

ENGLISH SUMMARY

The analysis of “Asymmetry and European Constitutional Law” examines situations in which not all Member States participate fully in the process of European integration. After a preliminary chapter the first part focuses on legal requirements for and constraints of the various forms of asymmetry which are currently laid down in the European Treaties (chapters 2-6). The second part considers to what extent the different forms of asymmetry raise similar legal questions to which a common answer may be given, thereby establishing general rules of European law for asymmetry (chapters 7-10). In a last step, part three explores whether the asymmetry of European law can be accommodated with the theoretical premises of European constitutional theory (chapters 11-2). The analysis of the legal relationship of asymmetry and European constitutional law shows that there is nothing inherently contradictory in considering asymmetry in conjunction with European constitutional law. Asymmetry is rather integrated into the single institutional and legal framework of the European Union.

1. Asymmetry in the meaning of this analysis is characterised by the limitation of the geographical scope of European law to certain Member States and the suspension of the latter’s voting rights in the Council when rules are adopted or changed. It has to be distinguished from various other examples of differentiation among the Member States due to divergences in form and substance. In German, the specific focus of the analysis is clarified by the use of the term *Ungleichzeitigkeit* for which “asymmetry” is only an imperfect translation. The forms of asymmetry in the European Treaties stem from pragmatic political compromises and do not pave the way for the realisation of the concept of hard core Europe or integration *à la carte*. In order not to mingle considerations of political usefulness and legal reasoning the analysis should transcend the political debate and concentrate on the legal relationship of asymmetry and European constitutional law (chapter 1).

2. The field of application of enhanced cooperations covers all aspects of the European Treaties in principle. Nonetheless, the use of enhanced cooperations is likely to focus on new areas of European integration and cases of unanimous decision-making in the Council. The procedures governing the setting-up of enhanced cooperations and the later participation of initial outs (non-participating Member States) comprise various safeguards for the decision on its political necessity. Even if all legal conditions are met, an enhanced cooperation is only established, if the European institutions conclude that it is politically desirable. Most of the ten legal “commandments” for enhanced cooperation laid down in Article 43 TEU are declaratory confirmations of general principles of Community law with only some requirements imposing specific constraints. Neither the procedural nor the substantive legal requirements appear as an excessive limitation of the potential of enhanced cooperation. They rather illustrate that enhanced cooperations are integrated into the single institutional and legal framework of the European Union. Enhanced cooperations are no magic potion for the future success or European integration, but a new pragmatic institute allowing for limited asymmetrical progress in specific situations (chapter 2).

3. Asymmetry in the area of freedom, security and justice is no uniform phenomenon, but a diverse occurrence with its focus on Title IV EC. Following the political motivation of the United Kingdom, Ireland and Denmark the legal position of these Member States varies. Denmark supports political cooperation with other European states, but opposes the supra-national Community method. Accordingly, there are intermediate stages of Denmark's union and international law-style relations to pre- and post-Amsterdam Schengen law and its general non-participation in Title IV EC beyond the Schengen law. The British-Irish position is a hitherto unique realisation of the political concept of European integration *à la carte* granting those two Member States a unilateral opt-in possibility whenever new rules are adopted. Nonetheless, the wide-spread use of the opt-in in recent years suggests that even such a radical instrument can result in integrationist dynamics supporting the gradual realisation of the area of freedom, security and justice throughout the European Union. In the new Member States the Schengen law will be put into effect gradually. The extensive asymmetrical *acquis* of the area of freedom, security and justice may serve as an illustration for legal problems and their solution within the wider context of asymmetry and European constitutional law (chapter 3).

4. The outs' position in monetary union comprises different legal and institutional links facilitating their later participation in the single currency and guaranteeing them prior influence on the substantive rules of the European monetary constitution. After enlargement, the new Member States will catch up with the present euro group following the Greek example, if the convergence criteria are met. The United Kingdom and Denmark have, however, been granted a political opt-out, whose future has been put in the hands of the citizens in respective referenda. The ins' asymmetrical position in economic policy under Community law is confined to sanctioning excessive budget deficits, while the informal meetings of the euro group's economy and finance ministers are not sanctioned by European law. The Draft Treaty establishing a Constitution for Europe does not provide for far-reaching changes in this respect. Instead, some Member States could set up an enhanced cooperation allowing for the political completion of monetary union within the EC Treaty. In this case, the outs could no longer be excluded from the deliberations of the euro group's ministers in the Council and would be entitled to join the economic policy coordination even before their full participation in monetary union in line with the Treaties' enhanced cooperation regime (chapter 4).

