally reasoning in terms of objective law. In consequence, “*procedure is more important than substantive law*”<sup>80</sup> but in a very particular way. It is not a question of priority of procedural over substantive law provisions, but rather a matter of two different ways to conceive legal phenomena. Although subjective rights and objective law should in an abstract way be complementary to each other, the concrete coexistence of the two logics can lead to misunderstandings. When the French doctrine denies the possibility for administrative authorities to contest a legislative act<sup>81</sup>, the argument is not

<sup>74</sup> J. Gicquel, *Droit constitutionnel et institutions politiques*, 16<sup>th</sup> ed. (Montchrestien 1999), p. 544; O. Dord, “*Mens sana in corpore insano*”: du Gouvernement sous la V<sup>e</sup> République”, in *La nouvelle Ve République*, (2001) 99 *Pouvoirs*, p. 50.

<sup>75</sup> L. Fabius, “Changer la République sans changer de République”, in *La VI<sup>e</sup> République ?*: RD publ. 2002, special issue, p. 95.

<sup>76</sup> L. Favoreu, “Les règlements autonomes n’existent pas” (1987) 3 *RFD adm.*, p. 878 ; J.-P. Campy, “34/37: des frontières perméables”, in *La nouvelle V<sup>e</sup> République*, op.cit., p. 280.

<sup>77</sup> G. Drago, *Contentieux constitutionnel français* (Presses universitaires de France 1998), p. 281; X. Vandendriessche “Le Parlement entre déclin et modernité”, in *La nouvelle Ve République*, op.cit., p. 65.

<sup>78</sup> L. Favoreu et al., *Droit constitutionnel*, 2<sup>nd</sup> ed. (Dalloz 1999), p. 144; L. Favoreu, “Le droit constitutionnel, droit de la Constitution et constitution du droit”, *RFDC* 1990, p. 71.

<sup>79</sup> L. Hamon, *Les juges de la loi: naissance et rôle d’un contre-pouvoir, le Conseil constitutionnel* (Fayard 1987); J. Gicquel, *Droit constitutionnel*, op.cit., p. 721; E. Zoller, “La justice comme contre-pouvoir : regards croisés sur les pratiques américaine et française”, *RIDC* 2001, p. 559; C. Poncelet, “La V<sup>e</sup> République aujourd’hui : un régime qui manque de contre-pouvoirs”, in *La VI<sup>e</sup> République ?*, op.cit., p. 99.

<sup>80</sup> J. Lever, *Why Procedure is More Important Than Substantive Law*, 48 *ICLQ* 1999, p. 285 et s.

<sup>81</sup> R. Chapus, *Droit administratif general*, op.cit., p. 71.



expressed in terms of subjective rights – in that case the protection of rights would have prevailed over law violation – but as a question of formal superiority of legislative acts over administrative decisions. In terms of separation of powers more precisely, the hierarchical separation of powers doctrine may stand as an impediment to the protection of subjective rights, and in particular EC ones.

The divergence between these two levels of legal analysis has been clearly demonstrated in the *Cohn-Bendit* Case that remains a point of conflict between EC and French Law<sup>82</sup>. The *Conseil d'Etat* refused to enforce the directly effective provisions of a directive, because of the absence of a national act of implementation. The dispute does not concern neither substantive law nor the obligatory force of directives. It has been clearly admitted in later cases that EC directives do impose obligations on national law-making powers<sup>83</sup>. Furthermore, it has been established that the provisions of the directive can be invoked in order to point out the failure of national legislation to comply with EC requirements. These provisions are not permitted, however, to overwhelm the process of law-making and to apply the rights conferred by the directive in the place of the defaulting national provisions. The *A.O.M.S.L.* Case<sup>84</sup> can be referred in the same sense. The violation of a directive's provisions – that confer directly effective rights – by a legislative act can be invoked before national administrative courts and establish the communitarian illegality of administrative regulations taken on the basis of this legislative act. But the omission of the Prime Minister to take the appropriate measures in order to remedy such a deficiency of national legislation cannot be sanctioned, because of the abundant liberty he enjoys in the choice of the appropriate constitutional procedure. Objective law stands as an obstacle to the generalization of controls required for the EC rights' protection.

The *Sarran* Case<sup>85</sup> before the *Conseil d'Etat* testifies the attachment of the French doctrine to the hierarchy of norms as well as the extension of control in case of conflict between the Constitution and EC Law. The court confirmed the superiority of the constitutional norms and also delimited its powers. Although the premise of the Court was hypothetical in this case and no concrete conflict was established, the *Conseil d'Etat* explicitly rejected the possibility to put aside a constitutional provision simply because it was contrary to EC rights. The specific implications of this case-law have not yet been further explored. It is, however, possible to imagine that the "self-restraint" of the administrative judge, which seems confirmed by the *Cour de Cassation* in the *Fraisse* Case<sup>86</sup>, could lead to an unusual negative control mechanism: the courts will refuse to put aside a legislative provision, on the grounds that it executes constitutional norms. Or, in a more impressive way, it can be argued that the legislative acts implementing EC Law should also be put aside by ordinary courts for they would be found unconstitutional. There is no doubt that this perspective cannot be easily welcomed, because it introduces a new model of decentralized judicial review, completely foreign to the French legal tradition. The paradox that is derived illustrates how EC Law is better protected than constitutional norms. Whereas directly

<sup>82</sup> *Ministre de l'Intérieur c. Cohn Bendit* Case, [1978] Recueil Lebon, p. 524.

