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# Deviating paths, converging policies; Dutch and German Constitutions within an ever-changing European Union

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## **Deviating paths, converging policies; Dutch and German Constitutions within an ever-changing European Union**

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In 2012, both German and Dutch politicians brought the ratification of the European Stability Mechanism (ESM) to court. The central question of the lawsuits was whether the establishment of a European permanent rescue fund was in keeping with national law. The lawsuits illustrate well how the various legal systems of EU member states respond to the European integration process, which is entering a new critical phase. In the Netherlands, the complainant, Mr. Geert Wilders, leader of the populist Party for Freedom, did stand a chance at all. Wilders critically commended on the democratic procedures of the ESM. The extensive power and immunity of its governors indeed hinders parliamentary control. However, his main argument was procedural: as the Dutch Rutte-Verhagen cabinet had resigned prior to the ratification of the treaty, the issue had become too important to discuss in Parliament before new elections take place. Mr. Wilders' case was handled by a regular court in The Hague. The judge denied the claim. He referred to the separation of powers, laid down in the Dutch constitution, and asserted that he is not in the position to interfere in politics, including when there are serious shortcomings in the decision-making process.<sup>1</sup>

Unlike the Dutch case, the German lawsuit was considered by many opinion makers to be a potential threat to further European integration.<sup>2</sup> After the federal German parliaments, the *Bundestag* and *Bundesrat*, both had approved the ESM Treaty and the EU Fiscal Pact with a two-third majority, the German president Joachim Gauck decided to postpone the ratification of the treaty until the Federal Court had approved the constitutionality of the treaty. In Europe, alarm bells started to ring. The decision of Karlsruhe could have serious consequences, not only for EU policy, but also for the financial markets. Various politicians - representing the citizen movement 'More Democracy', the Bavarian Christian Democratic Party CSU, and the populist Left Party Die Linke - accompanied by 37,000 German citizens, petitioned the Federal Constitutional Court in Karlsruhe to prohibit the German ratification. The complainants brought in several arguments, of which a further loss of sovereignty and a

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<sup>1</sup> Dutch Judiciary and the Supreme Court of the Netherlands, LJN: BW7242, Rechtbank 's Gravenhage, 419556 / KG ZA 12-523, viewed at 27-09 2012, <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW7242>

<sup>2</sup> See for example: Paul Gallagher, *Challenges to the ESM Treaty and the Fiscal Compact Treaty before the German Constitutional Court*, Working Paper, 10, Institute of International and European Affairs, 2012.

democracy deficit were the most important. According to the complainants, the German parliament would no longer be able to control the new facility sufficiently enough. Due to their duty of confidentiality, the governors - the secretaries of finance of the Eurozone member states - are not allowed to account for their decisions publicly, nor to inform the German Bundestag comprehensively. To prevent speculation of the markets, they are, when necessary, allowed to rise their lending capacity limitlessly. The complainants claim that this is a violation of the budgetary responsibility of the German Bundestag. Although the demands of the German complainants were refused, the judges stipulated two conditions to safeguard the rights of the German federal parliament.<sup>3</sup> Firstly, both German houses must be informed sufficiently about the ESM funding, despite the code of confidentiality. Secondly, the German contribution may not exceed the current maximum of 190 billion euro without the approval of the Bundestag. These conditions are considered to be moderate. Only one day after the judgment, president Gauck signed the ESM Treaty and Fiscal Pact into law. To effectuate final ratification, the German cabinet drafted an 'interpretive declaration' which secured the extra democratic checks sought by the Karlsruhe court. After this declaration was approved by all parties directly involved - the Bundestag, the constitutional court, and the Eurozone - Gauck finally signed the ratification record two weeks after the judgement of Karlsruhe had passed.

