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RENEWING THE EUROPEAN SOCIAL CONTRACT

**THE CHALLENGE OF INSTITUTIONAL REFORM
AND ENLARGEMENT
IN THE LIGHT OF
MULTILEVEL CONSTITUTIONALISM**

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RENEWING THE EUROPEAN SOCIAL CONTRACT

THE CHALLENGE OF INSTITUTIONAL REFORM AND ENLARGEMENT IN THE LIGHT OF MULTILEVEL CONSTITUTIONALISM*

by

Ingolf Pernice, Franz C. Mayer, Stephan Wernicke

Introduction

Our starting point is a truism: Europe is changing. It is true that both institutional reform and enlargement of the European Union have the potential to modify the European Union considerably¹. However, we do not intend to discuss the manner in which the institutions should be modified or what kind of Europe we will encounter at the end of this process here. Instead, we prefer to put the questions of institutional reform and enlargement into a specific constitutional perspective by suggesting an understanding of the EU's current constitutional order that, we consider, is not only better suited to capture the nature of European integration than traditional concepts of constitutionalism, but may also help to maintain the original character of the European project through these times of change.

What does "constitution" mean in the European context?² It does not mean establishing a constitution for Europe in the classical, 'statal' sense of a constitution. It seems to us that there is a

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¹ To avoid technicalities regarding the legal quality of the EU, "European Union" will be used as an umbrella term for EU and EC.

² See in that context the lecture held by the Minister of Foreign Affairs *Joschka Fischer* at Humboldt-University in May 2000: *J. Fischer*, Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration, in: Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed.), Verfassungsrechtliche Reformen zur Erweiterung der Europäischen Union, 2000, p. 171, also Integration 2000, p. 149, and the speech held by French President *Jacques Chirac* in June 2000 before the German Parliament ("Notre Europe - Discours prononcé par Jacques Chirac, Président de la République française devant le Bundestag", <http://www.botschaft-frankreich.de>). Other debates on a European constitution include German President *Johannes Rau* (see *J. Rau*, Die Quelle der Legitimation deutlich machen. Eine föderale Verfassung für Europa, Frankfurter Allgemeine Zeitung 4.11.1999, p. 16) and Italian President *Carlo Ciampi* (*C. Ciampi*, Zuerst muss die Vertiefung kommen, Zukunftspläne für die Europäische Union, Frankfurter Allgemeine Zeitung, 8.2. 2000, p. 16; Eine Verfassung für Europa, Frankfurter Allgemeine Zeitung 7.7.2000, p. 6; L'incontro in Sicilia tra il Presidente italiano e quello tedesco. Il passo avanti di Ciampi e di Rau "Serve una costituzione europea", La Stampa 10.6.2000, p. 8).

large consensus across Europe on this point. Europe is not [*page 62] a state and Europe should not become a state on the model of the nineteenth century nation state³.

When conceptualising constitution in the current EU, one has to acknowledge that, with European integration, we do have some kind of public authority beyond the nation State. This is a fact. This fact has to be matched with the need for a truly democratic, transparent and efficient system of governance, acknowledging that there have to be Member States and, sometimes, also sub-state entities, as a mere matter of proximity between government and governed. At the same time, one has to acknowledge that the setting for European integration is a globalised world, or what *Jürgen Habermas* calls "the Post national Constellation"⁴. Thus, conceptualising European constitutionalism is to a large extent thinking about how a "post national constitution" could be defined⁵.

This paper is divided into three parts. We will first - in part I - explore the possible constitutional foundations for Europe by contrasting constitutional orthodoxy with a concept of multilevel constitutionalism, and we will try to illustrate how the theoretical concepts of multilevel constitutionalism can be put into practice.

In part II, we will try further to elaborate the underlying idea of a European social contract.

In part III, we will return to institutional reform and enlargement in light of our suggested approach to European constitutionalism.

³ This was also emphasised by German Minister of Foreign Affairs *Joschka Fischer* in his Humboldt lecture in May 2000, see *J. Fischer*, Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration, in: Walter Hallstein-Institut für Europäisches Verfassungsrecht (ed.), Verfassungsrechtliche Reformen zur Erweiterung der Europäischen Union, 2000, p. 171, 177, also Integration 2000, p. 149, 153 et seq.; for a dissident voice, see *F. Mancini*, Europe: The Case for Statehood, ELJ 1998, p. 29.