<sup>83</sup> *Compagnie Alitalia* Case, [1989] Recueil Lebon, p. 44 ; *S.A. Arizona Tobacco Products et S.A. Philip Morris France* joint Cases, [1992] Recueil Lebon, p. 78; *S.A. Rothmans International France et S.A. Philip Morris France* joint Cases, [1992] Recueil Lebon, p. 80.

<sup>84</sup> *Association ornithologique et mammalogique de Saône-et-Loire and Rassemblement des opposants à la chasse* joint Cases, [1999] Recueil Lebon, p. 979.

<sup>85</sup> *Sarran Levacher and others* case, [1998] Recueil Lebon, p. 368 ; see also F. Chaltiel, "La boîte de Pandore des relations entre la Constitution française et le droit communautaire – A propos de l'arrêt SNIP du Conseil d'Etat du 3 décembre 2001", (2002) RMCUE n° 462, p. 595.

<sup>86</sup> *Pauline Fraisse* Case [2000] 4 Bulletin des arrêts des Chambres civiles de la Cour de Cassation, p. 7.

effective EC rights are fully protected against legislative acts, constitutional norms are defended by the abstract control of the *Conseil constitutionnel*, exercised only before the enforcement of the legislative act.

## VI. FINAL REMARKS: "CHECKS AND BALANCES" IN A MULTI-LEVEL GOVERNANCE SYSTEM: THE HIDDEN FACE OF FEDERALISM

The communitarian control system concerns exclusively the implementation of EC norms in national legal orders. And yet, the "Checks and Balances" doctrine refers to the entire legal process from law-making to the most concrete administrative decisions or judgments. As a matter of fact, the control system enforced by EC Law is a sub-system: the final product of a much more complex procedure- EC law-making. From a legal as well as from a political standpoint, this creation process presents a greater significance than the enforcement of EC norms for the definition of the guidelines and the attribution of decision-making powers to national authorities is operated at this stage.

Nevertheless, it cannot be argued that the communitarian national "Checks and Balances" doctrine is extended to the EC law-making process. The question of democratic legitimacy of EC Law is, for the time being, answered separately in EC and in the national legal orders: at the European level, through the intervention of the elected representatives of the Member States, the European Parliament and, up to a certain point, the participation of the so-called "civil society"<sup>87</sup>; at the national level by the necessary consent of national parliaments in the elaboration of the constitutive treaties, as the German Constitutional Court and the *Conseil constitutionnel* stated and the discreet participation of Parliaments in European affairs<sup>88</sup>. In consequence, there seem to be two different sources of legitimacy of EC Law, a European and a national<sup>89</sup>. Although they are complementary to each other, they remain, at least in legal terms, separated. There is no communitarian "Checks and Balances" rule referring to the articulation of powers between the national Legislative and Executive in EC law-making.

In the political debate on the future of the European Union, the role that national Parliaments will be called to play is still in question. The process of constitutionalization of the European Union<sup>90</sup> needs both national and supranational pillars. The idea of a direct participation of national parliaments in the EC law-making process will transfer the political conflict between the Executive and the Legislative up to the European level<sup>91</sup>. The political

<sup>87</sup> See P. Craig, "The Nature of the Community: Integration, Democracy, and Legitimacy", in *The Evolution of EU Law*, op.cit., p. 21.

<sup>88</sup> In France see J.-D. Nuttens, *Le Parlement français et l'Europe : l'article 88-4 de la Constitution* (LGDJ 2001); E. Saulnier, *La participation des parlements français et britanniques aux communautés et à l'Union européenne* (LGDJ 2002); in Germany: R. Lang, *Die Mitwirkungsrechte des Bundesrates und des Bundestages in Angelegenheiten der Europäischen Union gemäß Artikel 23 Abs. 2 bis 7 GG* (Duncker & Humblot 1997); D. König, *Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses – Anwendungsbereich und Schranken des Art. 23 des Grundgesetzes* (Duncker & Humblot 2000), p. 330.

<sup>89</sup> F. Brosius-Gersdorf, "Die doppelte Legitimationsbasis der Europäischen Union – Zu den verfassungsrechtlichen Grundlagen der demokratischen Legitimation der Europäischen Union", *EuR* 1999, p. 133.

<sup>90</sup> See D. Blanchard, *La constitutionnalisation de l'Union européenne*, (Apogée 2001); J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Editions de l'Université de Bruxelles 1997); C. Landfried, "Vers un Etat constitutionnel européen", in R. Dehousse (ed.), *Une constitution pour l'Europe ?* (Presses de Sciences Po 2002), p. 79; T. Georgopoulos, "La "Constitution", la "loi" et le juge communautaires" *Les Petites affiches* 2002, n° 132, p. 27.

<sup>91</sup> See at this sense Protocol n° 13 of the Amsterdam Treaty; J. Rideau, *Droit institutionnel de l'Union et des Communautés européennes*, 4<sup>th</sup> ed. (LGDJ 2002), p. 324.

struggle will be certainly exercised under different conditions, because of the simultaneous presence of multiple national Executives and Legislatives as well as European Institutions. However, together with this integrative function, the European decision-making system will enroll this national process to the components of the European legal order and in consequence guarantee its exercise. The European "Checks and Balances" doctrine implemented in national legal order would then renounce its fragmentary character and even its circumstantial nature...

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