

Constitutionalizing Environmental Protection in the European Union

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I. Does the European Union have a Constitution?

Any inquiry into the place of the environment in the constitution of the European Union presupposes the existence of such a constitution. This, however, is not self-evident. Especially British authors have often warned against such a premise, arguing that only states can have constitutions. We therefore first have to come to grips with the more general issue of an EU constitution, before we can turn to the more specific question of the constitutional status of the environment.

Since the term has been used in relation with human society,¹ 'constitution' has been understood as the basic political structure of a society. For a long time the understanding of the concept was material, in the sense that the constitution carries a dignity beyond human rule-making, which does not need to be written down. Only with the rise of social contract theories in the seventeenth century, did 'constitution' come to mean a man-made order, often in the form of a written document, forming the basic rules of state and society.

This document was to contain, in modern terms, second-order law, which regulates the formation and application of first-order law.² It should contain, so to speak, the law of laws, or, as Dicey put it: 'Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state.'³ The essential components of such second-order law are the allocation of different tasks to different state institutions, structures of cooperation and mutual checking of those institutions, the basis of their legitimacy (which in a democratic constitution is the people), a mechanism for the adaptation of the constitution to new circumstances, and fundamental rights of the citizen.⁴ In a growing

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¹ Cicero was probably the first, although he relied on the Greek concept of the *politeia* as developed by Plato and Aristotle. See K. Löwenstein, *Verfassungslehre* (Tübingen: J. C. B. Mohr, 1959), 129.

² See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961, repr. 1993), 77 ff. who proposes to distinguish between ('secondary') rules of recognition, of change, and of adjudication of 'primary' rules.

³ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885) (London: Macmillan 1965), 23.

⁴ Löwenstein, n. 1 above, 131.

number of legal systems, second-order law also came to mean that first-order rules violating the constitution were to be considered null and void.

Throughout European history, the making of a constitution has served to domesticate the power of the sovereign. Tradition or charisma, which were the basis of his or her legitimacy, was replaced by legality.⁵ His power was subsumed under a number of higher substantial and organizational rules.

The history of constitutionalism is nothing else but the search of political man for the limitation of the absolute power of the Sovereign, and an attempt to replace blind submission to the existing authority by a spiritual, moral or ethical legitimation of that authority. The legitimation was found in the consent to the exercise of social control by the addressees of power, and in correspondence with this their active participation in the political process.⁶

Can it be maintained that, in the EU, we have a similar situation of pre-state power which must be constitutionalized? Quite obviously the answer is no; there are no sovereign powers to be domesticated, since the powers acquired, and the institutions created, flow from the legal transfer of sovereign rights. In this context of the creation (rather than the control) of government, the term 'constitution' has another connotation, i.e. that of constructing a state-like entity, as opposed to a looser form of international organization.

This manifestation of constitutionalism has acquired particular importance in the context of the evolution of federations out of existing states. An important example is the formation of the 'Constitution' of the 'United States', which was specifically designed to overcome the disastrous experiences associated with its predecessor, the 'Federal Convention' of the Confederation.⁷ Another example is the formation of the *German Reich* and its *Reichsverfassung* of 1871, which is earlier proof that the new entity can be based on concepts of shared sovereignty and double legitimacy.⁸

Although in post-war Western Europe, sovereign rights shifted from the national to the supranational level, the European integration process has been profoundly different from that of the USA. Unlike in the case of the USA, in Europe there has never been an intentional decision to create a federation. The 'Communities' were based on international treaties, and these were not replaced by, or did not develop into a clear-cut constitution, but slowly evolved into a *sui generis* legal order, floating somewhere between a federal state and a union of states. The development is fed by the mutual reinforcement of *sui generis* innovations at EU-level, and supporting and complementary action by the Member States. The result is a highly complex polyarchical regime, an

⁵ M. Weber, *Wirtschaft und Gesellschaft* (Köln/Berlin: Kiepenheuer & Witsch, 1964), 159.

⁶ Löwenstein, n. 1 above, 128 (trans. from the German).

⁷ See the discussion in R. H. Gabriel (ed.), *Hamilton, Madison and Jay on the Constitution: Selections from the Federalist Papers* (New York: The Liberal Arts Press, 1954), in particular no. 39 (Madison).

⁸ For a comparative analysis of the formation of the Deutsches Reich and the EU, see St. Oeter, 'Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union' (1995) 5 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 659–707.

irregulare aliquod corpus et monstro simile,⁹ to use Samuel Pufendorf's earlier characterization of 'das Heilige Römische Reich Deutscher Nation' in the aftermath of the Westphalian peace of 1648, where constitutional theorists struggled with the structure of the *Reich* in a way similar to today's theorizing about the nature of the EU.¹⁰

This *irregulare aliquod corpus* may be characterized as a multifaceted regime, where internal and external sovereignty is shared between the Union and the Member States; supranational structures are supplemented by inter-governmental structures; legitimacy of supranational power is derived not from one but from two fundamentally different sources; the main legislative body (the Council of Ministers) also functions as an executive body; the formal executive body (the Commission) in fact is a clearing mechanism for national bureaucracies; the judiciary is not only the mouth of the law but also its creator and even a constitution builder;¹¹ the formal structures are intricately interspersed with informal networks; and where networks aiming at economic expansion constantly clash with opposing networks defending social and ecological goals.

Although it is both unlikely and undesirable that this polyarchial regime is turned into a federal state, this does not necessarily imply that it should not have a constitution. A different notion of constitution and constitutionalism is demanded in order to understand why there indeed is a need for a constitution, this despite the fact that there exists neither a pre-legal power centre to be transformed into a state, nor a new state to be carved out of existing states. In this third, and more pragmatic conception, the connotation is abandoned that what is constitutionalized must be a state. Rather, constitutionalization can be the object of any organization (which has been defined as a large grouping of people, structured along impersonal lines, and set up to achieve specific objectives).¹² 'Constitutionalization', in this understanding, means to consolidate the basic structures of the organization, and to generate a corporate identity. Such 'concept of law', where no single sovereign power is assumed, but rather where secondary rules gradually evolve out of primary rules,¹³ is more apt to cope with informal and piecemeal institution-building as in the EU. It is a pragmatic approach,¹⁴ which may help to avoid the present stalemate where, on the basis of a state-centred definition of constitution, cre-

⁹ 'Some irregular corpse, similar to a monster.'

¹⁰ Severinus de Monzambano (pseudonym for Samuel Pufendorf), *De Statu Imperii Germanici* (1667), cited in B. Gebhardt, *Handbuch der Deutschen Geschichte*, i (Stuttgart: Union Deutsche Verlagsgesellschaft, 1930), 786.

¹¹ F. G. Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in D. Curtin and D. O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law* (Dublin: Butterworths, 1992), 29. On the methodological implications see K. H. Ladeur, 'Richterrecht und Dogmatik-eine verfehlte Konfrontation? Eine Untersuchung am Beispiel der Rechtsprechung des Europäischen Gerichtshofs' (1996) 1 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 77 ff.

