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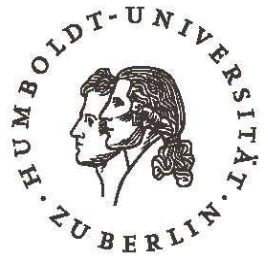

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THE TREATY ON THE CONSTITUTION FOR EUROPE AND NATIONAL CONSTITUTIONS IN THE AGE OF CONSTITUTIONAL PLURALISM

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1. Contemporary Constitutional Pluralism

1.1 Legal and Constitutional Pluralism

In the contemporary global age, constitutional pluralism poses challenges to traditional legal theory's failure to explain emerging new issues. Here I will speculate on the coexistence and interaction between multiple constitutional orders by referring to the national constitutions, the European constitutional construct (having still the form of an unwritten constitution) and the emerging beginnings of world constitutionalism.

According to legal positivistic method including its most developed forms like the doctrine of law autopoiesis, all legal and constitutional systems are hierarchically structured and provide institutions for conflict resolution within the law. The courts protect human rights, enforce the hierarchy of law excluding the contradictions between provisions in various sources of law and guarantee the legitimate monopoly of violence which lies at the heart of the Weberian definition of the state. Even libertarians and legal minimalists bring up catallaxy to rule out conflicts within the legal system. Without a hierarchical structuring, the legal and constitutional systems are considered to be chaotic phenomena or an amorphous conglomerate of inconsistent and disintegrated legal rules created by various regulatory bodies.

Methods of structuring interrelationships between international, EU and municipal law include harmonization of values through introducing international democratic standards (reception, transplants, mutual influence) and implementation of international law instruments in national legal systems by the national legislation of parliaments and the bylaws of the executive bodies.

Still other avenues to implement international standards - particularly in the field of human rights, are: applying decisions of the ECJ and ECtHR by the national courts, opening the national constitutional order of the EC member states by amending national constitutions and pooling of sovereignties to secure division of competencies.

It seems that at least 3 types of relationships between the different levels of pluralism develop. Multilevel governance in constitutional pluralism should rely on toleration, legitimation built on common values, contrapunctualism and hierarchy within the powers consigned to different levels of constitutional governance.

The evolution of legal pluralism has taken centuries during the last millennia of human civilization. For a long time, legal pluralism appeared to follow the dualistic type of division depicted by Ulpian in the Digest of Roman Law.[1] Ius civile within many statal legal systems existed simultaneously with the single ius gentium or law of the peoples. International and municipal law developed in separate realms of the legal continuum which never collided since the implementation of international provisions in the national legal system was virtually non existent.

1 Дигесты Юстиниана, Москва 1984, кн.I, титул I, 23.

Mutual influence between the plural legal systems was experienced rather as reception of legal patterns and solutions through legal transplants by a scenario where various national legal systems played the roles of donor and recipient. Except for the last couple of centuries when international law expanded through multilateral treaties, during the whole previous time period legal pluralism followed the dualistic separation between multiple monistic municipal legal orders and common international law limited by its regulatory ability. The emergence of global society bolstered diversification, structured international law's normative institutes to facilitate harmonization of different fields and universal or regional levels of international cooperation. Although an interesting object of research, legal pluralism has been a field much more explored by legal theory and comparative legal science.

In comparison to legal pluralism, constitutional pluralism is of a more recent origin as it emerged at a much later civilization stage.

For less than three centuries, written constitutions have been the monopoly of the nation-state which was perceived to be the sole legal entity in possession of the constitutional capability to draft and adopt the supreme law of the land. Of course, national constitutional law coexisted with international law though the pacta sunt servanda principle which was irreversibly established in legal and political reality after WWII and has since then considered to be within the scope of national constitutional supremacy. With the foundation of the European Communities, a new transnational legal order emerged having a supranational, direct, immediate and horizontal effect within the legal systems of the EC member states. At a first glance, supremacy of community law might be considered to undermine the position of a nation-state's constitution as the supreme law of the land. In fact, for the first time a supranational legal order has been gradually acquiring the formal characteristics of a constitutional system although founded on a typical unwritten constitutional arrangement. In this way European integration transformed legal pluralism built on the coexistence of national and international law into interaction between various levels of constitutional arrangements. Initially this took the shape of an interrelationship between the unwritten EC constitution, which encompassed some primary EC law provisions from the founding treaties, seminal decisions of the ECJ and a few important rules created by the EC institutions, and the written national constitutions of the EC member states. Since the 1960s constitutional pluralism was enriched by EC law - a new legal system reaching beyond the legal dualism of international and municipal law.

The term "global constitutionalism" has received a wide range of connotations in legal theory. It has been approached from a comparativist perspective referring to the national models of constitutional government in the world and not within the symbiosis of the constitutionalization of power relationships in the contemporary globalization process.[2]

The globalization of constitutionalism and the principle of adopting a constitution for a non state

2 For the best papers in this field with an analysis of post World War II trends, see: **T. Fleiner**, Five Decades of Constitutionalism, in Publications de l'Institute de Federalisme, Fribourg, Suisse vol. 5, 1999, 315 – 344; also his Ageing Constitution, paper to the Conference The Australian Constitution in Retrospect and Prospect, Perth, 21-23 September 2001; **B. Ackerman's** seminal article The Rise of World Constitutionalism, Virginia Law Review, May 1977, N.83, 771-798.

entity have been treated in the context of an unwritten constitution within the founding treaties.

During the last decade, scholars tackled a new phenomenon or a new stage in the development of constitutionalism emerging on a global level.[3] They have treated global constitutionalism as but another form of governance where, in order to meet benchmarks of democracy, power has to be framed with constitutional restraints.[4] The primacy of international law, the increasing role of many international organizations like the WTO, the development of legal instruments for human rights at the supranational level have been considered as different streams forming the fabric of global constitutional beginnings and posing limitations on the actors of emerging global governance. Although these phenomena resemble the guarantist function of the constitutions, it would be an exaggeration and a simplification to look for supremacy of the global rule of law, moreover for an emerging unwritten constitution. At present, proposing a draft world constitution is utopian illusion bordering on science fiction like the Constitution of Mars.[5] Within the context of global democratic governance, international legal standards have been instrumental to bridging national and global constitutionalism. Nowadays the intensity of legal binding and hierarchical structures are strongest within national constitutionalism, they are present in federalism and are in the process of affirming the relationship between the EU constitution and the constitutions of the member states. In current global constitutionalism there is some compatibility of democratic standards but not a full fledged hierarchy of constitutional orders. Globalization is still looking for its own constitutional order and the rule of law and the global standards' interaction with national constitutional orders still has to rely on the pacta sunt servanda principle. The significance of international legal standards increases since they compensate the weaker legal binding force of emerging supranational global constitutionalism.[6] National constitutions are affected by emerging global constitutionalism because it is a challenge to the role of national constitutions as the utmost expression of sovereignty. Global constitutionalism influences the status of national constitutional self-determination in the idea of

3 **Л.Ферайоли**, Отвъд суверенитета и гражданството. За един световен конституционализъм, Съвременно право, 1995, кн. 4, 70-78.

4 One of the best liberal definitions of constitutionalism emphasizing the constitution's role as a frame of government was offered in the second half of the 19th century in the US by **John Potter Stockton**: "Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy.", **J. E. Finn**, Constitutions in Crisis, 199,5.

5 See: A CONSTITUTION FOR THE FEDERATION OF EARTH, as amended at the World Constituent Assembly in Troia, Portugal 1991. Now being circulated world wide for ratification by the nations and people of earth. Distribution for ratification under the direction of the World Constitution and Parliament Association and the Global Ratification and Elections Network (wcpagren.org). World Constitution and Parliament Association 8800 West 14th Ave. Lakewood, Colorado 80215 USA ; See **K. S. Robinson**, The Constitution of Mars, in The Maritans, Harper-Collins, 1999.

6 In a recent article, M. Maduro offers three pillar constructs of constitutions in a national and global context. See **M. Maduro**, "From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance", Lead Paper to the Workshop "Changing Patterns of Rights Politics: A Challenge to a Stateness?", Hamnse Institute for Advanced Studies, Delmenhorst, Germany, June, 2003, 9-12.

self-government, the form of participation, power distribution and representation. The legal standards established by international treaties and soft law might be interpreted as a fourth pillar through which emerging global restraints on governance are transposed to national constitutionalism as universal criteria to constitutional governance.

Expanding constitutional governance at the global level is related to the concept of societal constitutionalism relating to broadening the scope of regulation which has been one of the main trends in the fourth constitutional generation. Societal constitutionalism concerns the increasing number of actors in the political decision-making process and poses limitations on their actions.[7]

The EU Constitution surpasses the proposition that the constitution is an attribute reserved for the nation-states and marks a new phase in constitutional civilization. For the first time in history, a non state entity has adopted a written constitution.[8] With the EU Constitution, mankind has entered the third stage of constitutional civilization when constitutional governance has expanded beyond the nation-state.

Three distinct stages in the evolution of governance and constitutionalism can be outlined. Mankind has lived for millenniums in a state without a constitution limiting governmental power. After the Westphalian treaty and especially after the last decades of the 18th century when the first written constitutions were adopted – for centuries constitutions have been the monopoly of nation-states. The rule of law has been entrenched in a written constitution as a legal form of state legitimately structuring power built on the supremacy of constitutional limitations and supporting the hierarchy of the legal and political system to ensure democratic government and protect human rights at the national level.

Non-state entities like the EU and in the foreseeable future, perhaps international organizations such as the WTO and/or the UN, which are founded on agreements between participating sovereign nation- states with "open statehood", will entrench the rule of law in a written constitution coexisting and interacting with the national constitutions.

However, the success of EU constitutionalism rules out two simplistic conclusions.

It does not mean that by adopting a constitution, the EU will be transformed into a state or a full fledged federation. Neither does it mean that the EU constitution and the emerging beginnings of

7 See **G. Teubner**, Societal Constitutionalism: Alternatives to State-centered Constitutional Theory, Stores Lectures 2003/2004, http://www.jura.uni-frankfurt.de/teubner/.pdf

8 For a brilliant critique on the thesis of no demos as reflected in the German Maastricht decision see **J. Weiler**, The State "über alles", Demos Telos and the German Maastricht Decision, EUI WP RSC N95/19; The classical Jellinek trinity of territory, nation and sovereignty as a prerequisite to constitution drafting has been overcome. Some definitions extended the benchmarks of the state by adding independence, effective government, recognition by other states, the capacity to enter into agreements with other states, the state apparatus, an organized economy, fictional pars of states as official residences of foreign diplomatic envoys. See: LTA Seet Uei Lim, Geopolitics: The Need to Reconceptualise State Sovereignty and Security, in the Journal of Singapore Armed Forces 1999, www.mindef.gov.sg/safti/pointer/back/journals/1999/Vol25_2/7.htm

global constitutionalism mark the process of the withering of nation-states. Instead, EU and global constitutionalism will exist hand in hand with the constitutions of the nation-states. They will be made possible through the national constitutional and legal systems and will not replace them. Moreover, the nation-states will be the main actors in the evolving constitutional pluralism and will work together with other non state actors.