In this paper, I will discuss the European integration process from the perspective of these two member states' constitutional cultures in a transnational perspective, taking each others and the wider European perspective into account. So far, legal scholars have dominated the debate about the coming into being of a European legal order as well as the openness of national constitutions towards Europe. To understand the Dutch and German constitutional perspective on European integration, a transnational, historical approach could reveal and contextualise different national paths, differences of opinion among politicians as well as among legal scholars and the public.<sup>4</sup> Also, it shows how relevant national constitutional cultures are to the general debates about the present and future state of the EU, and about the place of national constitutions within the European legal order - a question which is more complex than often assumed. After the Treaty of Maastricht, and particularly after the Maastricht-judgement of the German Constitutional Court, the relationship between national constitutions and a European legal order was questioned. The European integration process

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<sup>3</sup> Bundesverfassungs Gericht, 2 BvR 1390/12 vom 12.9.2012, Absatz-Nr. (1-319), viewed at 27-09 2013, [http://www.bverfg.de/entscheidungen/rs20120912\\_2bvr139012.html](http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012.html)

<sup>4</sup> See Bill Davies and Morten Rasmussen, 'Towards a New History of European Law', *Contemporary European History*, 21, 3 (2012), 305-318 (introduction to a special issue of this periodical).

has become one of the biggest challenges to those national constitutions, which were drafted in a period when *other* challenges were at stake. In this paper, I will show how both constitutional path dependencies and the search for a European public brought about new views of the relationship between the EU and its member states. The deviating Dutch and German perspectives of this could explain the background and setting of many legal, political and social debates about the EU in both countries. Finally, I will explain why, despite all differences, the Dutch and German constitutional policy in general has been and still is converging.

### *Two types of constitutions*

One could distinguish two main types of constitutions in Europe, which each differ in the way constitutional rights are established.<sup>5</sup> There are constitutions with a long history which has changed incrementally. In these more or less ‘old-fashioned’ constitutions, the traces of political and social changes are incorporated in such a way that it is hardly possible to detect its original intent. The meaning of these constitutions is determined by their evolution. Since the political order has engendered the incremental changes within these constitutions, they are less formalistic and more political in nature. A second type is the result of a revolutionary change of government. These constitutions were usually written in reaction to earlier historical events and were created in the spirit of a ‘moving myth’, such as *liberté, égalité, fraternité* or *nie wieder*. They have often been designed to constitute a new political reality, not the other way around. They tend to have a strong legal character, safeguarded by a court of law. According to the Dutch constitutional law scholar Leonard Besselink, the original intention of these constitutions remains important for an overall understanding.

The Dutch constitution is both a product of a revolutionary change - the instalment of a kingdom in 1814-1815 - and of a longer history. It was written in a completely different social setting and underpinned an entirely different political order. Since its adoption in 1814, the Dutch constitution has been amended 24 times.<sup>6</sup> It lacks a formalistic, detailed, and strongly legal character. It even leaves open many fundamental questions to ‘unwritten

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<sup>5</sup> Leonard Besselink, ‘The Dutch Constitution, the European Constitution and the Referendum’, in: Anneli Albi and Jacques Ziller (ed.), *The European Constitution and National Constitutions, Ratification and Beyond* (Alphen aan de Rijn 2007), 113-123.

<sup>6</sup> Gret Haller, a.o., European Commission for Democracy through Law, *Report on constitutional amendment*, Study 469 / 2008, 6, viewed on 27-09 2012, [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf).

constitutional law', for example the formation of a new cabinet. Since there is no constitutional court in the Netherlands, the constitution plays a relatively modest role in policy-making. Experts in Dutch constitutional law generally agree that the constitution distinguishes itself by its utter lack of pretension.<sup>7</sup>

The German constitution is in many ways the opposite of the Dutch. It is designed to outline the German federal democracy and does not leave many questions open to interpretation. Above all, the rulings of the Constitutional Court on the basis of the *Grundgesetz* are legally binding. The Basic Law is written to prevent, through any legal means, a recurrence of a boundless centralisation of power and of brute misuse of constitutional rights. Since the Weimar Constitution was perverted by the Nazis through legal measures, and many lawyers appeared to be loyal to the National Socialist regime, the post-war Basic Law was supposed to become an important symbol of German democracy.<sup>8</sup> To confirm the German principles of democracy, the authors of the Basic Law introduced an 'eternity clause', which can never be changed by parliament alone (as happened in 1933). Since the judges of the Constitutional Court are not afraid of bringing politicians to account, they personify the values of the constitution. They are of great importance in the German political decision-making process, since they exercise the right to examine all directives and regulations for compatibility with the constitution, and they rule over the relationship between the federation (*Bund*) and the states (*Bundesländer*). When the president of the Court, Andreas Voßkuhle, stated in an interview that 'more Europe is barely allowed in the German basic law', his warning was heard by many in Europe.<sup>9</sup>