¹² A. Giddens, *Sociology* (Cambridge: Polity Press, 1998), 284.

¹³ Hart, n. 2 above, 107.

¹⁴ E. U. Petersmann, 'Proposals for a New Constitution for the European Union' (1995) 32 *Common Market Law Review*, 1123.

ative reformatory design is often deemed proof of laying the bricks for a European federal state. On the other hand, the wealth of formal and informal patterns, helpful as they may be as a vehicle for flexibility, can lead to anomy and mistrust. Besides the EU, many other international regimes suffer from this disease. The trade and environment complex (WTO and environmental regimes) is a case in point, where debates about constitutionalization have also emerged.¹⁵

The omens for gradual constitution-building for the EU are, however, not all that good. There are different philosophies—*fallacies*, I believe—which frustrate the process.

The first is the fallacy of the technical nature of the EU.¹⁶ It assumes that the Union is a *Zweckverband*, whose tasks are mostly apolitical, and could therefore be adequately discharged by a European executive as it stands. As a corollary, legitimacy is localized more in the chain leading to national parliaments, than in the European Parliament (EP). In reality, in many policy areas, the EU has shouldered responsibility for substantive political tasks, rather than mere technical management. As it has taken up genuine political functions, it must be organized as a polity of its own. To deny this may be a sign of short-sightedness, but more often is a strategic attempt to conceal policy behind a veil of technicality.

The second fallacy is the mediation hypothesis,¹⁷ which presents the EU as a forum for informal and flexible negotiation and cooperation. Its proponents tend to focus on emerging innovative organizational forms, and regard them as close to the best of all possible worlds. This panglossian perspective is not conducive to an organizing normative idea. It sees flexibility, expertise, cooperation, autonomous control, deliberation, etc., as a self-organized process of rationalization,¹⁸ making constitution-building superfluous. Quite obviously, however, it cannot be taken for granted that the enlightened benevolence of polyarchy will necessarily also endure in times of clashing conflicts or inertia, at least if it is not fettered within a clear and formal framework.

The third fallacy is represented by the analogy with the state. Over the years, several ambitious constitutions for Europe were drafted, drawing on the model of a European federal state. Such initiatives were bound to fail, because principles and institutions derived from the state model, such as the separation

¹⁵ Cf. E. U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948' (1994) 31 *Common Market Law Review*, 1157 ff.

¹⁶ This theory has most forcefully been proposed by H. P. Ipsen, 'Zur Exekutivrechtssetzung in der Europäischen Gemeinschaft', in P. Badura and R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65. Geburtstag* (München: Beck, 1993), 425 ff. Another influential author of this school is G. Majone, 'The European Community: An "Independent Fourth Branch of Government"?' in G. Brüggemeier (ed.), *Verfassungen für ein Ziviles Europa* (Baden-Baden: Nomos, 1994).

¹⁷ See R. O. Keohane and S. Hoffmann, 'Conclusions: Community Politics and Institutional Change' in W. Wallace (ed.), *The Dynamics of European Integration* (London: Pinter for the Royal Institute of International Affairs, 1990), 276 ff.

¹⁸ See the contributions by C. Joerges and J. Neyer in C. Joerges and J. Falke (ed.), *Das Ausschusswesen der Europäischen Union* (Baden-Baden: Nomos, 1999).

of powers, distribution of legislative competences, hierarchy of norms and administrative levels, fundamental rights, judicial review, etc., cannot be made operational in the context of EU law without a process of prior adaptation to its *sui generis* nature.

Consequently, the search for a European constitution must start with an inventory of existing legal and factual forms, goals, and principles, which may subsequently be reorganized along more simple and transparent lines and visions of identity, falling short of the model of a state.

II. Constitutionalizing Environmental Protection

It is already difficult enough to find ways to mould the core structures of the European polity in an acceptable constitutional form. This task is even more intricate with regard to the place of the environment, because environmental concern has only recently entered into constitutions in general. Therefore, its proper place has not yet been determined, either on the national or on the supranational level.

On the other hand, we can approach the question more creatively, because the *sui generis* character of the Union also extends to environmental issues. We do not need first to clarify the role of environmental protection in state constitutions, before discussing the same issue in regard of the European polity. Whilst states must find an equilibrium of all interests concerned, the 'irregular' European polity is given special and even unbalanced tasks. Among these may figure an especially important task and, indeed, identity of protecting the environment. This is because the larger the geographic scope of a regime, the more the environment appears as an exhaustible resource. States will not usually see the environment as a highly vulnerable part of the biosphere. Such a perception is more likely to be triggered from a position transcending the states.

No matter if related to a state or a *sui generis* polity, constitutions organize *societal* relationships, including relationships between citizens and governments. As to the question of the place of nature in such a constitution, the answer *prima facie* might appear that protection of the environment should be framed and represented analogous to other interests like the protection of economic entrepreneurship, human health, social security, or consumer interests.

However, this would assume that nature is a concern comparable to any other. Yet it is the very precondition of survival for human society. While the biosphere can exist without human society, the reverse is not true. Human society has developed the potential to destroy earth as a habitat, and despite efforts of conservation, it is still progressively exhausting natural resources and damaging the environment. Approached from the perspective of the habitable biosphere, it would therefore be a misconception if in the European floating polyarchy the environment were represented as an interest on an equal footing with any other interest.

Once we accept that a balanced biosphere is a physical precondition of life, its preservation must be afforded essential and privileged constitutional status. This reorientation will affect all the core elements of the constitution: the overall objectives of the polity, fundamental rights, and the institutions. The objective of government must be extended from economic and social, to ecological welfare, fundamental rights must be complemented by fundamental duties and ecological rights, and the institutions must be made accessible to allow for the representation of ecological interests.

We now proceed to examining if these requirements are reflected in the process of European constitutionalization.

III. The Environmental Objectives of the European Union

Ecological thinking indeed has been written into the proclamation of objectives of the Union, both by the Maastricht and Amsterdam treaties. In the Maastricht version of the treaties, the preamble of the Treaty on European Union (TEU) mentions environmental protection, Article B TEU refers to 'economic and social progress which is . . . sustainable', and Article 2 EC appeals for 'sustainable . . . growth respecting the environment'. The preamble of the TEU in the Amsterdam version once again mentions environmental protection but cites, in addition, 'the principle of sustainable development', Article 2 TEU repeats the need for 'balanced and sustainable development', and Article 2 EC combines the 'balanced and sustainable development' with 'a high level of protection and improvement of the quality of the environment'.

In sum, the objectives apparently adopt a double approach: environmental protection and sustainability. The older concept of protection has been flanked by the more recent of sustainability. This does not mean that the former concept has become obsolete. Both objectives can be understood to be complementary. In what precise sense needs to be clarified, however.