Contemporary global constitutionalism is evolving in two different but interdependent spheres – depending on the actors in the various legal fields:

1- multilevel governance,

2- the recognition and protection of human rights by national and supranational institutions.

1.2. Multilevel Constitutionalism and Governance

Various levels of political governance in the modern age might be briefly represented in the following manner. Within the context of territorial division, ethnic and national unification and a vertical division of power, an analysis should be structured on the interdependence of certain forms of states and alliances between the modern nation-states. In constitutional democracies several simple forms of state exist according to the degree of independence of local authorities from the central government.

At the beginning of the 21century the modern unitary nation-state is represented by:

1- the centralized nation-state with the constitutionally recognized freedom of directly elected self government authorities;

2- the nation-state with a highly developed degree of devolution built on modern demands of decentralization and deconcentration of power;

3- the nation-state where the vertical division of power between the central and local government is supplemented by different degrees of recognition of autonomy, based on ethnicity or cultural diversity;

4- the modern complex states consisting of a federal union and member states, uniting multilevel governance where two state entities participate and federalism prevails over intergovernmentalism encompassing:

5 - traditional federal states based on territorial or national principles such as USA, Germany, Austria etc.;

6 - classical federal states founded on ethnicity or multinationalism – Switzerland, Canada, Belgium, India etc.;

7 - devolutionary federalism – represented by Spain, Bosnia and Herzegovina, UK in the making etc.;

8 - federations - asymmetric or symmetric and differentiated by the principle of equality or non-equality between member states.[9]

9 For extensive treatment see: **R.Watts**, Federal Systems and Accomodation of Distinct Groups, Working Paper, Queens University, Kingston, Ontario,1998,3; **D. Elazar**, Exploring Federalism, Tuscaloosa, Univ.

Modern unions between the sovereign states which differ according to the degree of separation or pooling of their sovereignties, together consist of:

1- confederations or confederacies;[10]
2- the European Union which is more than an international organization but not a state entity, having distinct territory, citizenship, but not a common people united on the basis of nationality and in which the member states and the Union pool their sovereignties;
3- customs unions between the states;
4- international organizations where the interaction and governance between the sovereign states is built on intergovernmentalism.

European integration before Maastricht was an undisputed triumph of functionalism, while all attempts at building a federal union in Europe, starting from ancient Greek Amfictionia, were either transitory or a chain of failures.

The Maastricht Treaty triggered new trends reaching far beyond the functional integration process and marked a return to the original ideas of J. Monnet and the founding fathers.

The lack of statehood is challenged not only by Jellinek's definition, but by the Weberian concept of the state as well, proven by the political compromise at the lowest common denominator and thriving euroscepticism demonstrated by the failure to ratify the Treaty on the Constitution for Europe by referenda. The second and third intergovernmental pillars cannot be identified with the legitimate monopoly of violence, as Weber has defined the state.[11]

Scholarly authorities in Europe have coined different constructs for looking at the EU from a federal perspective - Bogdandy's[12] supranational federation, Weiler's federation built on the principle of tolerance[13] and Pernice's multilevel governance and constitutionalism in the EU.[14] Enlargement has posed new obstacles to EU governance in an institutional framework which was built for 6 member

of Alabama Press, 1997.

10 **G. Malinverni**, The Modern Concept of Confederation, Strassbourg,1995.

11 **M. Weber**, Economy and Society, Univ. of California Press, 1979; See also G.F.Poggi, The State, its Nature, Development and Prospects,1990, 4.

12 **A. von Bogdandy**, The European Union as a Supranational Federation: A Conceptual Attempt in Light of the Amsterdam Treaty, Columbia Journal of European Law, vol. 6, 27-54.

13 **J.H.H. Weiler**, Federalism and Constitutionalism: Europe's Sonderweg, in **K. Nicoladis** and **R. Howse**, eds, Federal Vision Legitimacy and Levels of Governance in the US and EU, Oxford, Oxford. Univ. Press, 2 001.

14 **I. Pernice**, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?, Common Market Law Review, 1999, 703-705.

states and has already been ineffective for a Union of 15 members, not to mention one composed of 25 states. It seems that after the failure in ratifying the Treaty on the Constitution for Europe, the further success of integration will depend upon the gradual but definite transformation of functionalism into federalism, with the EU providing a typical example of integrative federalism.[15] Within this conceptual framework, we can analyze multilevel government in Europe and outline three to four levels of government in the unitary states: municipal, regional, central and EU government. In Germany, Austria, Belgium and Spain (with its federalism in the making), one should not simply add one more level of governance but distribute powers and arrange the institutional framework within the federal states in a federal Europe.[16]

Within the federal EU member states, the levels of government include: municipal, regional, member state or "Länder-" government, federal government, government within the EU framework. In fact interaction between the EU level of government and the national levels of governance, based on the principles of flexibility and subsidiarity, is much more complicated. For the time being at least three methods have evolved – supranationalism, intergovernmentalism, and infranationalism. To this scheme, plans for the regionalization and building of a Europe of regions should be added.

1.3. Supranational Recognition and Protection of Human Rights

The global dimensions of the contemporary recognition and protection of human rights consist of different levels, carriers, catalogues of rights and safeguarding institutions.

A brief overview of the current dimensions of human rights and their protection should by all means include the following levels of legal orders and their respective court systems providing remedies for human rights violations.

In constitutional democracies where rule of law has been firmly established, the most developed system for recognition and protection of human rights has been the legal and judicial system at nation-state level. Within the nation-state's territorial jurisdiction, the rights of it's citizens and those of foreign citizens or stateless persons are recognized and protected by the national institutions. It is natural that due to their ties and loyalty to their country, citizens enjoy a more extensive list of human rights in their country of citizenship. Within federations, two different sets of rights have been proclaimed in the constitutions, and residents and citizens receive protection from the federal or state courts depending on their jurisdictions.

For EU member states, codified freedoms which have been reaffirmed in the EU for half a century in community law and the decisions of the ECJ Charter of the Human Rights have established another set of fundamental rights belonging to the EU's citizens and protected by the ECJ and the national courts which directly enforce EU law.

15 **K.Lenaerts**, Constitutionalism and the Many Faces of Federalism, The American Journal of Comparative Law, vol.38, 204-263.

16 See **F.Delperee**, Etats federal in Europe federal, PUF, 1999.

Regional protection of human rights for citizens of the European countries holding membership in the Council of Europe and which have ratified the European Convention of Human Rights (ECHR) is provided by the possibility of the citizens to bring cases and grievances against their own governments to the ECtHR.

Last but not least we must mention the principle of international law which provides a universal system of recognition and protection of human rights for all human beings irrelevant to their citizenship (either of origin or of residence), or possible statelessness.

The multilevel system of human rights protection consists of multiple hierarchies which themselves do not take shape in one hierarchical order.

In general, differentiation of the sets of rights depends on the agreed and established jurisdictions. Though a hierarchy within the system of human rights does not exist for the simple reason of the integrity of freedom, within the national level, various judicial institutions protecting citizens against encroachments on their rights are subject to hierarchy. However, between the national and different sets of supranational human rights which function as legitimation for multilevel governance as well as the respective levels of their protection, certain harmonic relationships exists. What is more important - there is no hierarchy but a contrapunctual order of different governance levels and human rights within constitutional pluralism.

The evolving multilevel constitutionalism has been ignored or severely criticized from a legitimacy perspective because the nation-state was considered to be the sole repository of constitution-making and to be in possession of a monopoly of constitutionality.

At certain levels of cooperation and governance beyond the state, the recognition and protection of human rights has been the general principle of output legitimacy of multilevel constitutionalism just as efficacy has been a principle of multilevel governance. One of the main goals is enforcing human rights and ruling out violations of human rights.

In a world of constitutional pluralism, legitimation follows many tracks and locations of governance beyond which the nation-state will bring about plural legitimacies. Concurrent legitimacies are supposed to act simultaneously and are attributed to different locations of government. The overall picture should not be oversimplified – the growth of one legitimating mode should not be interpreted at the expense of another. Also, it should not be expected that the diminishing of one method of legitimacy should lead to the growth of other forms of legitimacy.

Perhaps it might be appropriate to draw a comparison with M. Maduro's concept of hierarchy within contrapunctual constitutionalism and legitimacy within national, EU and global constitutionalism. In our contemporary globalized age, constitutional pluralism is at a stage where separate constitutional locations have reached a different level of hierarchy within the legal order. The weakest of all has been the global constitutionalism where different currents mark the emerging priorities of governance and the legal order. In contrapunctual constitutionalism, harmonizing the different loci of constitutionalism should be done in a harmonious manner. Harmony, however, would require certain premises to be observed. For example, simultaneous melodies in music should be performed within one key and should not be sung in *a capella* or in a cannon fashion. Hierarchies and legitimacies in national, EU and global constitutionalism should be built on the consensus of basic

democratic values and should not be aimed at repetition, although with a different consequence.[17]

The heterogeneity of governance modes in the EU requires the use of all avenues of legitimacy available to the various modes of governance.[18] One should not fear that in this way complex and differentiated legitimacies will be the result. EU citizenship, which is not intended to destroy national citizenship, is based on national citizenship. The human rights belonging to EU citizens are not meant to impair the citizens' rights provided in national constitutions but to guarantee more opportunities for the EU's citizens.[19] However, multilevel recognition and protection of human rights and probably the soundest legitimacy building factor for supranational governance facilitating the interaction of different entities of multilevel governance in forming contemporary constitutional pluralism.