These historical, social and institutional circumstances are of great importance to a better understanding of the current Dutch and German constitutional perspectives of European integration. There are four important differences to take into consideration. The Dutch and German constitutions differ sharply on the availability of judicial review, the way transfer of sovereignty is guaranteed (or not), the relationship between national and European law and, finally, the form of government. I will discuss the four differences which influence the

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<sup>7</sup> Bruno de Witte, 'Do not mention the Word, Sovereignty in Two Europhile Countries: Belgium and the Netherlands', in: Neill Walker, (ed.), *Sovereignty in Transition* (Oxford 2003), 351-366, there 358, see also Barbara Oomen, 'Constitutioneel bewustzijn in Nederland', *Recht en Werkelijkheid* 2 (2009), 55-79, there 57.

<sup>8</sup> Tine Stein, 'Vergangenheitsbewältigung im Medium der Verfassungspolitik? Die deutsche Verfassungsdiskussion nach 1989 zwischen Vergangenheit und Zukunft', in: Helmut König, Michael Kohlstruck, Andreas Wöll (ed.), *Vergangenheitsbewältigung am Ende des 20. Jahrhunderts* (Opladen 1998), 136-166.

<sup>9</sup> Melanie Amann and Inge Kloepfer, 'Im Gespräch: Andreas Voßkuhle, „Mehr Europa lässt das Grundgesetz kaum zu“', *Frankfurter Allgemeine Zeitung*, 25-9, 2011.

relations between these two member states and the EU so strongly. Finally, I will argue that, in the end, they are no obstacle for converging policies.

### *Judicial Review*

There are two main types of constitutional review: Firstly, there is a court review, present in all federal states, which rules over the relations between the federation and its constituent countries. The question reviewed here is how authority is distributed by the constitution to various parts of the state; to the national and the component unit levels.<sup>10</sup> A second type of review is not about who is authorised to do what but about what limits may be placed on doing certain things. Here, the area of fundamental and civil rights, of bills, charters and declarations is at stake. It is the area where citizens file a constitutional complaint to protect their individual rights. While in Germany these two types of review are embodied in the two senates of the Constitutional Court of Karlsruhe, none of these exist in the Netherlands. Since the Dutch Constitution explicitly forbids the judicial review of the constitutionality of Acts of Parliament and of treaties, Mr. Wilders did not stand a chance of winning his case. In Dutch political culture, the separation of powers, as it is laid down in the constitution, is strictly observed. Professional judges, who are appointed by their peers are not supposed to interfere in the political process of decision making. Elected members of parliament are, together with the government, expected to exercise their legislative power independently. The situation in the Netherlands remains quite exceptional, since the power of the judiciary to review legislation for compatibility with international treaties has been recognised in the constitution since 1953.<sup>11</sup> This means that a Dutch citizen can effectively file a complaint based on international law, but not on its own constitution.

However, the long debate in the Netherlands about the necessity of constitutional review has led to the 2002 resolution of Ms. Femke Halsema, who was the Green Party leader, to allow judges to test formal statutes against the fundamental rights laid down in the Constitution. This form of judicial review will only be allowed with regard to those constitutional provisions which contain the so-called ‘subjective rights’, such as freedom of

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<sup>10</sup> David Robertson, *The Judge as Political Theorist, Contemporary Constitutional Review* (Princeton 2010), 9-10.

<sup>11</sup> Maurice Adams and Gerhard van der Schyff, ‘Constitutional Review by the Judiciary in the Netherlands A Matter of Politics, Democracy or Compensating Strategy?’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 66 (2006), 399-413, spec. 402.

speech, freedom of assembly or the right to be protected against discrimination. Halsema's proposal is still under review by both parliaments, but it remains to be seen whether it will finally pass the second reading with a two-third majority in both houses, which is necessary to amend the constitution. If this resolution is adopted, which is hardly expected, this form of constitutional review will not influence the political relations between the Netherlands and the EU in the same way that the German review does, particularly since the fundamental rights are already guaranteed in international law, often better formulated than in the Dutch constitution, which is not in all aspects up to date.<sup>12</sup>

In Germany, the constitutional court became internationally well known for reviewing important European treaties, such as the Maastricht Treaty and the Treaty of Lisbon. Even outside Germany, politicians fear the political interference of the German judges in the European integration process. In Germany, the interference of judges in the political decision-making process is usually not considered a problem. Of course, in the European policy arena, the German time-consuming decision making process is not always appreciated.