One suggestion is to understand sustainability as concerned with the consumption of natural resources (such as forests, water, minerals, or arable land), whilst the focus of protection is concerned with the utilization of environmental media (such as the atmosphere, soil, or inland waters and the sea) as absorption potential for many kinds of residues (such as exhaust, sewage, or waste). The fact that Article 174(1) EC distinguishes between protection of the environment and utilization of natural resources speaks in favour of this interpretation.¹⁹

Another and more profound interpretation would be based on a shift of paradigm. Protection, more traditionally, involves the shielding of the environment against overexploitation, inferring from what the environment can tolerate what the economy must refrain from, whereas sustainability concerns the inner logic of the economy, demanding that environmental protection is

¹⁹ Cf. J. Jans, *European Environmental Law* (Groningen: Europa Law Publishing, 2000), 28.

perceived as a (long-term) self-interest of the economic actor. In this instrumental perspective, whereas for protection it would suffice that production processes are subjected to 'external' threshold values, sustainability would necessitate that environmental concerns be part of the management structure of firms.

The EU objectives might be expressed more clearly in the future. A concept integrating protection and sustainability should be developed. The notion of the liveable biosphere of which man is at the same time subject and object, may be considered as appropriate. Reference can be made to the UNESCO concept 'man and the biosphere'.²⁰ However, the double approach is also valuable as it stands, no matter what interpretation prevails. It serves as a point of reference for more detailed principles, the allocation of competencies, and institutional design.

IV. Basic Obligations and EC Action

Normal constitutions usually accept the *Kompetenz Kompetenz* of the state as an implicit basis, and seek to define those powers in the context of, *inter alia*, fundamental rights which limit state action. Such constitutions have traditionally been reserved about incorporating programmatic proclamations, driving the state to act. One of the characteristics of the EU, which distinguishes it from a state, is that the Union is driven by a programme of action, and that the bases for competence, for secondary law-making, are framed as means for fulfilling that programme, or even as obligations to do so. This dynamic feature could be particularly useful as regards a specific policy focusing upon the preservation of the biosphere.

Numerous programmatic principles on environmental matters are found in the EC treaty. They are contained in:

- the integration principle (Article 6 EC),²¹
- the objectives of preservation of the environment, protection of human health, rational utilization of natural resources, and promotion of measures at international level (Article 174 (1) EC),
- the principles of aiming at a high level of protection, precaution, and prevention, of rectification at source and of making the polluter pay (Article 95(3) and Article 174(2) EC), and
- circumstances to be taken into account such as the available scientific data, diverging regional conditions, potential advantages and drawbacks of action, and the balanced development of the regions (Article 174(3) EC).

²⁰ See Resolution 28 C/2.4 of the UNESCO General Assembly. See also G. Winter, 'Umwelt-Ressource-Biosphäre. Ansichten von Natur im Recht' (2000) 3 *GALIA*, 200 ff.

²¹ The integration principle, in combination with the principles of high levels of environmental protection and of sustainable development, was also adopted by Art. 37 of the Charter of Fundamental Rights.

Most of these provisions are relatively vague. Some guidance may be derived from the terminology employed in the Treaty in Article 174 EC, distinguishing between objectives (para. 1), principles (para. 2, sentence 2), and criteria to be taken into account (para. 3). Although some of these requirements conflict, they are not unfit for case-related concretization and compromise. For instance, the apparent contradiction between precaution and respect for scientific data may be solved by understanding this to mean that beyond scientific proof there is room for extrapolations from the known to the uncertain.²²

Since the meaning of the provisions cited clearly can be concretized, the question poses itself as to what extent they have legal effect. Are they perhaps merely unenforceable programmatic policy guidelines without any such effect? The question remains controversial among commentators.²³ Whether these provisions have binding force, and if so, what the substance of the obligation is, should be answered differently depending on the context where the requirements are to be applied. Four different contexts may be distinguished:

- the framing of EC competencies,
- the justification of incursions, by EC action, of fundamental rights,
- the obligation of the EC institutions to act, and
- the directions for EC action.

In the first and second contexts, i.e. competencies for action and justifications of restrictions of fundamental rights, the requirements have an *enabling* character, which without doubt entail legal effects.

With regard to competencies, this legal effect of the objectives is expressed by the reference made to them in Article 175(1) EC, whilst the principles and criteria have been given legal value by the case law of the ECJ. For instance, in the *BSE* case, the Court of Justice, referring to the principles of high level of protection, prevention, and integration, held that 'where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent'.²⁴ In the *Bettati* case the court has even given the criterion of taking account of available scientific and technical data legal effect.²⁵

As to encroachments upon fundamental rights, the European courts have very rarely invoked the objectives and principles of Article 174 EC as a source for justification. It seems that the national plaintiffs challenging action based on EC environmental legal acts seldom allege that these laws violate European fundamental rights. One rare example is *Standley*.²⁶ This is interesting from a

²² Jans, n. 19 above, 33.

²³ *Pro*: A. Epiney, *Umweltrecht in der Europäischen Union* (Köln: Heymanns Verlag, 1997), 108. *Contra*: L. Krämer, *EC Environmental Law* (London: Sweet & Maxwell, 2000), 8; Jans, n. 19 above, 32; both authors referring to the principle of a high level of protection.

²⁴ Case C-180/96, *United Kingdom v. Commission* [1998] ECR I-2265, para. 99.

²⁵ Case C-341/95, *Gianni Bettati v. Safety High-Tech Srl* [1998] ECR I-4355, para. 48 ff.

²⁶ Case C-293/97, *R. v. Minister of Agriculture, Fisheries and Food, ex p. Standley and others* [1999] ECR I-2603. The relevant passage is found in paras. 55 and 56 which read: 'It is true that the

German perspective, because German environmental laws have often been challenged on the basis of fundamental rights, such as the right of free enterprise or private property. It is true, however, that the European courts have sometimes referred to environmental protection principles as a yardstick for a proportionality test (which, although being an element of a more comprehensive examination of violations of basic rights, is sometimes used as a separate yardstick). For instance, in the *Bettati* case the Court of Justice ruled that the regulation restricting the use of a chemical was proportional in relation to its environmental protection goal.²⁷

As to the substance of the requirements of Article 174 EC, their full meaning should be appreciated in the enabling context. For instance, in the *Safety Hi-Tech* judgment the Court applied the principle of a high level of protection, but did not find it had been violated in the present instance, because the principle did not require the 'technically highest level'.²⁸ The Court was further asked to decide whether a marketing restriction of a chemical substance always requires a comprehensive assessment of its effects on all of the relevant environmental compartments. The Court ruled that it was sufficient to show negative effects on just one compartment, which in the given case was the ozone layer, whilst it did not find it necessary also to assess effects on the warming up of the atmosphere.²⁹ This example shows that the Court does explore the full meaning of Article 174 EC.