2. The Added Value of a Written EU Constitution

2.1. Legitimacy Implications of the TCE

During the first stages of the European communities' evolution for more than three decades after the Treaty of Rome, a metaphoric usage of the term "constitution" encompassing primary law would have meant nothing more than a symbolic significance which can be compared to the qualifying of the structure of the Christian church as a "constitution" during the Middle Ages. For half a century, the evolution of constitutionalism has been an incremental, bottom up process, developing step by step and judicially driven.[20] Characterized as "low intensity constitutionalism", it

17 For contrapunctual constitutionalism, see: **M. Maduro**, 'Europe and the Constitution: What if This is as Good as it Gets?', in **J.H.H. Weiler** and **M. Wind**, eds., *Rethinking European Constitutionalism* (Cambridge, Cambridge University Press 2000). Also available at:
http://www.umich.edu/~iinet/euc/PDFs/2002%20Papers/Maduro.PDF

18 See **R. de Jonghe** and **P. Bursens**, 'The Quest for more Legitimacy in the EU as a Multilevel Political System' (Paper for ECPR Congress in Edinburgh March 28 - April, 2003) available at: <http;// www.clingendael.nl/library/litlijst/ litlst2004.1/European.integration.pdf>

19 Admitting that EU citizenship actually exists based on the prerequisite of citizenship of one of the member states of the Union automatically implies the direct participation of EU citizens, thereby creating input legitimacy, but this should not be seen as more valuable or impairing the indirect or output legitimacy of intergovernmentalism, as within the nation-state this is built on the direct participation of the people in government elections. Therefore the conclusion that there should be a prevalence of one mode of legitimacy in the EU above all others seems to be somewhat misleading. Within different EU governance methods, various types of legitimacy will undoubtedly prevail. For example, intergovernmental legitimacy will be based on indirect and output legitimacy, while direct and input legitimacy will normally develop more efficiently at the supranational level of community and federal methods of integration.

20 **M. Maduro**, How Constitutional Can the EU Be? Reconciling Intergovernmentalism with Constitutionalism in European Constitutionalism, http://www.jeanmonnetprogram.org/conference-JMC-Princeton/NYU

has led to the emerging of an unwritten EU constitution.

Compared to the UK's constitution with its uncodified character of constitutional norms in a single document, the EU's constitution has been identified as an unwritten constitution.

Although often considered to be the motherland of western democracy, Great Britain still has an unwritten constitution, even though during the revolution it was the first to create the Instrument of Government. It has been a common approach to compare EU primary law to the UK's unwritten constitution, which comprises a set of charters, bills, declarations, statutes of the parliament and constitutional conventions that contain fundamental legal norms. In this train of thought, especially after Amsterdam, the founding treaties were considered by some authorities to be the EU's unwritten constitution.[21]

The unwritten constitution is in fact a poly-constitutional act, comprised of provisions, contained in the founding treaties and in some of the decisions of the ECJ having a constitutionalizing effect. However the unwritten constitution is more difficult to understand since its provisions are contained in the founding treaties, and in the ECJ, they meet most of the formal requirements of the norms of the national constitutions as higher law.[22]

Why then was a new written EU constitution needed?

What added value does a written constitution, i.e. the Treaty on the Constitution for Europe (TCE) bring to the EU?

How does the constitutional theory of nation-states fit in with the metaconstitutional document which the TCE undoubtedly is?

It is a well-known fact that the idea of a written constitution of the modern nation-state is the offspring of the people and national sovereignty in the nation-state regarded as an universal and free association of the citizens living on a certain territory. Constitutions are indispensable in providing limited and responsible government, framing the political power structure, dividing powers between the constituted political institutions and protecting human and citizens' rights. The constitutions are created by a constituent power and draw their legitimacy from popular sovereignty and basic human rights. In principle, a democratic constitution is an undisputed prerequisite to the rule of law and a cornerstone building legitimate government in the nation-state.

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21 **Jo Shaw**, Law of the European Union, London, 1996, 63-66 **D. Curtin**, The Constitutional Structure of the Union: A Europe of Bits and Pieces, Common Market Law Review, 30, 17-69, 1993; **Walter van Gerven**, Toward a Coherent Constitutional System within the European Union, 2 EPL, 1996, 81 - 103 ; **M. Zuleeg**, The European Constitution under Constitutional Constraints: The German Scenario, 22 European Law Review, February, 1997, 19-34, 20-21; **Л.Ферайоли**, Отвъд суверенитета и гражданството. За един световен конституционализъм, Съвременно право, кн.6, 1995, 70-78.

22 For the evolution of a higher law concept in antiquity and after the drafting of written constitutions, see: **M. Capelletti, W. Cohen**, Comparative Constitutional Law, Charlottesville, 1979, 5- 11; **C. Friedrich**, The Philosophy of Law in Historical Perspective, Chicago, 1963, 12-26.

Since antiquity, at least two meanings of the word "constitution" have evolved.[23] The *real* (functional or material) constitution has been present since ancient times and still is a feature of every state and even organized human entity and corporation. The *real* constitution refers to the institutionalized forms of different associations and is related to the structure and functioning of these institutions and their relationship to the members of the collective body. In this train of thought, one cannot deny that the EU has a *real* constitution, consisting in its governmental structure and relationship to the member states and their citizens.

Modern *written* constitutions appear at a much later stage of evolution, although some of the acts of Roman emperors bore the name of "constitutions".

A *written* constitution is a charter, a higher law comprising a set of norms providing for the organization, separation and functioning of political power, protecting basic human and citizens' rights in order to prevent abuse and the concentration of absolute power and in order to guarantee civil, political and economic liberties.[24]

Referring to its mode of adoption, F. Snyder added another meaning of the term "constitution" relevant to its legitimacy by relating the constitution to a written document that has been deliberated by the citizens or by their representatives.[25]

At a first glance, the TCE does not exemplify a typical constitutional moment of discontinuity and transformation in terms of *B. Ackerman* and *N. Walker*.[26] It does not fall in the category of the

23 In Politics, Aristotle uses the term "polity", which has been translated in English as "constitution", as meaning a *real* constitution, since it concerns the organization and division of political power between the institutions and not a higher law or supreme legal act., **Aristotle**, Politics, Book IV, Ch. 1, Baltimor, 1970, 151; Contemporary authorities in the field differentiate three meanings of „constitution". According to F.Snyder *empirical* constitution refers to the way in which a state is organized, *material or substantive* constitutions are a set of fundamental legal norms comprising the legal order of the state, *instrumental* constitutions are written documents or fundamental legal acts which set forth the principal constitutional legal norms., **F. Snyder**, General Course on Constitutional Law of the European Union, Collected Courses of the Academy of European Law, vol.VI, Book I, 41- 155, 53; Blondel adds to the real and legal (written) constitution the prescriptive constitution referring to doctrines, values, goals and ideals including limited constitutional government., **J. Blondel**, Comparative Government, An Introduction, New York, 1995, 217-218; See also **V. Bogdanor**, Constitutions in Democratic Politics, ed. **V. Bogdanor**, **Aldershot**, 1988, 5 - 7; **Ph. Allott**, The Crisis of European Constitutionalism: Reflections on the Revolution in Europe, Common Market Law Review, 34, 1997, 439-490, 468-469; **N. Walker**, European Constitutionalism and European Integration, Public Law, Summer, 96, 266 - 290, 270.

24 The *written* constitution acquired its meaning as fundamental law and took on its contemporary shape after the adoption of the constitutions of the fourth generation after World War II. Today there are more than 180 constitutions of sovereign states and the constitutions drafted since 1970 outnumber the constitutions created before that date.

25 **F. Snyder**, The Unfinshed Constitution of the European Union: Principles,Processes, Culture, Report to the International Conference on Law and Justice in the 21 century, 6-7.

26 **N. Walker**, After the Constitutional Moment, The Federal Trust, Online Paper 32/03.

reactive constitutions drafted in Central and Eastern Europe as a radical break with the past.[27] It would have been much more comfortably situated within the concept of the growth of the constitution developed by *K. Llewelyn* in the US school of legal realism. Regarding continuity, it bears similarities to constitutional serialism, but differs in respect to the transformation which is inherent to the growth of the constitution concept.

It seems that it might be more appropriate not to use the constitutional moments concept but to refer to a "constitutional weather forecast" which produces a prognosis for timing and where the prerequisites for constitutional drafting are already in place and the time has come. The constitutional climate for a full fledged written EU constitution exemplified by the TCE was ripe considering pending issues that could not be postponed. The biggest enlargement in history – nearly doubling the number of EU member states and outnumbering the European Communities' founding states five times could not run the EU with a governance framework designed for six and developed to run an EU consisting of fifteen member states. The willingness of some countries to proceed at a greater speed of common efforts - to enhanced cooperation before the others would have been ready to join in this integration gear also increased the pressure towards constitution drafting. It seemed that now we should answer the question posed by *J. Weiler* "Do the new clothes have an emperor?" by saying that the emperor is in need of new clothes.

However, looking at the TCE from the legitimacy perspective raises some new issues.

The first set of open questions concern the legitimacy of constitution making in a non-state entity. What is the true nature hidden behind the hybrid and ambivalent title of a "Treaty on the Constitution for Europe?" What lies behind the dubious label of the European Convention's creation – a treaty or a constitution?

The TCE has received a reading both as a constitution and as a treaty. Some have questioned the constitutional character of the TCE. They claim that, although having some specific features of a constitution, the TCE should receive treaty status.[28]

The importance of calling the TCE a constitution has been emphasized by many distinguished scholars.[29]

Analyzing the mixed features of the TCE, J. Weiler labeled it a "treaty masquerading as a constitution and a constitution masquerading as a treaty".[30]

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27 See Constitutions in Democratic Politics, ed. **V. Bogdanor**, Aldershot, 1987, 7

28 **P. Elefteriades**, Constitution or Treaty, The Federal Trust, Online Paper 12/04, July 2004.

29 **J. Habermas**, So, Why Does Europe Need a Constitution?, EUI, RSC, Firenze, 2002; **A. Follesdal**, Drafting a European Constitution – Challenges and Opportunities, Constitutionalism Web-Papers, ConWEB N4/2002; **L.M. Diez-Picazo**, Treaty or Constitution: The Status of the Constitution for Europe, 2004 http://www. jeanmonnetprogram.org/conference- JMC- Princeton/NYU.

30 **J. Weiler**, Hard Choices, www.law.nyu.edu./clppt/program_2003/readings/weiler.pdf; For more arguments on the dual nature of the DTC see also **A. von Bogdandy**, The Preamble in Ten Reflections on the Constitutional Treaty for Europe, ed. **B. de Witte** Firenze, 2003, 4; **P. Craig**, Constitutions,

On the one hand, most of the controversial issues can be resolved by looking at the procedure followed in the TCE's adoption and those foreseen in enacting it and the TCE's functions, on the other. Answers to both questions are related to legitimacy. In the first case the issue is how the EU has created legitimacy. In the second, it is about the constitution's legitimizing function.