Within Germany, the Constitutional Court is usually considered a reliable safeguard of democracy. In recent decades, it has built this reputation also because of its reviews of European treaties. With its famous *Solange I* and *Solange II* judgments, respectively in 1974 and 1986, the court postulated a conditional acceptance of EU law, 'as long' as it guarantees the fundamental rights laid down in the German basic law.<sup>13</sup> With the Courts' judgement of the Treaty of Maastricht, it became clear that this was no hollow phrase. The court defined a limit to the EU's power in terms of its impact on national democratic sovereignty. However, the Court confirmed its 'cooperative relation' with the European Court of Justice, it also confirmed to approve EU law only when it is compatible with the *Grundgesetz*, and finally that the Constitutional Court itself judges this compatibility. The 1993 Maastricht Judgement agonised European federalists, who took the supremacy of European law for granted. Even fourteen years later, the Spanish constitutional law scholar Julio Baquero Cruz described the legacy of the Maastricht Judgement as risky, as distorting our view of the Union, leading to a stalemate in the politics of law. He considers a 'power game' among judicial institutions as a potential danger to the European rule of law, the rights of citizens, supranational politics and

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<sup>12</sup> See the debate between Gerhard van der Schyff, 'Waarom het wetsvoorstel Halsema tekort schiet: Mythes rondom het verdragsargument', *Nederlands Juristenblad* 2009, 2408-2414, and: Jit Peters and Geerten Boogaard, 'De mythes van Van der Schyff over het initiatiefwetsvoorstel-Halsema', *NJB* 2009, 2628-2630.

<sup>13</sup> In English, see: University of Texas, Institute for Transnational Law, Foreign Law Translations, viewed at 27-09 2012, [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/table.php?id=125](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/table.php?id=125).

the progressive democratization of the Union.<sup>14</sup> After the Lisbon Treaty, in its 2009 Lisbon-Judgement, the Court met to the objections of its critics by underlining the ‘Europe-friendliness’ of the German constitution. However, it further elaborated on the ‘democracy deficits’ of the European parliament. As long as the control powers and democratic legitimacy of the European Parliament are not sufficiently guaranteed, and the court thinks they are not, the democratic rights of the German parliaments must be protected. Following this judgment, the German chancellor must inform the Bundestag before and after every EU summit about his or her policy. Also, not the German cabinet but both chambers decide on any possible transfer of sovereignty towards the EU.

### *Transfer of sovereignty and the supremacy of international law*

Sovereignty is a politicised concept. ‘Transfer of sovereignty’ has become a sensitive issue, since it weakens the idea of a ‘Europe of the fatherlands’ and confirms the idea of an irreversible integration process, summed up as an ‘ever closer Union’. The EU is often considered a test case for the transformation of state and popular sovereignty into a post-sovereign society, regulated on the basis of rights.<sup>15</sup> Seen from the perspective of the member states, in casu Germany and the Netherlands, one again encounters opposing approaches. While sovereignty is a key issue in the German constitution, and particularly in its interpretation by the Karlsruhe Court, the concept is absent in the Dutch constitution. While in Germany sovereignty has been a contested concept, in the Netherlands sovereignty seems to have been self-evident to such a degree that it was not considered necessary to turn it into a constitutional issue.

After the Second World War, Germany had to regain its sovereignty, both externally, the power to act in the world arena, as well as internally, the power of self determination.<sup>16</sup> Although the German Federal Republic in practice regained its external sovereignty in 1955, full sovereignty was only reached after the Two Plus Four Agreement, signed by the Allied Forces and representatives of both Germanies in 1990. Yet, internal sovereignty was contested even more strongly. The post-war division into two Germanies had made the

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<sup>14</sup> See: Julio Bacquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, EUI Working Papers, RSCAS 2007/13, 23.

<sup>15</sup> R. Bellamy, ‘Sovereignty, post-sovereignty and pre-sovereignty: three models of the state, democracy and rights within the EU’, in: Neill Walker, (ed.), *Sovereignty in Transition* (Oxford 2003), 167-190.