It should be added that, by implication, in the enabling context, there is room for reasoning *a maiore ad minus*. Article 174 EC sets out the minimum standards for action, and does obviously not exclude that, if even more compelling reasons exist the measure may also be taken. For instance, since a Community measure can be based on the precaution principle, it can of course also be taken if there is an imminent danger of environmental damage. Similarly, because a Community act pursuing a high level of protection may have restrictive effects for the relevant actors, it can all the more be adopted if the measure envisaged is less restrictive. Another implication of the enabling character is that even one ground for action suffices, in other words not all of the imperatives need to have been fulfilled. This was the dominant message of the *Safety Hi-Tech* judgment.

In the third and fourth contexts, EC action is mandated and directed. It is of the utmost importance to know if and to what extent the EC institutions (and,

action programmes which are provided for in Art. 5 of the Directive and are to contain the mandatory measures referred to in Annex III impose certain conditions on the spreading of fertilizer and livestock manure, so that those programmes are liable to restrict the exercise by the farmers concerned of the right to property. However, the system laid down in Art. 5 reflects requirements relating to the protection of public health, and thus pursues an objective of general interest without the substance of the right to property being impaired.'

²⁷ Case C-341/95, n. 25 above, para. 54 ff.

²⁸ Case C-284/95, *Safety Hi-Tech Srl v. S & T Srl* [1998] ECR I-4301, para. 49. See also Case C-233/94, *Germany v. European Parliament and Council* [1997] ECR I-2405, para. 48 for the respective clause in Art. 95, para. 3.

²⁹ *Ibid.*, para. 45.

as will be seen, also Member States) are pushed to take environmental protection measures. The environment, although recognized as a reason for justifying encroachments upon competencies and freedoms, will normally bear the burden of proof in these contexts. By contrast, if there is an obligation to act, the burden of proof that some environment protection measure is unsound is shifted to the other (the economic) side.

Unfortunately, as yet no case law exists as to the legal effect of environmental obligations. However, to deny legal effect from the outset would contradict the general approach the ECJ pursued as regards programmatic clauses since its judgment of 1985, when it held that the obligation under Article 75 (now 71) EC to take action towards a common transport policy, although allowing for a margin of discretion, binds the Council.³⁰ It is true, however, that those measures are more exactly circumscribed in Article 71 EC than in Article 174 EC. The nature of the obligation here is to establish a 'Community policy on the environment', whereas Articles 71 and 72 EC require a number of specific legal acts. Interestingly, however, the integration principle of Article 6 EC refers to policies, and also to 'activities'.³¹

Assuming the mandatory legal effect of such obligations, their content differs from the enabling context. Not every single objective, principle, or criterion can be said to amount to an obligation to act or instruction to be followed. Given the comprehensiveness of the programme contained in Articles 2 and 174 EC, the political process of legislation would otherwise be strangled, and ultimately handed over to the discretion of the courts. Therefore, only some fundamental and indispensable requirements should be afforded binding effect.³²

The methodology of distilling those binding principles, however, remains to be developed. For the purpose of laying bare the envisaged core, it would be useful to 'mirror' the design previously discussed in the enabling context. This would give rise to the following kind of reasoning:

- if *precautionary* measures are admissible, measures which abate *imminent and severe dangers* should be obligatory;
- if measures aiming at a *high level* of protection are admissible, measures aiming at a *minimum level* of protection should be obligatory;
- if measures *improving* environmental conditions are admissible, measures *preserving* a given environment should be obligatory;
- if measures which *substantially integrate* environmental requirements into any other policy are admissible, a *reasoned and public statement* about the environmental consequences of a measure must be obligatory.

An alternative to mandating protective action is to prohibit detrimental action. It is more modest and realistic but would nevertheless be a significant

³⁰ Case 13/83, *European Parliament v. Council* [1985] ECR I-1513, para. 49.

³¹ Art. 6 EC.

³² Alternatively, one might postulate that the requirements are indeed binding in all respects, but that the relevant regulators have a wide margin of appreciation. But this approach to the problem is less suggestive for the purpose of elaborating the core of indispensable duties.

step forward. Such a proposal was made by the newly founded Avosetta Group. A new paragraph to be inserted into Article 6 EC was suggested, which would read: 'Subject to imperative reasons of overriding public interests, significantly impairing the environment or human health shall be prohibited.'³³

V. Basic Rights to EC Action?

From a radical democratic perspective, it may be argued that EC decision-making should not be bound by basic environmental rights. In this view, policies should be an outcome of democratic political processes which contain sufficient safeguards against unresponsive attitudes. But even if we (unrealistically) assume that a democratic polity exists at EC level, the crucial problem is that fundamental rights have already been developed that bind the legislature, and that economic and ecological stakes are unevenly represented. A simple example may illustrate this imbalance. Let us assume that a German enterprise encounters difficulties exporting goods to Spain. Numerous basic rights may be invoked by the undertaking to challenge this obstacle, such as:

- the German basic right to free enterprise (Article 12 of the German Federal Constitution), if the restriction is German;
- the Spanish basic right to free enterprise (Article 38 of the Spanish Constitution), if the restriction is Spanish;
- the basic EC freedom of trade (Article 28 EC), if the restriction is German or Spanish;
- the basic EC right to free enterprise as developed by the ECJ, if the restriction is European;
- the basic EC right to free enterprise if the restriction is German or Spanish, but based on EC law;
- the basic right to property guaranteed by the European Convention on Human Rights (ECHR), if the restriction is German or Spanish (Article 1 of the 1st Additional Protocol to the ECHR);³⁴
- in future possibly a basic right to free enterprise as provided by the General Agreement on Tariffs and Trade (GATT).

Of course, these basic rights are not absolute, and the restriction therefore could well be found constitutional. What this example shows, however, is that *homo oeconomicus* is privileged by virtue of the possibility to invoke judicial review, as well as by the shift of the burden of proof from the necessity to protect economic freedom, to the necessity to protect the environment or other social goods.

³³ For a commentary on this draft, see on the Internet at: <http://www.uni-bremen.de/~avosetta>.

³⁴ The ECHR guarantee of property has been interpreted broadly by the European Court of Human Rights (beginning with ECHR 23 Sept. 1982, A52, *Sporrong and Lönnroth v. Sweden*). Also, know-how and its usage is protected against unjustified state intrusion. Therefore, in our case, Art. 1 indeed may be invoked. See L. Condorelli in L. E. Pettiti, E. Decaux, and P. H. Imbert (eds.), *La Convention Européenne des Droits de l'Homme* (Paris: Economica, 1995), 977 and 994.

In stark contrast, constitutional environmental rights are generally lacking. This becomes also apparent from a survey of national constitutions. Article 45 of the Spanish constitution and Article 66 of the Portuguese constitution³⁵ *prima facie* seem to be exceptions in this regard, but closer analysis shows that, as for the Spanish provision, this is regarded as a mere guiding principle which does not provide access to the Constitutional Court.³⁶ Nevertheless, basic rights of other content do have environmental implications.³⁷ In so far as human health is dependent on environmental conditions, the right to human health found in many constitutions may serve as a vehicle upon the back of which some environmental protection may also be carried.³⁸ The same kind of reasoning applies with regard to the protection of private property. For example, to the extent that polluted air impairs the growing of crops, the fundamental right to property also touches upon environmental conditions. However, beyond this overlap with immediate human health or property, the environment is normally not framed in terms of a subjective right in national constitutions.