The creation of the TCE might be presented laconically by O. Neurath's famous metaphor of building a ship at sea.[31] This must be the normal outcome of top down constitution building characterized by gradual, low intensity constitutionalism resulting in a written document drafted according to the constitution making procedure in the member states and reflecting the peculiarities of the EU as a non-state entity.

Traditional democratic constitution making within the nation-state has always followed the pattern that demos is the only source shaping the polis. People elect a representative body endowed with constituent authority, and by arriving at consensus this body drafts a constitution that is accepted by the nationals as a valid and legitimate written supreme legal act and ratified directly or indirectly by the people. This constitution building process blends several equally important elements – a constituent assembly, legitimately elected by the people, arriving by consent at a written constitution.[32]

What was the procedure applied to EU constitution making considering the missing EU demos and European state? By all means the adoption of the TCE had to comply with the TEU amendment procedure. Legality and legitimacy implied that voluntary adoption of the DTC would better fit the treaty amendment procedure if the legal term "treaty" is present in the title of the new EU written constitution.

The eurosceptics go further and refute the legitimacy of the DTC as a written constitution by the fact that a non-constituent authority in a non-demos entity has adopted a constitution for a non-existing EU state. Of course the treating of the constitution as a treaty has been seen as the only logical explanation of the TCE consistent with the traditional theory of democratic constitution making.

Constitutionalism and the EU, European Law Journal, 2001, vol.7, N.2, 125-150.

31 "We are like seafarers, who must rebuild their ship in open sea, without being able to take it apart in a dock and build it up of its best constituents from the bottom up." cited in **A. Follesdal**, Drafting a European Constitution – Challenges and Opportunities, Constitutionalism Web-Papers, ConWEB N. 4/2002, 1 ; For a keen metaphor commentary see **Jo Shaw**, Process, Responsibility, Inclusion in the EU Constitutionalism: The Challenge for the Convention on the Future of the EU, Federal Trust, September 2002, Online Paper 01/02, 5.

32 Principles generating consensus by bargain, by argument, by commitment or mystification have further impact on the life expectancy and legitimacy of the constitution, once it has been enacted., See **M. Muller, G. Schaal**, The Relevance of a Constitution for Europe,
http://www.epsnet.org/2004/pps/Muler.pdf

However, the adoption procedure of the DTC has a constitutional context as well. In fact to adopt the DTC, a three stage constitution making procedure was invented in order to overcome the missing elements of traditional national constitution drafting and to reinforce the legitimacy of the written constitution of the EU by a combination of devices common to all of the modes of EU governance.

The Convention on the Future of Europe was the first stage of preparation of the DTC. Certainly there were weaknesses in the convention method reflecting community governance but they are outweighed by the successful outcome. Though it was strongly criticized with regard to the method of formation and procedures that had been followed[33], the Convention proved to be an autonomous and representative body with sufficient internal dynamics, open to deliberation, receptive to new proposals and efficient in integrating a communicative process into the frame of decision making.[34]

Though there has been resemblance in substance and type of name, the Convention on the Future of Europe has not been a typical example of the representative constituent assemblies that have drafted national constitutions. Only the comparison between the unlimited authority of the constitutional conventions and the assigned tasks of the Convention on the Future of Europe, which was a mandated body, speaks for substantial difference. For example, the 1787 Philadelphia convention was intended to propose amendments to improve the Articles of Confederation in order to prevent the disintegration of the loose and fragile confederal union of states. By adopting a completely new federal constitution, the founding fathers exceeded their mandate. As a safeguard against the unpopularity of their endeavor the voting procedure in Philadelphia was secret.[35] Voting was conducted under the confederal principle of one state one vote, but when the draft was completed it was signed by 39 delegates out of the 74 of which 55 never attended.[36] If this principle has to be applied to the final voting of the draft it would lead to the positive vote of 6 state delegations which is a minority in the 13 states. The signature of 39 founding fathers overcame this shortcoming.

Instead of starting debates after the constitutional drafts were introduced as was done in Philadelphia, the French or any other constituent assemblies, the Convention on the Future of

33 For a detailed list of Convention demerits see **A. Coughlan**, A Critical Analysis of the EU Draft Constitution, Brussels, 2003 Team Working Paper Nr. 10.

34 **Jo Shaw**, Process, Responsibility, Inclusion in the EU Constitutionalism: The Challenge for the Convention on the Future of the EU, 12 –26.

35 The founding fathers kept their notes of the convention debates but agreed not to publish them during their lifetime. The most accurate accord, by J.Madison, has been bought from his inheritance after he was the last of the delegates to pass away in 1836 and was published in 1840. By that time the Federal Constitution was in force for more than five decades securing foundations of effective constitutional government evolving to costitutional democracy., **F. Lundberg**, Cracks in the Constitution, Seacacus, New Jersey, 1980, 133.

36 After waiting for the majority of the delegates to appear in Philadelphia for ten days 29 delegates started the meetings., see The Records of the Federal Convention of 1787, ed. **M. Farrand**, Yale Univ.Press, 1966, v.I, 1-2.

Europe began with the reports of the working groups on controversial issues. Voting on the solutions proposed cleared the debate on the draft's potential conflicts that might lead to disruption.

The Convention on the Future of Europe should be seen as an indispensable stage, as an element but not as the whole constituent authority and sole repository of constituent power.[37] The Convention on the Future of the EU was assigned by the Laeken declaration and was never intended to copy the model of constitutional conventions in the nation-state context, nor had it ever aspired to assuming such an elevated role. Indeed, as a constituent assembly in these terms, the EU convention would have produced an illegitimate DTC. That is why the comparative constitutional approach used as a critique of the Convention seems inconsistent since it cannot be criticized for not meeting the features it was not intended to.

By virtue of the requirement that the DTC be adopted by the IGC, the intergovernmental method has been included in the process of adoption of the EU constitution. The consent of the governments of the member states at the IGC might be seen as the second stage in the constitution drafting or as an integral part of the constituent authority in the drafting of the EU constitution.

The ratification process by the member states is the third stage in the procedure of exercising constituent authority in the adoption of the EU constitution.

At first glance the ratification stage is the typical procedure for the adoption of new treaties or treaty amendments. In light of EU constitution making, when the final product to be submitted for ratification is the TCE (i.e. a treaty containing a written constitution), this stage acquires another meaning. It can be seen as the third element or the third phase of constituent authority. It is during the ratification process that the "no European demos" objection[38] is successfully invoked to be superseded by the consent of the European *demoi*[39] to the EU Constitution.[40]

The ratification process adds the legitimacy of the support of the peoples in the EU member states to the EU Constitution. This stage of the constituent authority can be regarded as EU constitutional *demoi*-cracy as EU governance already has been. Its significance might be downgraded providing the entry into force of an international or EU treaties. While at this stage the constituent authority functions at the national governance level, it should not be forgotten that in all federal constitutions,

37 For a historical overview of the conventions in the constiution-drafting process, see: **H. Dippel** Conventions in Comparative Constitutional Law, College of Europe, Research Papers in Law N 4/2003.

38 This thesis has many adherents in academic circles and has been extensively expounded by Judge **P. Kirchoff** of the German Constitutional Court in the famous Brunner case decision, BVerfGE 89, 155.

39 „Demoi" is understood as „demos" in the plural and connotes the plurality of the component peoples of the EU. (The editor)

40 **K .Nicolaidis**, The New Constitution as European Demoi-cracy? The Federal Trust, Online paper 38/03.

the constituent authority has always included ratification - of a totally new constitution or amendments to an acting constitution - at the level of the member states. So ratification acquires the double significance of national participation in constitution drafting and as an indispensable stage of the federal constituent authority.

Thus the two-sided nature of supranationalism has been preserved in the constitution making process. In order to be legitimate, the EU constitution has to be produced by three levels or stages of constituent authority. As compensation for its lack of legitimacy in the constitutional drafting process when compared to the constituent authority, vested in the nation-state, each part of the threefold constituent authority contributes to the legitimacy of the EU's written constitution. Beyond any doubt if a legitimate constitution is adopted after ratification it will have a tremendous effect on the legitimacy of the EU.

The constituent authority in the EU constitution has successfully exploited the metaphor of building of a ship at sea. Instead of following the sequence: demos - constituent power - constitution - polity line, it has gone the other way round: a constitution built by constituent authority to be ratified by the European *demoi* resulting in a new EU polity. Here lies the real impact of the constituent power on the political and social system. For the genuine impact of the constituent power leading to the adoption of a written constitution has been defined as the creation of a new polity ex nihilo.[41]

The other reason for the threefold constituent procedure to be applied is due to the fact that the TCE is the first written constitution in the history of the EU. While the constitution is in the process of adoption, primary EU treaty law and the unwritten EU constitution are still in force. So legality and the rule of law require that this procedure should be followed to bring the TCE into existence and give birth to a written constitution for the EU. A successful transition from the unwritten to a written EU constitution had to be anchored in the existing treaty amendment system.

However, the first stage in the drafting processes of the Convention is not the exercise of a typical think tank working group preparing a draft for the IGC's decision, which, upon ratification is integrated into and upgrades the EU's treaty system. The threefold constituent authority had to comply with the requirements which are in force for an entity founded on treaties and for the requirements for constituent power to transform primary EU law into a written Constitution. Thus, under the legitimacy requirements of the constituent power, the adoption of the EU constitution had to fully follow the treaty amendment procedure. By means of a successful convention, the drafting process has generated legitimacy stemming from the three sources of the existing different modes of governance in the EU. The threefold constituent power and the requirements to arrive at consent have predetermined the DTC's content.

A legitimate constitution would have many implications for the EU, but one of them is directly related to the topic under consideration in this paper: the TCE has mobilized legitimation and will

41 Constitutions are adopted as an outcome of gradual development or of a revolutionary act. "The constituent power is the power to create a political order ex nihilo". See **U.K. Preuss,** Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution in Constitutionalism, Identity, Difference and Legitimacy, ed. **M. Rosenfeld**, Duke Univ.Press, Durham, 1994, 143.

lead to a boost in EU legitimacy which is one of the best methods to cure the present democracy and legitimacy deficit.

The merits of a written constitution go far beyond the simplification and codification of complex primary EU law structure and content which will be easier for the EU citizen to understand. The TCE's advantages cannot be limited to the channeling of power distribution and the horizontal and vertical separation of power by the pooling of sovereignties. In a broader context, the TCE creates the framework of the European public sphere[42]; it doesn't institute a European superstate but maintains the delicate balance between the EU constitutional order and the member states' national constitutions.[43] A written constitution substantiates validity and by its supremacy excludes recourse to regression in justification of governmental actions and human rights.[44]

However, the most important of the new constitution's functions has been legitimization.