<sup>16</sup> Miriam Aziz, ‘Sovereignty Über Alles: (Re)Configuring the German Legal Order’, in: *ibidem*, 279-304.



question topical, since it remained an issue which belonged to ‘the German people’. Until the 1999 reforms of the German nationality law, German citizenship was not determined by place of birth but by having at least one German parent. This question, ‘who belongs to the German people?’, has become even more urgent considering the way sovereignty is explained in the basic law: “All state authority is derived by the people” (Art 20 GG). The German democracy is a popular sovereignty, which means that the legitimacy of the state and its state organs are sustained by the will and consent of the people, who are the source of all political power. The state authority is exercised by the people through elections and through legislative, executive and judicial bodies, such as the Bundestag, the Cabinet, and the Constitutional Court. For this reason, the concern about the loss of sovereignty through the loss of budgetary rights by the German parliaments became a key issue in the rulings of the Constitutional Court on EU-treaties. The court just protects the democratic rights of the German people. If these rights are transferred to EU-institutions in an orderly way, meaning by general consent of the German *Bundestag* and in keeping with the German constitution, the Court does not have any objections against further integration. If not, then Germany has a problem, and the EU as well. Interestingly, the concept of sovereignty has been of great importance in German constitutional thinking, not because of a possible transfer, but because of the legal protection of the democratic values of the people which were at stake after the Second World War. As is often the case, the original concept serves new purposes.

As earlier mentioned, the concept of sovereignty has not been a key issue in Dutch politics, as shown by its absence in the constitution.<sup>17</sup> Only in the original 1814 version, which was valid for just one year, was sovereignty offered to the king and his heirs. But the paragraph was changed already in 1815, when not sovereignty but the crown was offered to the king.<sup>18</sup> In the 1814 version is already stated that the States General represent the entire people of the Netherlands, but this form representation mainly served as a legitimization of the unity and general public spirit within the new kingdom.<sup>19</sup> While the Dutch semi-absolutist monarchy gradually developed into a liberal democratic order, the constitution itself did not change as drastically into a people or a parliamentary sovereignty (although in fact it is close to the last variant). In the Nineteenth and a large part of the Twentieth Century, the concept of national sovereignty did not match with the Calvinist principle of ‘sovereignty in one’s own

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<sup>17</sup> Bruno de Witte, ‘Do not mention the Word’, in: Neill Walker, (ed.), *Sovereignty in Transition* (Oxford 2003), 351-366

<sup>18</sup> Parlementair Documentatie Centrum, ‘De Nederlandse Grondwet’, viewed at 27-09 2012, <http://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vi6dcwst7dtw>

<sup>19</sup> Ibidem, ‘Artikel 52: Staten-Generaal vertegenwoordigen het geheele Nederlandsche volk; Toelichting Staatscourant’, <http://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vi6dhrlc6mzx>

sphere'. The constitutional reforms of 1953/1956 followed an older international law tradition by prioritizing adopted international law treaties over national law, even when they are conflicting. The reform was necessary to accept the 1957 Treaty of Rome and it includes treaties and decisions of international organizations like the EU. This non restrictive approach to international treaties is rather unique. Still, there is a mechanism to control the constitutionality of new treaties, which can be done only by Parliament and only in the short period before the treaty is adopted.<sup>20</sup> If Parliament decides that a new treaty contains provisions that deviate from the constitution, the treaty may only be approved by a two third majority of both houses (which is a shortened procedure to amend the constitution). After an international treaty is approved and made public, no constitutional review is allowed anymore.

This brings me to an important third difference between the two EU member states. In the Dutch legal order, international law is more highly ranked than the constitution itself. The Dutch system could be qualified as moderate monist, which means that the internal and international legal system form a unity. Both national and international law, accepted by the state, determine whether actions are legal or illegal.<sup>21</sup> In the German dualist system, national and international law are two distinct spheres. International law does only exist as law after it has been translated to national law. Like the Netherlands, Germany is bound by international law, but in Germany international law has to be translated first to become valid as German law. On the one hand, one could designate this as just paperwork, on the other hand it might stand for more than that.

The idea of Dutch monism versus German dualism fits to the Dutch and German forms of government; a unitary state versus a federation. The debate about constitutional pluralism within the European legal realm, initiated after the Maastricht-*Urteil*, relates to the idea of 'multilevel constitutionalism', as put forward by the prominent German constitutional scholar Ingolf Pernice.<sup>22</sup> This concept is in keeping with the German legal and political order and with Germany's relations with the EU. With its federal structure, legal culture, constitutional court, clear demarcation of competences between federation and states, checks and balances and control mechanisms, German congruency with the EU is significantly higher

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<sup>20</sup> De Witte, *Sovereignty*, 362, see also Karin van Leeuwen, 'On democratic concerns and legal traditions. The Dutch 1953 and 1956 constitutional reforms 'towards' Europe', *Contemporary European History*, 21 (2012) 357-374

<sup>21</sup> Pieter Kooijmans, *Internationaal publiekrecht in vogelvlucht* (Groningen 1994), 82-84.