5. The success of Europe's Common Foreign and Security Policy depends essentially on the uniformity of its external appearance, which could be seriously impeded, if the European Union proceeded on behalf of some Member States, while the outs openly pursue a divergent policy. The limited scope of asymmetry in the second pillar is based on this understanding: the "spontaneous" constructive abstention, the limited field of application of enhanced cooperation and the general rules governing European Security and Defence Policy all allow asymmetrical decision-making in specific situations, but guarantee that the general orientation of the Common Foreign and Security Policy is supported by all Member States. The reform proposals of the European Convention do not reverse this picture. The specific forms of asymmetry in the field of defence focus on the improvement of military capacities. Within the widened field of application of enhanced cooperations the uniform appearance of the Union is guaranteed by the unanimity requirement. The legal regulation of asymmetry in the second pillar continues the process of legalisation of the Common Foreign and Security Policy. But a more ambitious extension of asymmetrical arrangements requires the convergence of foreign policy preferences on the European level (chapter 5).

6. International treaties among some Member States on the basis of classic international law are no integral part of the European legal order, but they nonetheless establish a “asymmetrical” forum of European cooperation. Due to this functional parallelism to European law asymmetry the general analysis of the relationship of asymmetry and European constitutional law has to examine the importance and admissibility of international agreements among Member States. The asymmetrical entry into force of agreements concerning the cooperation in criminal matter under Article 34 TEU may reduce the length of ratification periods. Nonetheless, the recent practice suggests that European institutions prefer the adoption of regular European law. A look at the German practice of cooperation with other Member States and international agreements on defence issues confirms that the international law-style cooperation among the Member States is losing momentum. The European Union has become the central legal framework of cooperation among the Member States. New integration projects are regularly realised within the institutional and legal framework of the European Union – if necessary on the basis of asymmetry. International treaties among some Member States may possibly regain some importance as a means to realising the concept of hard core Europe or integration *à la carte*. In this context, Maastricht’s Agreement on Social Policy and Article 306 EC on Benelux integration may only partially serve as a model for a possible legal link between the European Union and such an *avant-garde* (chapter 6).

7. The different forms of asymmetry raise similar legal questions to which a common answer may be given, thereby establishing general rules of European law for asymmetry. The unmodified composition and decision-making procedures of the Commission, the Parliament and the European courts as well as the full participation of the outs in the deliberations of the Council and its sub-structures underline that the ‘Treaties’ asymmetry regime is integrated into the single institutional framework of the European Union. The outs may assure that asymmetry respects the ‘Treaties’ supreme constitutional rules by exercising their unlimited rights to initiate proceedings in the European courts and to intervene in ongoing disputes. Against this background, the suspension of the outs’ voting rights in the Council and the asymmetrical financing through one of the models explored appear as an adequate modification of the European Union’s single institutional framework. Its general extension to asymmetry guarantees a pan-European political discourse and makes sure that asymmetry allows for legal differentiation without political rupture (chapter 7).

8. As a supranational legal order Community law is based upon specific principles of varying legal status which cannot be found in most national legal orders. The interpretation of these principles was so far based on the uniform application of Community law in all Member States and the proliferation of asymmetry requires a modified approach in certain situations. Generally, asymmetrical European law is an integral part of the European legal order and has the same legal effects in the participating Member States as regular European law. In particular, it enjoys supreme effect and can be directly applicable. Potential conflicts between asymmetrical and regular European law are solved by specific rules guaranteeing the cohesion of the European legal order. Asymmetry may strengthen the principle of subsidiarity by allowing for a differentiated treatment of the Member States. Moreover, new dimensions of the notion *acquis communautaire* and of the principle of mutual loyalty may arise in the light of asymmetry. The single market is no “constitutional core” in which no asymmetry may be established. But the obligation to respect the fundamental freedoms and the prohibition of discriminations on the ground of nationality in the case of asymmetry guarantees the equal treatment of the citi-

zens in the single market and confirms that asymmetry can be harmoniously accommodated with the general principles of the supranational European legal order (chapter 8).