At the level of EU constitutional law the situation is similar. Case law has established the fundamental right to private property, which also covers environmental dimensions in appropriate cases. Although a right to personal health has not yet been formally introduced,³⁹ at least the Fundamental Rights Charter proposes, in Article 3, everybody's 'right to respect for his or her physical and mental integrity'.⁴⁰ Subsequent case law may develop which holds (along the lines of the judgments of the European Court of Human Rights in relation to Article 8 ECHR)⁴¹ that the right is breached where the Community

³⁵ See Art. 45, para 1 of the Spanish constitution: 'Everyone has the right to enjoy an adequate environment for the development of the person, as well as the duty to preserve it', and Art. 66, para. 1 of the Portuguese Constitution: 'Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.'

³⁶ A. M. Moreno, *The Right to Environmental Protection in the Spanish Constitutional System* (paper presented to the Avosetta Group, 12/13 Jan. 2001; published on the Internet at: <http://www.uni-bremen.de/~avosetta>).

³⁷ For a comparative analysis, see M. Ruffert, *Subjektive Rechte im Umweltrecht der Europäischen Gemeinschaft* (Heidelberg: R. v. Decker's Verlag, 1996), 50 ff.

³⁸ For instance, in a judgment concerning a fast breeder reactor, the German Constitutional Court held that the individual has a right to demand health protection against possible damages caused by the reactor. The Court, however, found that this right was not violated in the particular case (*Bundesverfassungsgericht* (Federal Constitutional Court) 8 Aug. 1978, (1979) 49 *Entscheidungen des Bundesverfassungsgerichts*, 140 (Kalkar)).

³⁹ Cf. B. Beutler in H. von der Groeben, J. Thiesing, and C. D. Ehlermann (eds.), *EG-Vertrag. Kommentar* (Baden-Baden: Nomos 1997), Art. F nos. 55–62.

⁴⁰ [2000] OJ C364/1

⁴¹ See ECtHR 9 Dec. 1994, A303-C, *Lopez Ostra v. Spain*:

Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of a positive duty on the State—to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Art. 8 (Art. 8-1)—, as the applicant wishes in her case, or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (Art. 8-2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin

fails to take protective action in the case of severe environmental degradation.⁴² As a procedural safeguard, the Fundamental Rights Charter establishes, in Article 42, every citizen's right of access to official documents, including those concerning the environment. One may also mention the fundamental right, proposed in Article 41(2), of every person to be heard before any individual measure which would affect him or her adversely, is taken, which might be extended to third parties affected. However, a genuine substantive right to appropriate environmental conditions or a procedural right of public participation has not been recognized. The Charter confines itself to laying down an objective principle of environmental protection, not a subjective right of the individual or collectives.⁴³

This is especially striking, because at the level of secondary EC law a number of subjective rights have been introduced.⁴⁴ In particular, procedural rights have been provided, such as the right of access to information, the right to be informed, and the right to comment on certain projects.⁴⁵ There are also rights of a more substantive character, where environmental quality standards are set with a view to protect human health.⁴⁶

Of course, it is difficult to frame a fundamental right with sufficient specificity so as to allow for its judicial protection.⁴⁷ Indeed, the phrasing to be found in many texts is vague, both in national and international legal documents.⁴⁸ For instance, according to the Stockholm Declaration of 1972 'man has the fundamental right of . . . adequate conditions of life, in an environment of quality that permits a life of dignity and well-being'; according to the Rio Declaration of 1992, 'human beings . . . are entitled to a healthy and productive life in harmony with nature'.

of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Art. 8 (Art. 8-1), in striking the required balance the aims mentioned in the second paragraph (Art. 8-2) may be of a certain relevance.

See also ECtHR 19 Feb. 1998, Reports 1998-I, *Guerra v. Italy*, para. 60. For a comprehensive account of the environmental case law of the European Convention of Human Rights, see P. Szczekella, 'Grundrechte' in H. W. Rengeling (ed.), *Handbuch zum Europäischen und Deutschen Umweltrecht—i* (Köln: Carl Heymanns Verlag, 1998).

⁴² R. Macrory, *Environmental Integration and the European Charter of Fundamental Rights* (paper presented to the Avosetta Group, 12/13 Jan. 2001; published on the Internet at: <http://www.uni-bremen.de/~avosetta>). For the problems of doctrinal construction of negative rights and protection obligations, see Szczekella, n. 41 above, nos. 20–6, 38.

⁴³ Art. 37 of the Charter.

⁴⁴ See for a wealth of examples including consumer rights N. Reich, *Bürgerrechte in der Europäischen Union* (Baden-Baden: Nomos, 1999); C. Hilson, 'Implementing EC Environmental Law in the UK' in J. Holder (ed.) *The Impact of EC Environmental Law in the United Kingdom* (New York/Chichester: John Wiley, 1997).

⁴⁵ See Case 131/88, *Commission v. Germany* [1991] ECR I-825 for a right that certain investigations required by Council Dir. 80/68/EEC on the Protection of Groundwater Against Pollution Caused by Certain Dangerous Substances ([1980] OJ L20/43) are implemented.

⁴⁶ See Case 361/88 *Commission v. Germany* [1991] ECR I-2567 for a right that certain air quality standards set up by Council Dir. 80/779/EEC on Air Quality Limit Values and Guide Values for Sulphur Dioxide and Suspended Particulates ([1980] OJ L229/30) are respected.

⁴⁷ This concern leads even 'subjectivists' to warn against the introduction of a basic right. See, e.g., Ruffert, n. 37 above, 43.

⁴⁸ L. Krämer, 'The Citizen and the Environment' (1999) 3 *Resource Management Journal*, 1 ff.

But this difficulty is associated with any fundamental right, including economic rights. No constitution specifies the precise content of the right to economic activity, the rationale of which is, as was observed, predominantly to reallocate burdens of proof, and instigate judicial review. The judiciary is familiar with, and has developed techniques to gradually concretize, vague formulas through case law. Initially, rights may be constructed merely as procedural safeguards and a check against arbitrary action, whilst the substantive content may be confined to an indispensable core.

In addition, there is the substantive objection of the difference between individual and collective environmental interests. The interests of individuals do not necessarily coincide with those of the environment. For instance, a landowner claiming liability for damage caused to crops may be satisfied if economic loss is compensated, and hence refrain from insisting on the return of the biotope in its original state. It would need an unrealistic measure of altruism for any individual also to defend the collective interest of environmental preservation, all the more so because legal action involves the risk of costs in the case of failure. This remains true even if some progress may be expected from the emergence of a more broadly concerned *homo oeconomicus*, such as in the concept of green consumerism.⁴⁹

Scepticism is therefore appropriate with regard to an over-extensive citizen suit, as envisaged by Article 9(3) of the Aarhus Convention.⁵⁰ Environmental associations should step in, and be given rights and standing, as has often been proposed,⁵¹ and recently once more been brought on the agenda by the said Aarhus Convention.⁵² It is to be hoped that the European Commission will propose a horizontal directive in this regard, covering public participation and access to justice.⁵³ What is emphasized here is that it is now necessary to provide environmental organizations with a constitutional position. The model which may be followed is that of Article 139 EC, which institutes an EC-wide dialogue and contractual status of management and labour.