<sup>22</sup> Among many others: Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, WHI Paper, 02/09 (Berlin 2009), see: Wouter Hulstijn and Jan Willem van Rossum, 'Het Lissabon-Urteil: pluralisme op Duitse voorwaarden', in: J.M.J. van Rijn van Alkemade en J. Uzman (ed.), *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil, Preadviezen Jonge Staatsrechtstag 2010* (Nijmegen 2011), 21-47.

than Dutch congruency.<sup>23</sup> Already in the 1990s it became clear to the Dutch public that it would be difficult to transpose the Dutch consensual ‘poldermodel’ to the European level.<sup>24</sup> For the Dutch, this has led to a lack of a recognizable European political culture, of forms and structures within the EU which are familiar to their own. In 1996, the Dutch influential commentator Paul Scheffer stated that the picture of a federal Europe has been a naïve projection of German federalism on the EU as a whole, and that classical thinking about integration fails to appreciate the tenacity of political and cultural loyalties elsewhere.<sup>25</sup>

### *A lack of congruence?*

To sum up, the idea of a European constitution seems to have been embedded in German political and intellectual culture, and felt unfamiliar to many Dutchmen.<sup>26</sup> The former German Foreign Minister Joschka Fischer as well as the philosopher Jürgen Habermas could be considered the fathers of the idea of a European constitution. In his legendary 2000 Humboldt address, Joschka Fischer proposed to strive for an ultimate ‘finality’ of European integration by drafting a constitutional treaty, and establishing a new federation based on the principle of subsidiarity.<sup>27</sup> The idea of a European constitution met with broad support among German politicians, including those at the state level, who considered it a chance to secure the position of the *Länder* in Berlin as well as in Brussels.<sup>28</sup>

Of the German intellectuals, Jürgen Habermas was the most prominent proponent of the idea. He transposed the idea of active citizenship in a post-national state under a democratic constitution towards the EU. European constitution building would function as a

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<sup>23</sup> Simon Bulmer and Charlie Jeffery, ‘Does Congruence matter? Germany and Britain in the European Union’, in: *ibidem*, and Stephen Padgett, *Rethinking Germany and Europe, Democracy and Diplomacy in a Semi-Sovereign State* (New York 2010), 113-138.

<sup>24</sup> Hanco Jürgens, *Identity loss; identity regained? Recent transitions of the Dutch and German social welfare states in a European perspective*, Montesquieu Paper, 3 (2012), *ibidem*, ‘Soziale Marktwirtschaft, Modell Deutschland und Poldermodell, wirtschaftspolitische Leitbilder als Merkmale nationaler Identität und Europäisierung’, *Eurostudia*, 7:1-2 (2011), 105-118

<sup>25</sup> Paul Scheffer, ‘Land zonder spiegel, Over de politieke cultuur in Nederland’, in Koen Koch (ed.), *Het nut van Nederland, opstellen over soevereiniteit en identiteit* (Amsterdam 1996), 14, quoted by Jieskje Hollander, ‘The Dutch Intellectual Debate on European Integration (1948-present)’, *Journal of European Integration History*, 2 (2011), 197-218, there 213.

<sup>26</sup> See also Jieskje Hollander, *ibidem*, 197-218, and Jan-Werner Müller, ‘In the Shadow of Statism, Peculiarities of the German Debates on European Integration’, in: Justine Lacroix and Kalypso Nicolaïdis (ed.), *European Stories, Intellectual Debates on Europe in National Contexts* (Oxford 2010), 87-104.