9. Insofar as an international treaty with a third state might affect or alter the scope of existing asymmetrical Community law the Community has the external competence to conclude the agreement on the basis of the Court's ERTA case law in relation to the ins, while the outs remain, in principle, free to conclude agreements on the same issue. The case study on the external dimension of the area of freedom, security and justice is illustrative of the growing importance of the external dimension of asymmetry in the years to come, for which the first practical examples of the association of Norway and Iceland with the Schengen and the Dublin law are only the starting-point. If politically so desired, a uniform international appearance of the Community and all Member States may in practice be achieved on the basis of partially or asymmetrically mixed agreements. The scope of Community law obligations of the Member States within asymmetrically mixed agreements reflects the "asymmetric" scope of the external Community competence in accordance with the general rules of European law for asymmetry. In specific circumstances, the outs may indirectly participate in asymmetrical Community law on the basis of international agreements concluded between the outs and the Community (chapter 9).

10. General rules of Community law prohibit the cooperation among some or all Member States on the basis of classic international law in the field of exclusive Community competences, while the Member States may proceed largely unrestricted outside the scope of the European Treaties. In the field of mixed competences, treaties among all Member States may regularly collide with their obligation under Art. 10 EC not to jeopardise the functioning of the Community. With regard to cooperations among some Member States, the introduction of enhanced cooperation does not entail a restriction of the admissibility of international cooperations as long as certain procedural and legal constraints are respected. International agreements among some Member States in the field of mixed competences are admissible, when the attempt to reach a Community law solution is not successful and if the supremacy of existing and future European law is respected. The institutions of the European Union may only be "borrowed" with the consent of all Member States and as long as the functioning of the Community procedures is not hampered. Contrary to European law forms of asymmetry, international cooperations of the Member States are no integral part of the single institutional and legal framework of the European Union (chapter 10).

11. The debate in the European Convention and the Intergovernmental Conference concerns the adoption of the "Treaty establishing a Constitution for Europe". Nonetheless, the theoretical analysis leads to the conclusion that the European Treaties are already a constitution in the understanding of European constitutional theory. The basic assumptions and features of this European constitutional theory are: (1) The Treaties fulfil the functions regularly performed by a constitution. (2) The Treaties are the supreme law of the European legal order; the Court assures that secondary law complies with its rules, thereby establishing the characteristics of legal constitutionalism. (3) The "postnational" separation of constitutionalism and statehood serves as the basis for the extension of the concept of a European social contract; the legitimacy of the European legal order is no longer based on national constitutions. On this basis, the European constitution co-exists with the national legal orders on a non-hierarchical equal footing in the European constitutional federation, which is no federal state. (4) In so far as the European citizens gradually develop an understanding of European

citizenship complementing their national and regional identities, the democratic legitimacy of European public authority is based on an original European democracy (chapter 11).

12. How do the assumptions of European constitution theory interact with asymmetry? Asymmetry originates in and illustrates the gradual transition from the functional integration logic of the single market to political union. It underlines the political maturity of European integration, if asymmetry preserves the democratically formulated policy preferences of some Member States and allows for division without fundamental rupture. The 'Treaties' rules governing asymmetry are not only a formal part of the supreme layer of the European legal order. Their substance moreover guarantees that asymmetrical and regular European law are both integrated in the European constitution's unique legal and institutional framework. The Convention's Draft Constitution indicates that the legal substance of asymmetry will not be fundamentally changed in the near future. It is left to future amendments to decide on the maintenance, change, abolition or extension of the existing asymmetry regimes. As long as the basic features of the relationship of asymmetry and European constitutional law presented in this analysis are maintained, asymmetry does not hinder the constitutional aspirations of the European Treaties and remains a specific expression of the social contract of the European Union's citizens (chapter 12).