⁴⁹ T. Wilhelmsson, 'Consumer law and the environment: from consumer to citizen' (1998) 21 *Journal of Consumer Policy*, 45 ff.

⁵⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), published on the Internet at: <http://www.unece.org/env/> (not yet in force). Art. 9 (3) reads:

In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative and judicial procedures to challenge actions and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

On the question whether the 'if any' makes the provision void or, on the contrary, allows for a limitless citizen suit, see J. Jendroska, *Aarhus Convention: Towards New Era in Granting Individual Rights in International Environmental Law* (paper presented to the Avosetta Group, 12/13 Jan. 2001; published on the Internet at: <http://www.uni-bremen.de/~avosetta>).

⁵¹ See for a recent summary account including further references Krämer, n. 48 above, 12.

⁵² See Art. 9 (2), subpara. 2, sentence 2.

⁵³ Unfortunately, this widely discussed project is not listed as a measure in the draft 6th Environment Action Programme (COM(2001)31, 24 Jan. 2001).

VI. Basic Obligations and Member State Action

Principles of EC environmental law not only bind the EC institutions but possibly also the Member States. Two kinds of influence may be distinguished.

First the objectives, principles, and criteria laid down in Article 174 EC can be invoked for the purpose of justifying national market regulation intruding into basic Community freedoms. As with the case where Community action is backed by the principles of Article 174 EC, we may term this an enabling function.

Environmental protection has been accepted as a reason for domestic regulation since the *Danish Bottle* case.⁵⁴ The same is true with regard to the protection of human health, if only because human health already figures among the interests mentioned in Article 30 EC.⁵⁵ But the rational utilization of resources also should be accepted as a valid justification for trade restrictions. For instance, under this justification a Member State could hinder shipments of waste for recovery to another Member State, arguing that national technology of recovery is more effective.⁵⁶

As to the principles in Article 174(2) EC, which concretize those environmental objectives, the ECJ in *Wallonian Waste* regarded the principle of rectification of damage at source a legitimate ground for Member State waste regulation incorporating the principle of self-sufficiency.⁵⁷ The principle of abatement of pollution at source consequently is a legitimate general interest in the sense discussed here. We may infer from this that the same applies to other principles, such as precaution and prevention.

The second kind of influence exerted by EC principles on national measures is not related to their enabling, but to their obliging potential. Member States are certainly not obliged to respect EC environmental protection principles in the pursuit of normal national political business. But to the extent they do apply EC law, notably in transposing EC directives, arguably they then also have to abide by those principles. This indirect obligation finds its precedent in the reasoning of the ECJ in *Wachauf*. The Court held that national authorities, when implementing EC milk quota regulations, must respect the EC

⁵⁴ Case 302/86, *Commission v. Denmark* [1988] ECR-4607, para. 9. For a full account of the case law see H. Temmink, 'From Danish Bottles to Danish Bees: the Dynamics of Free Movement of Goods and Environmental Protection. A Case Law Analysis' (2000) 1 *Yearbook of European Environmental Law*, 61-102.

⁵⁵ Case C-473/98, *Kemikalieinspektionen v. Toolex Alpha AB* [2000] ECR I-5681, para. 38. On differences of terminology in Art. 174 EC and Art. 30 EC, see Jans, n. 19 above, 27.

⁵⁶ In the *Dusseldorp* case (Case C-203/96, *Chemische Afvalstoffen Dusseldorp and others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075), where Dutch export restrictions for waste for recovery were at stake, the ECJ could have invoked the general interest in prudent resource utilization. But the Court was not asked to express itself on this matter, and the case itself did not necessitate such a ruling, because recovery technology in the country of destination was not less effective than the one in the country of origin. See G. Winter, 'Die Steuerung Grenzüberschreitender Abfallströme' (2000) 10 *Deutsches Verwaltungsblatt*, 657 ff.

⁵⁷ Case C-2/90, *Commission v. Belgium* [1992] ECR I-4431, para. 34.

fundamental right of private property.⁵⁸ Although this reasoning concerns fundamental rights,⁵⁹ there is no reason why it should not also be applicable to fundamental environmental principles framed in more objective terms.

In line with the distinction between enabling and obliging contexts, it is understood that we are dealing with an obliging context here. Therefore, only indispensable core principles will produce such binding effects.

Assuming that Member States' legislation pursues a respectable level of environmental protection, the principle of an indirect impact of EU principles may not appear of much practical significance. One crucial exception, however, is formed by the integration principle. This principle is a novelty in almost all Member States. For instance, according to this principle, an EC directive on the liberalization of the energy market must be transposed into national law by Member States in a way that takes into consideration the environmental implications.⁶⁰

One further element of the relationship between national and EC law should be considered in connection with the foregoing. EC primary and secondary law also impacts on national constitutions, which has become most visible in the arena of human rights. The basic freedoms established by the treaties have led national constitutional courts to reinterpret national constitutional freedoms. For instance, the German freedom of enterprise (Article 12 of the German Federal Constitution) was reconstructed so as to apply not only to Germans, but also to other EU citizens.⁶¹ In the environmental field, the basic freedoms of manifestation and association (Articles 8 and 9 of the German Federal Constitution) must similarly be extended to any EU-citizens.⁶² The objectives of environmental protection of the former Article 130r EC have influenced the introduction of a similar objective into Article 20a of the German federal constitution. Likewise, it could be argued that the EC concepts of 'integrated pollution control' and 'river basin management' necessitate a shift of competencies for water legislation from the *Länder* to the *Bund*, turning the present framework competence into a concurrent competence of the *Bund*. This would facilitate the task of the federal legislature to preside over integrated air, water, and nature-related licensing, and to organize water management in river basins where they transcend the jurisdictions of the *Länder*.

⁵⁸ Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR-2609, para. 19.

⁵⁹ See for a fuller account M. Ruffert, 'Die Mitgliedstaaten der Europäischen Gemeinschaft als Verpflichtete der Gemeinschaftsgrundrechte' (1995) 22 *Europäische Grundrechte Zeitschrift*, 518 ff.

⁶⁰ R. Macrory, *Environmental Integration and the European Charter of Fundamental Rights* (paper presented to the Avosetta Group, 12/13 Jan. 2001, 8; published on the Internet at: <http://www.uni-bremen.de/~avosetta>); N. de Sadeleer, 'Les Fondements de l'Action Communautaire en Matière d'Environnement' in L. le Hardy de Beaulieu (ed.), *L'Europe et Ses Citoyens* (Frankfurt am Main: Peter Lang, 2000), 112; both authors discussing more examples.