<sup>27</sup> Joschka Fischer, ‘Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration’, Humboldt-Rede, 12. Mai 2000, viewed at 27-09 2013, [http://www.europa.clio-online.de/site/lang\\_\\_de-DE/ItemID\\_\\_17/mid\\_\\_11373/40208215/default.aspx](http://www.europa.clio-online.de/site/lang__de-DE/ItemID__17/mid__11373/40208215/default.aspx)

<sup>28</sup> Charlie Jeffery, *A Regional Rescue of the Nation State*, EUSA Tenth Biennial International Conference, Montreal 2007, viewed at 27-09 2012, <http://aei.pitt.edu/7918/1/jeffery-c-09j.pdf>.

focal point of European identity and transnational solidarity. Habermas supported Fischer's address with various publications on the question 'why Europe needs a constitution'.<sup>29</sup> As a philosopher in postwar Germany, he was and still is deeply involved in debates about the place of law in modern societies. Constitutional law is an important discipline in Germany, with its own libraries, periodicals and scholarly traditions. Thanks to the successive German judgements of the Constitutional Court, professors of constitutional law regularly publish in German newspapers.

In 2005, Dutch intellectuals were hardly aware of these debates. The outcome of the 2005 Dutch referendum on the Treaty establishing a Constitution came as a big surprise to many. Yet, seen from the perspective of the Dutch constitutional culture it might not have been so shocking. A formalistic, detailed, comprehensive basic law is not only unknown, but also considered unnecessary; the Dutch democracy functions rather well without it.

In a 2005 news broadcast *Buitenhof*, in which the German Foreign Minister Joschka Fischer was interviewed on the near referendum, the Dutch philosopher Herman Philipse called the voting a farce and a populist deception of the public. Philipse advised his audience not to vote since one needs days to read the necessary texts to make up one's mind. He also condemned Dutch politicians avoiding further debate by not discussing the Constitution in parliament on forehand. To underline his statement, Philipse tore up his referendum ballot publicly.<sup>30</sup> He rightfully complained about the absence of a serious debate in the Netherlands about the issue. The referendum in both France and the Netherlands finally made clear that the EU depended on public support. The search for the European public became a topical issue in all capitals of Europe. To encounter this problem, the deviating political cultures of the various member states should be bridged in Brussels in such a way that European citizens could identify themselves both with national as well as with European politics.

In Germany too, the public is skeptical about further integration. But the German political as well as the intellectual elite seems to have a more positive attitude towards the EU than the Dutch. They recognise more of their national path dependencies in EU policy than the Dutch do.

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<sup>29</sup> Among others: Jürgen Habermas, 'Why Europe needs a Constitution', *New Left Review* 11, September-October 2001, 5-26.

<sup>30</sup> His second advice was, if one really wants to vote, from a sense of duty, to vote yes, since experts asserted the Constitution to be better than the existing treaties all together. According to the philosopher, one has to rely on experts, if one can not rely on one's own judgment Herman Philipse, VPRO, *Buitenhof*, 22-5 2005, viewed at 27-09 2012, <http://www.vpro.nl/programma/buitenhof/afleveringen/22038356/>.

## *Converging policies*

Considering the deviating paths described above, the differences between the Dutch and German constitutional relationships with the EU are in practice smaller than one might expect. One of the reasons is that the professional communities of lawyers made it their aim to effectuate article 4.3 of the Treaty of the European Union, to cooperate sincerely, and to assist each other with full mutual respect in carrying out tasks which flow from the Treaties. In both countries, the judicial Europeanisation has advanced tacitly.<sup>31</sup> It has been a complex process, often initiated by professional lawyers, who were aware of the necessity to accommodate national to European law, and vice versa. In reaction to the judicial activism of the European Court of Justice, national lawyers adapted their legal systems by actively monitoring and implementing EU law. Particularly when a judgment of the European Court of Justice gave rise to misunderstandings, a judicial ‘ping pong’ match takes place between national lawyers and the ECJ.<sup>32</sup> The judges’ contribution to judicial Europeanisation, often supplied by case law, has been complex to such an extent that it is usually only observed by experts.

Another reason for putting the deviating paths into perspective is that member states politicians have a double role when they are active in the European arena; on the one hand they defend the interests of their home country, on the other hand they seek European solutions to find a way out in times of crisis. This double role makes them, willingly or not, the perfect representatives of both national as well as European interests.<sup>33</sup> Particularly in times of crisis, they tend to find solutions in converging policies, as is shown by the 2012 plan for a ‘genuine economic and monetary union’ of Herman van Rompuy. Since these plans are discussed exhaustively in Brussels as well as in the capitals of the member states, conflicts between national constitutions and European treaties are usually avoided beforehand.