Within nation-states, constitutions have normative, integrative and framing functions but they also legitimize the states and justify the democratic values and virtues of the established form of government, foster citizens' attachment and mobilize their support of the constitutional government. Constitutional supremacy is the prime safeguard of legal security and respect for legitimate social expectations. The adoption of a written constitution is the "birth certificate" of constitutions in that it establishes a new regime and polity legitimacy. In this context the TCE is a means to the formation of political legitimacy[45] and legitimates the building of a new polity.[46] DTC bridges community, intergovernmental and national legitimation by anchoring the EU's frame of governance in the consent generated in the community governance method, in intergovernmentalism and national member states' constitutional orders. The difficulties of consent building predetermine the TCE's contents. As was noted in the DTC, it possesses as much "statehood" as has been constituted for it, as much power as has been conferred to it by the various national constitutions and equally much unity to preserve identities.[47] The written EU constitution can be seen as a catalyst for deepening and strengthening mutual trust and the emerging common

42 **J. Habermas**, So Why Does Europe Need a Constitution?, EUI, Fienze, 2001/02, http://www.eui.it

43 **Jo Shaw**, The Draft Treaty Establishing Constitution for Europe, Paper prepared for the Conference "Value of Constitution for Europe", Malta, 2004.

44 **H. Kelsen**, The Function of the Constitution 1980, Lloyd Introduction to Jurisprudence, London, 1985, Fifth ed. 379-385.

45 **A. von Bogdandy**, The European Constitution and European Identity: Potentials and Dangers of the Draft Treaty Establishing a Constitution for Europe,
http://www. jeanmonnetprogram.org/conference- JMC- Princeton/NYU.

46 **N. Walker**, Europe's Constitutional Momentum and The Search for Polity Legitimacy,
http://www. jeanmonnetprogram.org/conference- JMC- Princeton/NYU.

47 cit. in **R. Goring**, Requirements for the Emerging European Constitution, WHI Workng Paper, 2/03.

attachment to shared European values.[48] Constitutional legitimizing by the TCE is instrumental to filling the missing element of "the nation", (a gap in the EU constitution) by the creation of a new polity when compared to the member states' constitutions. However, the claim that a full fledged postnational constitution should meet all the features of the constitution of a nation- state would be a simplification.

Constitutions confer legitimacy but cannot be considered as a cure all to legitimacy crisis problems. The TCE's legitimating function should not be overestimated for it does not contain universal solutions to democracy deficits. This holds both for postnational constitutions and for the constitutions of nation-states. Constitutional legitimacy cannot be tied to the content – based concept of the binding virtue of constitutions.[49] Legitimacy is dynamic by nature. Thus, the sole fact that EU governance would act based on, and is exercised within the EU constitution will be far from enough to automatically bestow legitimacy on Europe's multi-centered governance.

2.2. Referendums and Ratification of the TCE

The TCE's tremendous legitimacy effect on the EU would have spoken for the decision to hold a single Europe-wide referendum. Ratification by means of a single European referendum conducted on the territory of the member states would have had an impact on the voters' common feeling of belonging and might have given them the opportunity to transcend their identity as nationals. We may suppose they would have voted with their conscience and values as EU citizens. In the long term, it might not be an exaggeration to claim that a Europe-wide referendum on the TCE would have had an influence on the gradual formation of the European demos by raising the citizens' EU awareness. No doubt, the symbolic function of a written constitution would have mobilized the feeling of community of EU citizens and would have promoted the further development of the European public sphere. Direct participation in the ratification process would affirm the EU citizens' belief in the benefits of further integration and generate their trust and support, thus allowing the constitution making process a most profound impact on the EU's legitimacy. Last but not least, the EU citizens would have the opportunity to look at the EU's "new constitutional clothes" in one mirror which reflects their preferences in the same light and size and minimizes distortions based on the various national settings of the ratification arrangements. No doubt, a single Europe-wide referendum would have minimized the risk that the TCE's ratification be bogged down in national issues.

This fact has been well recognized by some politicians and NGOs.[50] Respected members of academia have emphasized the constructive role in the EU's polity demos formation and the big legitimacy advantage of holding an all European referendum on the EU constitution.[51]

48 **N. Walker**, After the Constitutional Moment, Federal Trust, Online Paper, 2003 32/03, 10.

49 See **F. Michelman,** Constitutional Legitimation for Political Acts, Modern Law Review, 2003, vol. 66, N.1,1-15, 14.

50 **B. Berg**, Transnational Referendums Plans Presented, 20.09.2002 , http://www.euroobserver.com

51 See **J. Wiler**, Hard Choices, http://www.law.nyu./cllpt/program 2003/readings/weiler.pdf , p. 6-7.

Instead the decision was taken that the ratification process should be decided by the governments of nation-states with each one of them opting variously for direct or parliamentary voting on the TCE. Of course this decision was not prompted by logistical reasons. At first glance it encapsulates democratic ratification procedure in the nation-states and makes it dependent on the different "demoi" of the EU member states. However, it is this form of ratification which is in consonance with the amendment drafting a new treaty procedure, and ratification by the nation-states opting for different procedures is the sole option of legal continuance. In this way legitimation of the EU constitution is sanctioned by observing legality, while in ratification by referendum it rests on popular sovereignty.

There are other arguments against holding a Europe-wide referendum.

The first of them relates to the responsibilities of political leaders. Is a referendum a weapon to hold the political leaders accountable or are leaders capable of being responsible to proceed with a policy which is beneficial for the common well being without recourse to referendum? Might the "excuse" of consulting the people's will be a way out of avoiding responsibility in government? What if in this referendum, participation is so low that it cannot be representative of the people's will? What impact will an all-Europe referendum have on the future of European integration if the majority of the EU's citizens vote against the creation of the Convention on the Future of Europe? Of course, a euroskeptic minded radical democrat would say the EU would remain where it was before the Convention (with the unwritten constitution it already has) but the important thing is the people's standpoint. However, it is not possible to "go back". At least, going back after a negative popular vote would have a devastating effect on the EU's future. An enlarged EU having 25 and later more member states would be extremely difficult to manage even with an enhanced institutional framework initially designed for the regional cooperation of six states.

Here then is where the legitimacy of governance transforms itself into legitimacy against governance. Does democracy then mean a preference for a legitimacy crisis - which for sure would and cannot be liquidated once and for all by a referendum - to the crisis of EU governance which must certainly follow upon the DTC's defeat in a state-by-state referendum?

A return to the logistics of a referendum being held in the context of the national constitutional arrangements will provide insight as to where the hostility to a Europe-wide referendum comes from.

From comparative perspective, the constitutions of the member states are of three kinds depending on the provisions made for holding a constitutional referendum. Some of them do not envisage holding nationwide referendums at all. Some of them - like Germany – would consider an amendment to the constitution to open up the possibility of holding a referendum. Others – as exemplified by Irish and Austrian constitutions - contain provisions which create an obligation to hold a nationwide referendum for the purpose of ratification. There is a third group as well, for which holding a nationwide referendum on constitutional ratification is an option, but the choice to use it (instead of parliamentary ratification) is in the hands of the national political elite.[52]

52 According to the latest data 9 of the member states have decided to hold a referendum, Malta has ruled out a referendum and the other 15 member states are still undecided, 2004 http://www.unizar.es/euroconstituton/Treaties/Treaty_Const_Rat.htm

The middle ground compromise has been holding simultaneous referendums in the EU member states according to their national constitutional arrangements.[53] This method, however, does not provide the stimulus for EU polity and demos and will mean mechanical support for the TCE from the European demoi – each one acting within national context and in different constitutional houses. Holding simultaneous national referendums might bonus national loyalty to a feeling of European belonging. Still more important, the national setting might distort or at least make the preferences of the citizens of the EU member states less comparable.

The big advantage to a Europe-wide referendum (as opposed to a state-by-state one) is that a defeat of the DTC in one or even in 5 of the 25 member states does not mean total DTC defeat as such. It could even survive with majority support of 20 member states to be considered in the European Council.

Under Article 48 of the Treaty on European Union, amendments to the existing treaties require the unanimity of all member states. Adoption of the TCE requires the existing treaties to be substantially amended with each member state having a veto on the adoption of the TCE.

The TCE recognizes this in Article G, providing that if, after two years, any member state has not ratified, the Constitution goes back to the European Council - where again, each member state has a veto. So a member state which chooses not to ratify the treaty has a very strong position to negotiate a new "associate membership", which might provide for a free trade area or other options which seem to be the opposite of enhanced cooperation in the TCE. Other possible scenarios might include intergovernmental renegotiation in the European Council or the community option of rewriting the TCE by a new convention.

Considering the direct ratification method, some other implications of a referendum should not be ignored. All told, the number of referendums on EU accession, on the ratification of EU treaty amendments since 1972, and until the last enlargement of the EU in 2004, has been 40. It is worth noting that among the last ten countries that acceded to the EU, for well known specific reasons only Cypress did not hold a referendum. Almost all of them were decisive referendums with a yes or no voting option for the nationals taking part, most of them being sovereignty referendums facilitating the transfer of external sovereignty.[54]

Are the experiences of these nation-states and particularly the constitutionalism of the 90ies relevant

53 MEPs Call for Synchronization of Referenda Timetable, 02.09.2004, http://www.euroobserver.com

54 Between 1791 and 1999, over 1090 referendums were held world wide. In Switzerland, from 1866 to 1993, 414 forms of direct democracy have been used. Nearly 40% of all referendums were on constitutional issues. There have been six kinds of referendums on sovereignty: affirming the independence of nation-states, settling border disputes, determining the status of territories, facilitating transfer of sovereignty, downsizing (facilitating the secession or cession of territories) and upsizing (to incorporate territories). In Europe 33 out of 88 sovereignty referendums were on the transfer of sovereignty, **G. Sussman**, When the Demos Shapes Polis - The Use of Referendums in Settling Sovereignty Issues, http://www.iri-europe.org

to the ratification of the TCE by referendum? Can the constitutional experience of the emerging democracies be regarded as a laboratory for the implications of the referendums to be used at the EU level? What lessons can be drawn from the experience of the new democracies? Can referendums be regarded as a panacea to legitimation?