⁶¹ For the related doctrinal controversy see H. Bauer, 'Europäisierung des Verfassungsrechts' (2000) 122 *Juristische Blätter* 750, 758.

⁶² *Ibid.*

VII. Subsidiarity

EC environmental policy is, pursuant to the principle of subsidiarity, 'subsidiary' to Member State environmental policy. Although the debate of the early 1990s about the precise meaning of the principle of subsidiarity as expressed in Article 5(2) EC has now settled down, four important points of controversy remain, which have also a bearing on environmental action.

The first such question is whether the subsidiarity principle *a priori* aims at minimizing EC measures, or concerns the optimal level of regulating any given problem. The 1987 Treaty had adopted the second approach,⁶³ which was, in this respect, confirmed by the 5th Environment Action Programme. The Commission used to pursue this approach in its practice of motivating legislative proposals.⁶⁴ However, by introducing a two-step test (insufficiency of Member State action, and better achievement by Community action), the wording of Article 3b(2) of 1993 and Article 5(2) of 1997 seem to support the first interpretation. Such a reading would imply that, once it is concluded from the first test that Member State action sufficiently achieves the objective, the question of whether EC action could not be still more effective becomes obsolete. Such an outcome is highly undesirable. It is even logically unfeasible. For, how could the adequacy of national measures be assessed without prior consideration of the alternative at EC level? Therefore, it is submitted that the two steps proposed by the principle of subsidiarity are rearranged, so that as a first step the national and EC alternatives are identified, and subsequently assessed in the light of criteria of the kind listed in the Protocol on subsidiarity⁶⁵ and other documents⁶⁶ and publications⁶⁷ (transnational effect, conflict with requirements of the Treaty, economies of scale, effects on investment and quality of life, scale of the problem, etc.).

The second problem relates to the question whether, once the competent level has been determined, the relevant organs are obliged rather than permitted to use their powers. Those who argue that this is indeed the case understand 'subsidiarity' literally as 'providing assistance'.⁶⁸ Whereas in a political discourse about subsidiarity this may be considered, it would be to overstate

⁶³ Art. 130r read: 'The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member State.'

⁶⁴ e.g. Proposal for a Council Directive on Integrated Pollution Prevention and Control, COM(93)423, 14 Sept. 1993, 11.

⁶⁵ Protocol on the Application of the Principles of Subsidiarity and Proportionality (Annex to the Treaty of Amsterdam), para. 5. For an interpretation of the Protocol, see Jans, n. 19 above, 12.

⁶⁶ Earlier lists of the Council and the Commission as well as the German and even the Bavarian Government are reproduced in D. Mertens (ed.), *Die Subsidiarität Europas* (Berlin: Duncker & Humblot, 1993).

⁶⁷ L. Krämer, *EC Treaty and Environmental Law* (London: Sweet & Maxwell, 1998), 76, citing H. Sevenster.

⁶⁸ Cf. V. Constantinesco, "'Subsidiarität': Magisches Wort oder Handlungsprinzip der Europäischen Union?' (1991) *Europäisches Wirtschaftsrecht*, 561.

the force of subsidiarity as a legal principle.⁶⁹ If one accepts the notion of a constitutional duty to act, then this should be derived from the specific policy-related provisions of the Treaty (such as those discussed earlier), rather than from a general understanding of subsidiarity.

The third point of controversy is whether subsidiarity merely requires a comparison of Member State action with EC alternatives or, in addition, a comparison of public action with private forms of self-regulation. Although subsidiarity in the Catholic tradition extends to the government–society comparison, according to the clear wording of Article 5 EC the principle is exclusively related to the Member State–EC dimension. The question whether the goal could be better attained by self-regulation, is a matter to be judged in the light of the proportionality principle. To be sure, in this instance we should apply the unwritten version, associated with the justification of encroachments on basic rights, rather than the one contained in Article 5(3) EC, the latter, in common with the other sections of Article 5 EC, exclusively concerning the Member State–EC dimension.⁷⁰ In its proposals for legal acts, the Commission not always separately identifies these two dimensions, even though it would contribute to transparency if it were to do so.

This applies in particular to instances where legal acts operate to deregulate a policy area. Often, deregulation has been confused with subsidiarity⁷¹ and even 'promoted' by using the rhetorics of subsidiarity.⁷² Deregulation, however, is a matter of political discretion rather than imperative command. A genuine enquiry into the necessity of any measure, if compared with self-regulation, would require the Commission to prove that the problem can equally well be resolved by self-regulation. Mere reference to subsidiarity should not free the Commission from this enquiry.

A fourth point relates to the fact that the Commission often provides a quantified account of the costs and benefits of Community action measured against lower degrees of integration or inaction. This has occasionally provoked bizarre calculations of the gains of avoided fatalities valued in euros as opposed to costs of pollution abatement. For instance, in the Proposal for a Council Directive Relating to Limit Values for Sulphur Dioxide, Oxides of Nitrogen, Particulate Matter and Lead in Ambient Air, the Commission estimated the expected additional costs at 48 million ecu, and the expected gain in avoided mortality at up to 3.784 million ecu per year, human life being valued as up to 4.2 million ecu.⁷³ Whereas it is perfectly reasonable, and even required by the Protocol on subsidiarity, to consider financial burdens which actually fall upon public and private actors,⁷⁴ an exercise of artificial monetization of intangible goods is unsound and also not required by subsidiarity as a legal principle. Even if the instance cited may appeal to environmentalists,

⁶⁹ G. Winter, 'Subsidiarität und Deregulierung im Gemeinschaftsrecht' (1996) *Europarecht*, 259.

⁷⁰ *Contra*: Jans, n. 19 above, 14 ff.

⁷¹ Krämer, n. 67 above, 73.

⁷² Winter, n. 69 above, 263.

⁷³ COM(97)500, 14 Jan. 1998, 18 ff.

⁷⁴ Protocol on the Application of the Principles of Subsidiarity and Proportionality, n. 67 above, para. 9, 3rd indent.

this should not excuse poor methodology.⁷⁵ Obversely, in the case of benzene standards, the Commission's assessment of costs and benefits found that the abatement costs were excessive compared to the benefits. The Commission made some effort to correct this undesirable outcome with some qualitative arguments, which had the taste of *corriger la fortune*. More realistic is the Commission's approach in the Proposal for a Council Directive Establishing a Framework for Community Action in the Field of Water Policy, where it stated:

Given the said difficulties, the Commission concludes that any assembling of figures or estimations concerning a financial cost/benefit analysis would at best be unreliable and at worst misleading or quite simply wrong. Therefore, in the following analysis mainly the kind of cost/benefit factors involved by the proposal are given. Figures are only submitted in order to convey an idea of the order of magnitude of the costs of monitoring and management.⁷⁶

VIII. The Making of Tertiary Law

The term 'tertiary law' refers to regulations, directives, and decisions giving EC secondary law concrete significance. Tertiary law is of particular importance in environmental policy, because it is an important tool for fixing technical standards. The immense multitude of processes and products putting stress on nature requires fast-track procedures. However, this conflicts with the need for scientific proof and stakeholder participation, which makes standard-setting a time-consuming business.