However, the most important reason is that the position of the Karlsruhe Constitutional Court is not as rigid as it seems to be. In its judgments, the Court has indeed demonstrated its Europe-friendliness and its cooperative attitude. Until now, the Court has not interfered in European affairs actively. Instead, it has been focusing on the German decision-making process, for example by defending the rights of the German parliament to be informed

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<sup>31</sup> Anna Katharina Mangold, *Gemeinschaftsrecht und deutsches Recht, Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Tübingen 2011), 487-500, S. Prechal, R.H. van Ooik, J.H. Jans and K.J.M. Mortelmans, ‘Europeanisation’ of the law, *consequences for the Dutch judiciary* (Den Haag 2005).

<sup>32</sup> W.T. Eijssbouts a.o., *Europees Recht – Algemeen Deel, Sinds het verdrag van Lissabon* (Groningen 2010), 22, 366-383, Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law, Cases and Materials* (Cambridge 2010), 168-177.

<sup>33</sup> See Luuk van Middelaar, *De passage naar Europa, geschiedenis van een begin* (Groningen 2009), 39-46.

about the German position in the European Council and to decide on the transfer of sovereignty themselves. Through its judgments, the Court has become an important actor in the field of German as well as European politics. It set itself up as the safeguard of the rights of parliament within an ever-changing Union. With the increase of power of the European Council, this is no luxury but a necessary line defense.

After comparing the German and Dutch constitutional perspectives on European integration, one may ask whether the debate about the Dutch democracy within the EU needs a new impetus.<sup>34</sup> The Netherlands does not dispose of a powerful institution which is able to protect the democratic rights of the parliament, besides the parliament itself. A critical focus on the democratic power and legitimacy of the European Parliament alone would certainly not be sufficient. The Karlsruhe Constitutional Court is right in claiming that ideas to solve a EU democracy deficit should not only focus on the EU level, but revalue democratic traditions at home as well. European integration has brought a decrease of competencies of national parliaments. Since many important decisions are made in Brussels by the Council of Ministers, and since the minutes of the council are confidential, the national parliaments are often dependent on responsible ministers to be informed. The German parliament has better access to confidential EU policy documents than the Dutch have. While the German Bundestag and Bundesrat have access to the public, limited, and restricted EU documents, as well as to the documents of the Committee of Permanent Representatives, the Council Working Group and Briefings, the Dutch MPs have only gained access to the public documents for parliamentary scrutiny.<sup>35</sup> Political control of EU decision making in the Netherlands is not only weakened by the lack of information provided by the Dutch government, but also by a lack of enthusiasm for the subject, as shown by parliamentarians. While in the Netherlands EU-affairs are even in times of crisis often left to a small group of specialised MPs, in Germany, the EU is of interest to all representatives, who, for example in case of the ESM Treaty, all attend the parliamentary debates.

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<sup>34</sup> Ton Nijhuis, 'Ontzet ziet Duitsland het Eurobeleid aan', *de Volkskrant*, 17 september 2012, Erhard Blankenburg, "'Warum brauchen wir kein Verfassungsgericht?'" Die niederländische Diskussion im Licht der deutschen Erfahrung', in: Anita Böcker a.o., *Migratierecht en rechtssociologie, gebundeld in Kees' studies* (Nijmegen 2008), 303-310.

<sup>35</sup> Thanks to Sven Bergmann: Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, *Seventeenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* (Copenhagen 2012), 10, see also: Tineke Strik, 'Nationale parlementen, de hoop van de Europese Unie?', in: Anita Böcker a.o., *Migratierecht en rechtssociologie, gebundeld in Kees' studies* (Nijmegen 2008), 365-376, and Leonard Besselink and Brecht van Maurik, 'The Parliamentary Legitimacy of the European Union, The Role of the States General within the European Union', *Utrecht Law Review*, 8, 1, January 2012, 28-50.

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*In een vrije staat dient iedereen die in het bezit kan worden geacht van een vrije wil, zichzelf te besturen. De wetgevende macht zou dan ook bij het volk in zijn geheel moeten berusten. Maar aangezien zo iets in de grote staten een onmogelijkheid is en ook in kleine staten op veel bezwaren stuit, dient het volk vertegenwoordigers aan te stellen die alles moeten doen wat het volk zelf niet kan.*

Montesquieu, *Over de geest van de wetten* (1748)



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