Besides the well known abuse of direct democracy leading to a plebiscitary effect which has had a long tradition in France, referendums have sometimes served as an antipode to deliberative democracy by circumventing parliaments, reinforcing authoritarianism and legitimating totalitarian regimes.[55] Referendums have been used by political leaders as a means to avoid responsibility, to resolve deadlocks in governance or to submit unpopular issues to be decided by popular vote. In some cases the majority decision taken in a referendum has led to infringing minority rights.

Overexaggeration of and excitement about the democratic virtues of direct governance has often been based on an underestimation of their role in the decision making process. In a consultative referendum, citizens can make proposals but their vote has no mandatory effect on the decisions taken by the parliaments or presidents. In a binding referendum on the other hand, the people's vote can be neither appealed nor changed, a citizen's vote only has a yes or no alternative on an issues that may have already been predecided by the formulation of the question submitted by the representative assembly.

All post-totalitarian constitutions provide for various forms of direct democracy channeling public opinion and citizens' involvement in governmental decision making.

National and local referendums have been provided in most of the constitutions as a recourse to the public will and the expression of popular sovereignty which are considered to be the ultimate source of legitimate authority. Some of the constitutions contain other direct democracy forms like popular initiative, constitutional or confirmatory referendum, which in Poland has been shaped along the model of the ratification referendum in Italy.[56]

Constitutions provide content limitations on the subject matter of legislation submitted to a referendum concerning financial matters, budget and tax bills.[57] These issues can lead to complicated

55 In his time C. Schmitt has compellingly shown how misleading the traditional argument on the benefits of direct democracy is by emphasizing the negative impact of plebiscitarian legitimacy on the legality of parliamentary statutes in the German Weimar Constitution., **C. Schmitt,** Legality and Legitimacy, Duke Univ.Press, 2004, 59-66.

56 Ratificatory referendum is a brand of the classical but outdated institute of popular veto. Referendums can be initiated by parliaments, by presidents or by voters when they meet the requirement to collect a certain number of signatures. According to the 1997 Constitution of Poland (art. 125) the parliament is to submit an issue for a national referendum by absolute majority decision, the president with the consent of the absolute majority in the Senate. The result of the referendum is binding if at least half of the voters take part. The Supreme Court has been charged with determining the validity of the referendum concerning certain specified issues.

57 The longest list is to be found in the 1998 Albanian constitution and includes issues related to territorial integrity, limitation of fundamental rights and freedoms, budget, taxes, financial obligations of the state, declaration and abrogation of the state of emergency, declaration of war and peace, as well as amnesty (art. 141).

consequences and should be decided on the basis of agreement resulting from a robust parliamentary debate which takes different opinions into account and safeguards minority interests and freedoms.

Constitutional courts have been charged with preserving constitutional supremacy (as the ultimate legal expression of legitimacy, reached by fundamental consensus) from any encroachment on the part of the institutions or direct democracy. Subjecting issues to be decided by a referendum to constitutional review has been another precaution against undermining legality and legitimacy by direct democracy.[58] Radical democratic arguments stemming from popular sovereignty and from the thesis that people are the best guardians of their rights, cannot overrule the need to protect constitutional legality and legitimacy. The conclusion that constitutional review trumps legality over legitimacy is certainly wrong. When a Constitutional court acts to preserve legality this is the best safeguard of legitimacy in democratic systems. In this train of thought, constitutional review of the issues submitted to referendums should be viewed as a check against the tendency to design and use referendums so as to avoid deadlocks in politics, to escape from responsibility or to acquire more power. Under limited and responsible constitutional government, constituted powers are circumscribed to the constitutional limitations set by the constituent power, as the ultimate expression of popular sovereignty. Hence, the intervention of constitutional courts to preserve legality is an effective safeguard of hierarchy and demonstrates the compatibility of two claims to legitimacy coming from the constituent and the constituted powers respectively. A legitimate decision reached through direct democracy has to reflect the will of people as expressed within the confines of constitutional legitimacy and legality and not as an ineffective instrument for resolving deadlocks between the institutions and political elites.[59]

2.3. The TCE is Dead – Long Live a Written Constitution for Europe

With the adoption of the DTC as a written constitutional document, the EU (as a union of European constitutional democracies) would itself become a constitutional democracy.

Considering that half of the member states have ratified the TCE and the failed referendums in France and the Netherlands, the TCE remains in limbo.

So far the TCE has been the third unsuccessful attempt at the adoption of a written constitution. In the course of previous attempts at drafting a constitution for the EU, the TCE has been the most far reaching after the failed 1984 Altiero Spinelli draft and the Herman draft which was voted for by European parliament resolution in 1994. Only time will tell if this third attempt might be the final

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58 For specific forms of constitutional review on the issues submitted to referendums in Hungary, Lithuania, Poland, Russia, Slovakia and Western Europe see Constitutional Justice and Democracy by Referendum, Science and Technique of Democracy, N 14, European Commission for Democracy through Law, Council of Europe, Stassbourg, 1998.

59 See **H. Brady** and **C. Kaplan**, Eastern Europe and Former Soviet Union, in Referendums Around the World, ed. **D. Butler** and **A. Ranney**, The AEI Press, Washington, 1994, 174-215, at 210.

one or if it will result in a revoting in new referendums, renegotiation, rewriting or the drafting of a totally new constitution.

Only the future will tell whether the current impasse is due to the fact that the issues regarding the legitimacy crisis were not handled on time.

I would like to share some ideas that would have made the ratification process easier and more open and deliberative and would have increased the TCE's overall legitimation effect on the EU.

It seems that a common speed for integration by all EU member states would have been preferable to accelerated integration accomplished by a vanguard of states. Certainly, the construct of enhanced cooperation in the TCE is a good thing, though to be sustainable, it requires legitimacy of a higher level than ordinary cooperation. It might have been better if the founding fathers in the Convention for the Future of Europe had foreseen another level different from regular integration and being an antipode to the enhanced cooperation which I will call "slow dancing". Supplementing regular and enhanced cooperation with an integration reflecting the pre-TCE state of integration would have opened up the possibility for some member states to ratify. Having designed integration along the three gear model, the Convention might have increased the chances of ratification of the TCE with some member states willing to preserve first gear cooperation instead of opting not to ratify.

In the context of modern democratic constitution drafting and legitimacy building the TCE ratification process should be perceived not as a formal legal requirement to completing the treaty amendment procedure alone but should be considered in terms of a constitutional discourse securing deliberative democracy.

Could the ratification procedure, if it were not already decided, facilitate the enactment of the TCE and its and legitimation impact? Could it provide flexibility and the conditions for a constitutional discourse?

At first glance, opting for the binding referendums which have been decided in nearly half of the member states at present has been the most democratic ratification mode proposed in the Convention.

In fact, instead of elevating citizens and national parliaments to a position of participants in the constitutional discourse during the ratification process, most of the current ratification procedures treat ratification as a "take it or leave it" deal in which - whether with the participation of the people or of the parliaments - political elites would like to avoid taking responsibility for decisions.

Another option which could have increased the chances for ratification is the simultaneous use of a consultative referendum where citizens might propose amendments to the TCE supplemented by ratification by their national parliaments (combining a positive ratification vote with proposals for amendments to the TCE to be considered by the European Council).

A three stage constitutional discourse would have been a better solution during the ratification process. Consultative referendums would have been instrumental to citizens to make different propositions (and not provide a mere yes or no decision), which should then be deliberated in national parliament and taken into account when deciding to ratify or not to ratify the TCE. The

third stage which would take the national constitutional discourses on the TCE to the supranational intergovernmental level would have been an option for the national parliaments to ratify the TCE with some reservations and propose amendments to be discussed in the European Council. Being aware that one of the most frequently taught lessons in history has been that no one learns from the experience of others, it may not be helpful to keep in mind that this was the key to the ratification of the US 1787 Federal Constitution where support in most of the states was based on certain proposals leading to the adoption of the Bill of Rights. But what is much more important is not learning lessons based on the historical experience of others but providing a ratification process taking into account the citizens' legitimate opinions and arriving at a decision after deliberating the issues in the national parliaments which, instead of a mere yes or no alternative, would present the option to ratify while making proposals to improve the TCE. In this way, the ratification process would benefit from being an inclusive constitutional discourse engaging the participation of most of the constitutional actors – be they citizens, parliaments or governments.

But what is the use in making proposals to decisions that have been already made? No use at all for the "happy ending ratification" which I would prefer. On the contrary, it is very useful if failure to ratify the TCE leads to new decisions on building support for a written EU constitution.

Learning from past experience in EU constitution making, we should not cry over the death of the TCE. Remembering the classical maxim of no interregnum – "le roi est mort, vive le roi" - we might conclude that no time is left for long funeral ovations for the TCE for the time is ripe for the next attempt at EU constitution drafting. If we hope that the EU is successful in drafting a constitution the 4th time around, it should not wait to first brave the challenges of globalization and the tensions of enlargement during the next decade in order to make the fourth attempt at a constitution. In the meantime, ratification efforts might go on as a muscle and fitness building exercise which is not a sine qua non to success in clearing the hurdles of a fourth constitutional jump.

3. Amendments to the Constitution, Ratification and Fulfillment of the Constitutional Acquis

3.1. Structuring Constitutional Hierarchies in the Context of Constitutional Pluralism

Contemporary multiple constitutional orders consisting of national, EU and world constitutionalism pose several important problems, in particular concerning hierarchy and legitimation. Hierarchy is the primary prerequisite in order to avoid the implicit conflicts within multilevel constitutionalism. Subordination between the legal rules belonging to multiple constitutional orders is sine qua non to the contemporary rule of law principle. Of course as a complex phenomena there is no single principle securing subordination between legal orders like survival of the fittest in social Darwinism. Multiple constitutional orders do not form something like Jurassic Park where strong national rule swallows a weaker international norm or vice versa.

Three groups of devices might be used to eliminate conflicts between multiple legal orders.

The first of them belongs to comparative jurisprudence and legal science and has encompassed methods of unification, reception, legal transplants aiming at convergence between the different laws belonging to different legal families. I will leave aside analysis of these devices for they treat

collisions of norms between several national legal orders.

The second and the third group of legal techniques concerns conflicts between provisions belonging to national and supranational legal orders.

3.1.1. Constitutional Devices for Implementing International Provisions in the Municipal Legal Order

From a legal point of view EU member states and candidate member constitutions vary according to the procedures of ratification foreseen to implement the international instruments.

The traditional supremacy of the constitutions of the nation-states is undermined by the primacy of international law and for the member states of the EU by the supranational, direct immediate and horizontal effect of community law. Thus the coexistence and interaction of the evolving national, EU and international legal orders transforms the hierarchy of the national legal system and establishes new constitutional relationships between these currents of contemporary constitutional pluralism.