Instruments therefore must be found at the EC level allowing for the process of tertiary rule-making to be accelerated. Four manifestations currently employed deserve brief consideration:

- The Council acts, be it alone or jointly with the EP. This is the case with for instance market restrictions for toxic chemicals.⁷⁷
- The Commission acts in the context of one of the structures pursuant to comitology. This procedure is usually employed for process and environmental quality standards.⁷⁸
- Standards may be elaborated by standardization institutions made up of representatives of the relevant industry, directed by general secondary law criteria, exposed to third-party comments, and supervised by the

⁷⁵ See COM(98)591, 24 Feb. 1999, 15. On efficiency analysis in environmental regulation in general, see G. Winter, 'Nutzen und Kosten der Effizienzregel im Öffentlichen Recht' in E. Gawel (ed.), *Effizienz im Umweltrecht. Grundsatzfragen Wirtschaftlicher Umweltnutzung aus Rechts-, Wirtschafts- und Sozialwissenschaftlicher Sicht* (Baden-Baden: Nomos, 2000).

⁷⁶ COM(97)49, 17 June 1997, 22 (my translation).

⁷⁷ L. Krämer, 'Introduction into the European Chemicals Regulation: Basic Structures and Performance' in G. Winter (ed.), *Risk Assessment and Risk Management of Toxic Chemicals in the European Community* (Baden-Baden: Nomos, 2000)

⁷⁸ See J. Falke and G. Winter, 'Management and Regulatory Committees in Executive Rule-Making' in G. Winter (ed.), *Sources and Categories of European Union Law* (Baden-Baden: Nomos, 1996), 541–82; Joerges and Falke (eds.), n. 18 above.

Commission. This so-called 'New Approach' has been employed in the area of product harmonization and consumer safety.⁷⁹

- Specialized tests may be performed by Community administrative agencies existing autonomously from the administrative structures of the General Directorates, and which have been set up for the purpose of streamlining information gathering. The European Environment Agency (EEA) is a case in point. A similar agency is projected in the field of chemicals regulation. In some exceptional cases, where no discretionary powers are involved, decision-making powers were even delegated to these agencies, such as in the case of the Trademark Agency.⁸⁰

The present discussion on this matter is conducted in terms of 'either/or'. Natural allies of the first variant (the preservation of a ministerial reserve) are Member States and national ministries. Comitology is favoured by the Commission, and—with certain reservations—the EP. Self-regulatory agencies are pushed by industry, whilst independent agencies are promoted by national sectoral bureaucracies. In reality, all of these structures have a proper role to play, the intricate question being which instrument suits what particular task.⁸¹

It is a misconception to hold that standard-setting is a mere cognitive operation, based on established scientific facts, and consequently to opt for independent scientific committees as standardization bodies. There is significant scope for variety in precautionary reasoning, balancing of environmental protection gains against economic drawbacks, or the influence of risk perception cultures, etc. Therefore, a line should be drawn between risk assessment and risk management, scientific committees having their role to play only in the risk-assessment phase of standard-setting.

A useful distinction can be made between economic and social regulation. Economic regulation aims at harmonizing product design in order to facilitate trade. One example is the DIN-standard for paper, which allows for the standardization of copying machines. The most appropriate tool for economic standardization is self-regulation by industry. To the extent the standards incite consumer preferences, this can be left to market mechanisms. Should there be implications for consumer safety, the 'New Approach' still may function well if combined with a strict product liability scheme.

By contrast, social regulation aims at the protection of diffuse interests, which usually have no purchasing power, and cannot be protected sufficiently by strict liability schemes. One major case in point is the environment. The appropriate forum for such externalized interests is fundamentally public.

⁷⁹ See J. Falke, 'Standardisation by Professional Organisations', in Winter (ed.), n. 78 above.

⁸⁰ See Majone, n. 16 above; M. Everson, 'Independent Agencies', in Winter (ed.), n. 78 above; D. Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (Berlin: Duncker & Humblot, 1999).

⁸¹ See for a description of the criteria emerging in the EU practice, M. Everson, 'The Constitutionalisation of European Administrative Law: Legal Oversight of a Stateless Internal Market' in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999), 281, 298 ff.

Most appropriate is the Commission-comitology structure, because scientific, economic, and cultural interests meet in a procedure which allows for the issue to be returned to the legislature, should it prove too controversial.

Because this kind of deliberative procedure is very slow, however, it is intolerable in cases where hundreds or even thousands of standards need to be considered, such as in the case of waste-water emission norms or standards for dangerous substances and preparations. Where time is a major factor, regulatory agencies appear to offer the most suitable solution. Experience with independent agencies in the USA have shown that problems of unresponsiveness of new bureaucracies could be solved by a mixture of substantial criteria, procedural rules, organizational safeguards, political checks, and judicial review mechanisms.⁸² The comitology structure could be integrated into a European type of regulatory agency. This would require a change in the constitutional principle articulated in the *Meroni* case law, which holds that decision-making powers may only be delegated to separate entities if no discretion is involved.⁸³

IX. Representing the Environment

The final issue of this chapter also concerns institutions. If interaction between humans and the environment is to be constitutionalized, the question which institutions should represent the environment becomes a crucial one. The EC has specialized structures in this respect, which are embedded in the general institutions, such as the Environment Committee of the EP, the Council of Environment Ministers, and the Commissioner and Directorate General for the Environment. They represent the environment as a concern which may be traded against gains in other policy areas.

Of course, this is normal and unavoidable political practice. In the case of the environment, however, the fact that this is an actor which does not trade must be taken into account. Rather, the environment supplies and uses resources according to its autonomous laws, which should be objectively ascertained. For this task, an independent watch-dog institution is needed at arm's length from the bargaining systems, determining as objectively as possible the state and development of the environment, and the likely impact of EC action. What is envisioned is a kind of independent Public Auditor of the Budget of the European Environment, which combines the more general observatory functions of the EEA, with the power to evaluate past and new EU policies.⁸⁴ Arguably the EEA should be developed in that direction.

⁸² Majone, n. 16 above.

⁸³ Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community* [1958] ECR 11, at 43.

⁸⁴ See Everson, n. 80 above.

X. Conclusion

In this chapter, I have endeavoured to investigate how the horizon of EC law can be broadened so as to allow for increased substantial and organizational interaction between humans and the environment. Objectives, principles, basic rights, and institutional safeguards afford environmental protection undeniable constitutional status, which however needs to be consolidated and developed further. It is hoped that the EU will engage proactively in this process, instead of having to react to ecological reality at a later stage. What must be avoided at all costs is that the achievements of decades are somehow wasted because we failed to take heed of the bare essentials of human life.