The classical principle of constitutional supremacy is assuming new dimensions with the development of the relations between the national legal systems and the international legal order from one side and due to the emerging post national constitutional order.

Contemporary constitutional states recognize the primacy of international law. However, the systems implementing treaty obligations are different due to the choice of monism or dualism in the national constitutions.[60] Incorporation of the treaties provisions follows two types of procedures.[61]

According to the monistic system which is dominant in Europe, an international treaty becomes an integral part of national law after having been ratified. Under dualism, treaty implementation can take place not by ratification but by drafting a special law or by amending existing national legislation.

Comparative analysis of European systems demonstrates another type of difference due to the position of the international treaties in the national legal order.

In some countries like Belgium, Luxembourg and the Netherlands, provisions of the international

60 For different legal orders in a dualistic system and the integration of both legal orders in monism, see: **M. Kumm**, Towards a Constitutional Theory of the Relationship between National and International Law International Law Part I and II, National Courts and the Arguments from Democracy, p. 1-2, www.law.nyu.edu/clppt/program2003/readings/kumm1and2.pdf; **L. Wildhaber**, Treaty-Making Power and the Constitution,Bazel,1971, 152-153

61 **P. van Dijk, G. , J. H. van Hoof**, Theory and Practice of the European Convention on Human Rights, Boston, 1990, 11-12; **A. Drzemczewski**, European Human Rights Convention in Domestic Law, Oxford, 1985, 33-35.

treaties have a supranational effect and stand above the legal system, superseding the authority of constitutional norms.

According to the constitutional practice of other countries like Austria, Italy and Finland, the treaties, having been ratified by parliamentary supermajority vote, have the same legal binding effect as constitutional provisions.

The third type of implementation of the obligations made by treaties under the monistic system in Europe places them above ordinary parliamentary legislation but under the national constitutions according to their legally binding effect. This is the current practice in Bulgaria, France, Greece, Cypress, Portugal, Spain and others. In Germany, customs and principles of international law enjoy primacy over national parliamentary legislation, but the treaties are equal in legal force to the national statutes and in case of a conflict lex posterior enjoys precedence.

In the Czech Republic, Lichtenstein, Romania, Russia, and the Slovak republic, only the treaties relating to human rights stand above ordinary legislation.[62]

The Bulgarian Constitution of 1991 proclaims the primacy of the international law treaties which have legally binding force and supersede the contradicting provisions of national legislation. Under the monistic approach, international treaties which are constitutionally ratified, promulgated, and have come into force in the Republic of Bulgaria, shall be part of the country's domestic law. They shall take precedence over any conflicting legal rules under domestic legislation. In an interpretative ruling, the Constitutional Court of the Republic of Bulgaria has extended the validity of this constitutional provision (i.e. art. 5, para.4) to include all the treaties which were signed before the Constitution entered into force, providing they fulfill the requirements of art. 5, para.4.[63]

62 **C. Economides**, The Elaboration of Model Clauses on the Relationship between International and Domestic Law, The European Commission for Democracy Through Law, Council of Europe, 1994, 91-113, 101-102 ; **L. Erades**, Interactions between International and Municipal Law, T.M.C. Asser Institute – The Hague, 1993 ; The French Legal System: An Introduction, 1992, 45; See **Й. Фровайн**, Европейската конвенция за правата на човека като обществен ред в Европа, София, 1994, 32; Вж също така **Л. Кулишев**, Прилагането на Европейската конвенция за правата на човека в българския правен ред, сп. Закон, бр. 2, 1994, 3-25.

63 Article 5 of the Bulgarian 1991 constitution provides:
1(1) The Constitution is the supreme law, and no other law may contradict it.
2(2) The provisions of the Constitution shall have direct applicability.
3(3) No one may be sentenced for any action or inaction that was not legally provided for a crime when it was committed.
4(4) International treaties, constitutionally ratified, promulgated, and having come into force as for the Republic of Bulgaria, shall be a part of the domestic law of the country. They shall take precedence over any conflicting legal rules under domestic legislation.
5(5) All normative acts shall be promulgated. They shall come into force three days after their promulgation, unless another period of time shall be stipulated therein.

The Constitutonal court ruled that the legal effect of treaties signed and ratified before the Constitution of 1991 entered into force is determined by the regime that was in effect at that time and especially according to the requirements for their publication. The treaties are part of the Bulgarian legal system if they are published or if there was no requirement to be published. If they are not published, they do not have

Interpretation of art. 85, para. 3 and art. 149, para.1, 4 in connection with art 5, par. 4 makes apparent that the 1991 Constitution of Bulgaria has situated treaties only second to the Constitution itself but above all national legislation.[64] Here, the primacy of international law complies with the requirements of art. 2 of the UN Charter respecting nation-state sovereignty.[65]

The process of implementing a treaty is different from the interaction between the legal order of the EU and the legal systems of the EU member states'. Due to the transfer of sovereignty, provisions of EU law prevail over national constitutional norms and have legally binding effect after the member states have been notified. That is why the implementation of international treaties bears no similarity to the obligation to comply with the acquis communautaire in adapting national constitutions and the approximation of legislation in order to provide the supranational, direct, immediate and horizontal effect of primary and institutional EU law.[66] The process of adapting national constitutions to the EU's constitutional order, thereby forming the constitutional acquis, has been founded on the transfer of sovereignty from the member states to the EU and its institutions and creating so called "open statehood". The sovereignty issue is the most important of the problems to be resolved. It is quite different from the solutions of the sovereignty locus in federal governance.

3.1.2. Sovereignty in Federations and in the Constitution of the European Union

State sovereignty has been defined as the ability of the nation-state to determine its domestic and

primacy over the contravening provisions of national legislation. From the moment of their official publication they may acquire the superseding effect over the contravening norms of Bulgarian legislation. See Мотиви на Решение N 7 от 1992 г. по к.д. N 6 1992, ДВ, N 56, от 1992 г.

64 Article 85. (3) stipulates that the signing of international treaties that require constitutional amendments must be preceded by the passage of such amendments. Under art. 149. (1), 4 „The Constitutional Court rules on the consistency between the international treaties signed by the Republic of Bulgaria and the Constitution, prior to their ratification, as well as on the consistency between the laws and the universally accepted standards of international law and the international treaties to which Bulgaria is a signatory"; The Constitution and the Participation of Bulgaria in international agreements, edited by **E. Konstantinov**, Sofia, 1993; **G. Tisheva, I. Muleshkova**, Relations Between the Domestic Legislation of the Republic of Bulgaria and International Human Rights Standards, the Human Rights Magazine, Issue No. 1, 1997, 4-9.

65 The supranational, direct, immediate and horizontal effect of EU law is provided by the proposed EU clause in the constitution providing for the transfer of sovereign powers to the EU and its institutions.

66 These undoubted characteristics of European law were formulated by the Court as early as the beginning of the 60s, N.V. Algemeine Transport - en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration; Case 26/62; Costa v. ENEL; Case 6/ 64. See in a detail **E. Stein**, Lawyers, Judges and the Making of a Transnational Constitution, American Journal of International Law, vol. 75, January 1975, N 1, 1-27; **P. Pescatore**, The Doctrine of Direct Effect, European Law Review, 8, 1983, 155-157; **J. Weiler**, The Community System: the Dual Character of Supranationalism, Yearbook of European Law 1, 1981; **A. Easson**, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI, Florence, 1994-1995.

foreign policy alone and independently from the other subjects of international law.[67] Though the sovereignty of nation-states proclaimed in the UN Charter[68] has been a benchmark of the post World War II international legal order, this principle is not an absolute category, for it is balanced by other principles and values legitimating democratic governance. As early as the time of E. De Vattell, the protection of basic human rights has been a frequent argument in favor of limiting state sovereignty to guarantee freedom.[69]

Globalization and the economic and political power of states as subjects of international relations are the preconditions which erode the state sovereignty of countries. This trend reveals again the superiority of political sovereignty over legal sovereignty, manifested both internally and in the area of international relations.

After the end of World War II, the scope of state sovereignty has been narrowed by the principle of the primacy of international law over national law in all democratic rule-of-law states.

The European integration process makes the state sovereignty issue particularly acute.[70] The architecture of European integration is evolving from regional organization through a special sui generis international union to reach a unique non statal political system of European states[71] - and in a more distant future - a federal union, though one unknown to classical federalism and confederalism.

The multilevel government in the European Union is a triad of community, intergovernmental and federal methods which ensure the successful development of the member states and the supranational formations comprising the architecture of European integration.

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67 Some authors analyze the content of state sovereignty in several different aspects. Krasner maintains that in international relations state sovereignty is exercised in the first place as Westphalian sovereignty, which excludes the intervention of external legal and political subjects in defining the internal organization of the national state; legal sovereignty manifested in the requirement for the international recognition of states; and interdependent sovereignty covering the methods employed by states to control transborder migration, **S. Krasner**, Sovereignty, Princeton, 1999, 9.

68 According to Para. 1, the Organization is based on the principle of the sovereign equality of all its members; Para. 4 says that in their international relations, members shall refrain from the threat or use of force against the territorial integrity or political independence of any state, and Para. 7 proclaims a ban on intervention in matters which are essentially within the domestic jurisdiction of any state.

69 **E. De Vattell**, The Law of the Nations, Philadelphia, 1835, 94 –96.

70 This aspect of sovereignty was been discussed in Bulgarian legal literature before the European Union was established, see **Д. Георгиев**, Суверенитетът в съвременното международно право и сътрудничеството между държавите, София, 1990, 70-81.

71 Vattel is the first to write about Europe as a political system, meaning that the nation-states on the old continent are linked as a single body where the independent states are united by a common interest to maintain order and protect freedom. Of course, the European Union today is not a political system within the meaning attributed to this notion by Vattel, **E. De.Vattel**, Op. cit., book 3., Ch. 3, sect 47.

The basic trend in terms of state sovereignty is not its elimination but co-existence parallel to so-called "open statehood", with member states delegating political powers to the European Union and its institutions. The movement towards a federal union does not automatically mean the loss, abdication and full transfer of sovereignty to the European Union. However, in none of the classical federations do member states lose their sovereignty and assume the status of territorial entities typical to the unitary state.

In all forms of classical federalism, the success of the political union depends first of all on advance consensus on sovereignty and the division (vertical separation) of powers between the institutions of the Union and those of the member states.

The history of federalism is full of various solutions for sovereignty in complex state formations. The different sovereignty doctrines in federalism differentiate the holder of sovereignty and superpose more than one state sovereignty on one people and one territory.

The first group of constitutionalists accepts the thesis of divisibility of sovereignty between the federation and the member states. Thus both state formations are bearers of sovereignty[72] and there are two sovereignties in the federation – that of the Union and that of the member states. The sovereignty of the member states is natural and primary and the sovereignty of the Union is a derivative one, formed by delegation of rights by the member states establishing the federation.

According to the second school, sovereignty is indivisible. The member states or the federation are alternatively holders of sovereignty.

Whenever constitutionalists maintain that sovereignty belongs to the member states, they practically identify the federation with a confederation. Thus, in the United States, immediately before the Civil War, the representatives of the Southern States justified their sovereignty by the fact that it preceded the formation of the federation.[73] Federal bodies are only agents of the subjects of the federation acting within strictly limited powers.[74] The organization and functioning of federal institutions come closer to the intergovernmental method established after World War II in community law.

Other constitutionalists maintain that sovereignty is indivisible but it belongs to the union only.[75] The states forming the federation are not sovereign.[76] At the same time, the subjects of the

72 This view is expressed by J. Madison and A. De Tocqeville about the USA and by G. Waitz, **L. Duguit**, op.cit., 189-194; **G. Waitz**, Grudzuge der Politik, Breslaw, 1862, 161-176; In modern times this school is represented by L. Siedentop, see **Л. Зидентоп**, Демокрация в Европа, София, 2003 p 132-133.

73 Sovereignty is a single whole, to divide it means to destruct it., See **J. Calhoun**, A Disquisition on Government, Boston, 1881, v. I, 118.

74 M. Seydel in Germany also maintains that sovereignty is indivisible and belongs to the states forming the federation., **M. von Seydel**, Staatrechtliche und politische Abhandlungen, Freiburg, 1893, 15.

75 **P. Laband**, Das Staatrecht des Deutschen Reiches, Tubingen, 1911, vol. I, 91.

76 **G. Jellinek**, op.cit., 280

federation preserve such a level of autonomy from the central government, including their own constitution and citizenship, which makes them significantly different from the territorially differentiated administrative subdivisions of the decentralized unitary state. Today the German *Länder*, though not having their own sovereignty, are declared constitutionable formations.[77] The cooperative federalism doctrine which developed as early as the 1930ies in the United States and in the second half of the 20 century in Germany, gives flexibility to the federal state. According to the representatives of this school, constitutional regulation is directed partially towards cooperation and overcoming the conflicts between the central government and the *Länder*, and partially towards coordination of the relations between the *Länder* themselves.

In his day, C. Schmitt noticed the defects of sovereignty in federalism. He formulated the following paradox which theoreticians had to conclude in their attempts to build a sovereignty framework in a federal state. If sovereignty is single and indivisible, then the existence of a federation is practically impossible. If it belongs to the federation and the subjects of the federation are non-sovereign formations, the federation itself becomes a unitary state. In the opposite hypothesis, where the member states are the bearers of sovereignty, we have a confederacy or an international union.[78]

Pragmatically, the European constitutional discourse has avoided the contradictions and antinomies of sovereignty in federations. The gradual success in uniting Europe is definitely a result of functional cooperation and the evolution of community integration methods. The incomplete political union has been compensated by economic cooperation and integration based on community law as a new transnational order having direct, immediate and universal effect with respect to all legal subjects in the member states. The Maastricht Treaty has placed the issue of partial transfer of sovereignty on the agenda, which was provided for by the constitutions of some member states even earlier. The Constitutional treaty goes beyond "open statehood" as it replaces multilevel government with the method of distribution of competence between the European Union and the national member states.

The champions of integration try to tone down the eurosceptics' criticism of the radical federalization of the European Union by calling the Constitution of the EU a constitutional treaty, on the one hand, and by refusing to solve the problem of state sovereignty in the context of a federal system of government, on the other. But as is well-known from the history of federations, it is the content of the legal act and not its title that shapes the Union.[79]

Instead of following the beaten track of division or unity of sovereignty, the thinkers of European

77 **E. Stein**, Staatsrecht, Tubingen, 1998, 103; The same view is maintained by O. Kiminih in the seven-volume commentary of the fundamental law of FRG, Государственное право Германии, Москва, 1994, т 1, 77.

78 **C. Schmitt**, Theorie de la constitution, Paris, 1993, 517-522.

79 In his federation doctrine C. Schmitt notes that "the federal treaty is a constitutional treaty" and its content immediately forms the federal constitution and becomes part of the constitution of each member state., see C. Schmitt, ibid, 518. The work of the European Convent seems to paraphrase his thesis, reformulating it to mean that the development of a constitutional treaty establishes a federal union.

integration have coined the "pooling of sovereignties" formulae. The idea of pooling and sharing of sovereignty itself was substantiated by H. Macmillan as early as 1962.[80] Instead of going into meaningless scholastic disputes, politicians and theoreticians offer a practical solution of combining the supremacy of the union with the supremacy of the member states by delineating their respective competences.[81] Thus in a globalized environment the protection of the states' national interests requires pooling their sovereignties and not opposing them.[82]

The practical solution which avoids the antinomies of sovereignty in federalism and is a precondition for the introduction of a horizontal and vertical division of powers in the European Union is the distribution of competence between the member states and the EU institutions.

However, even the most precise and comprehensive separation of powers in federal constitutions do not exclude conflicts. The setting of constitutional jurisdictions after 1920 in Europe has been the basic method of settling disputes between the government of the union and the institutions of the member states overstepping their powers.

The constitutional acquis is constantly developing with the integration process. There are several elementary issues in the legal area which can get complicated due to the national political context and the goals of politicians in the member states.

The extent and frequency of the amendments depend on several factors. The most important of them are the actual integration speed (i.e. the development of EU law requiring the adaptation of the constitutions of the member states in order to guarantee a supranational, immediate, direct and horizontal effect), the extent of the clauses transferring sovereignty in certain fields, the complexities of multilevel governance in complex states, and the procedures triggering national constituent power. The wider the transfers, the rarer the need to adapt and vice versa. The more incremental the development of the founding treaties and the emergence of a codifying constitutional instrument in the EU is, the less amendments we need in the national constitutions.

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80 Accession to the Treaty of Rome does not imply an unilateral waiver of sovereignty on our part, but pooling the sovereignties of all parties concerned, mainly in the economic and the social areas. Delegating some of our sovereignty, we will in turn get part of the sovereignty delegated by the other members." **H. Macmillan**, Britain, the Commonwealth and Europe, 1962, in Tory Europe Network, www.toryeuropenetowrk.org.uk

81 **N. MacCormick**, Beyond the Sovereign State, Modern Law Review, v. 56, January 1993, N1, 16.

82 On the EU's official internet site, the introduction to its institutions is preceded by a statement attesting to the common understanding of a pooling of sovereignty. "The European Union is not a federation like the United States. Nor is it simply an organization for cooperation between governments, like the United Nations. It is, in fact, unique. The countries that make up the EU (its "member states") pool their sovereignty in order to gain the strength and world influence none of them could have on its own. *Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level*., www.europa.eu.int/institutions/index_en.htm

3.2. A List of the Amendments to the 1991 Bulgarian Constitution

In 2003, several provisions were modified in order to improve the independence and efficiency of the judiciary. In 2005, a relatively extensive package of amendments was introduced to create a constitutional basis for accession to the EU and eliminate conflicts with EC law in the Constitution. The amended version of the Constitution can be found in English on the website of the Bulgarian National Assembly, at http://www.parliament.bg. The key amendments include the following:

Article 4(3)
The Republic of Bulgaria shall participate in the construction and development of the European Union.

Article 22[*]
(1) Foreigners and foreign legal persons may acquire property over land under the conditions ensuing from Bulgaria's accession to the European Union, or by virtue of an international treaty that has been ratified, published and entered into force for the Republic of Bulgaria, as well as through inheritance by operation of the law. (2) The law ratifying the international treaty referred to in paragraph 1 shall be adopted by a majority of two thirds of all members of the Parliament. (3) The land regime shall be established by law.

[*] This provision will take effect upon the entry into force of the Accession Treaty.

Article 25(3)
No Bulgarian citizen may be surrendered to another state or to an international tribunal for the purposes of criminal prosecution, unless the opposite is provided for by international treaty that has been ratified, published and entered into force for the Republic of Bulgaria.

Article 42(3)
The elections to the European Parliament and the participation of European union citizens in the elections for local authorities shall be regulated by law.

Article 85(1)
(1) The National Assembly shall ratify or denounce by law all international instruments which confer to the European Union powers ensuing from this Constitution.
(2) The law ratifying the international treaty referred to in paragraph 1, point 9 shall be adopted by a majority of two thirds of all members of the Parliament.

Article 105
(3) The Council of Ministers shall inform the National Assembly on issues concerning the obligations of the Republic of Bulgaria resulting from its membership in the European Union.
(4) When participating in the drafting and adoption of European Union instruments, the Council of Ministers shall inform the National Assembly in advance, and shall give detailed account of its actions.

Article 129
(3) Having completed a five year term of office as a judge, prosecutor or investigating magistrate, and upon attestation, followed by a decision of the Supreme Judicial Council, the judges,

prosecutors and investigating magistrates shall become irremovable. They, including the persons referred to in paragraph 2, shall be removed from office only upon:

1. completion of 65 years of age;
2. resignation;
3. entry into force of a final sentence imposing imprisonment for an intentional criminal offence;
4. permanent de facto inability to perform their duties for more than a year;
5. serious infringement or systematic neglect of their official duties, as well as actions undermining the prestige of the Judiciary.

(4) In cases of removal from office under paragraph 3, point 2 and 4, the acquired irremovability shall be restored upon subsequent appointment to the office of a judge, prosecutor or investigating magistrate.
(5) The heads of the judicial bodies, except for those referred to in paragraph 2, shall be appointed for a period of 5 years and are eligible for a second mandate.

Article 131
Any resolution of the Supreme Judicial Council to appoint, promote, demote, transfer or remove a judge, prosecutor or investigating magistrate, for giving permission under Article 132, paragraphs 2 and 3, as well as the proposals under Article 129, paragraph 2, shall be passed by a secret ballot.

Article 132(1)
When exercising the judicial function, the judges, prosecutors and investigating magistrates shall bear no civil or criminal liability for their official actions or for the acts rendered by them, except where the act performed constitutes an indictable intentional criminal offence.

* * *