⁴ *J. Habermas*, Die postnationale Konstellation und die Zukunft der Demokratie, in: Die postnationale Konstellation. Politische Essays, 1998, p. 91 et seq.; see also *M. Zürn*, The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance, ARENA Working Papers WP 99/35; *G.F. Schuppert*, Demokratische Legitimation jenseits des Nationalstaates. Einige Bemerkungen zum Legitimationsproblem der Europäischen Union, in: W. Heyde/T. Schaber (eds.), Demokratisches Regieren in Europa? Zur Legitimation einer europäischen Rechtsordnung, 2000, p. 65, 76 et seq.: Die postnationale Konstellation oder die EU als dynamisches Mehrebenensystem.

⁵ See the writings of *Deirdre Curtin* and *Jo Shaw* in that respect; *D. Curtin*, Postnational Democracy. The European Union in search of a political philosophy, 1997, p. 5, 48 et seq., 51 et seq.: "‘postnational’ is meant to express the idea that democracy is possible beyond the nation-state"; *J. Shaw*, Postnational constitutionalism in the European Union, Journal of European Public Policy 1999, p.579, 586 et seq.

I. The composite constitution of Europe and multilevel constitutionalism

The attempt to find an adequate label to attach to the European construct has not been confined to solely German scholars, nor to recent times. The quest for a name is as old as European integration itself. Whether Europe is a *Bundesstaat*⁶ (federal State) or a *Staatenbund* (confederation of States) or something in between, a *Staatenverbund* (compound of States⁷), as the German Constitutional Court following *Paul Kirchhof* suggests⁸, has been subject to extensive debate. [*page 63]

We believe that the name itself is not of primary importance. No conclusions can be drawn from the attribution or otherwise of notions of state or international organisation to an entity⁹. What is relevant is the concept behind the title. *Paul Kirchhof's* suggestion to name the European construct *Staatenverbund* is related to a specific view of European integration. It is a sceptical interpretation of European integration, and this scepticism extends to European constitutionalism.

1. Orthodoxy: constitutional conservatism

There are two major strands in German constitutional thought that represent legal scepticism against the European Constitutional process: The first one can be associated with the writings of *Dieter Grimm*¹⁰. His claim is basically that, to date at least, as there is no European people, there cannot be

⁶ *Walter Hallstein*, the first President of the Commission, published the first editions of his classic on European integration with the title 'Der unvollendete Bundesstaat', 1969 (The unfinished Bundesstaat).

⁷ The translation 'compound' is used in English language versions of the Maastricht-decision, it seems unfortunate, though, as it is much more connoted with technical-chemical language than the original 'Verbund'.

⁸ The notion lies somewhere between pun (*Staatenbund* - *Staatenverbund*) and camouflaged confederation (*B. Kahl*, *Europäische Union: Bundesstaat - Staatenbund - Staatenverbund?*, *Der Staat* 1994, p. 241, 245 et seq.), it was coined by the judge-rapporteur in the Maastricht case *Paul Kirchhof*, cf. reports of the decisions of the German Constitutional Court vol. 89, p. 155; *P. Kirchhof*, *Der deutsche Staat im Prozeß der europäischen Integration*, in: J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. VIII (1992), § 183 Para. 66 and seq.; *P. Kirchhof*, *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*, in *EuR Beiheft* 1/1991, p. 11; *P. Kirchhof*, *Die Gewaltenbalance zwischen staatlichen und europäischen Organen*, *JZ* 1998, p. 965.

⁹ Notions and concepts can make meaningful analysis more difficult, though, if they don't fit, which is one of the reasons why the neutral notion of multilevel-system has been quite successful in European integration analysis in the social sciences. See in that context *F.C. Mayer*, *Kompetenzüberschreitung und Letztentscheidung*, 2000, p. 37; see also *A. Benz*, *Verwaltungskooperation in Mehrebenensystem der Europäischen Union - Das Beispiel der regionalen Strukturpolitik*, in: E. Schmidt-Abmann/W. Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts*, 1999, p. 45, 46 et seq.; *B. Kohler-Koch*, *Einleitung: Regieren im dynamischen Mehrebenensystem*, in: *Europäische Integration*, 1996, p. 15 et seq.; *M. Zürn*, *Regieren jenseits des Nationalstaats*, 1998, p. 234 et seq.; *C. Harding*, *The Identity of European Law: Mapping Out the European Legal Space*, *ELJ* 2000, p. 129, 144 et seq..

¹⁰ *D. Grimm*, *Does Europe Need a Constitution?*, *ELJ* 1995, p. 282, commented on by *J. Habermas*, *Remarks on Dieter*

a *pouvoir constituant* in Europe and, thus, it follows that there is no basis for a European Constitution. For him, as for many others, the notion of ‘constitution’ is necessarily bound to the concept of a people¹¹. Others go even beyond that in claiming that there has to be a *Staat* first, before there can be a constitution. This is the central element of the perspective suggested by *Josef Isensee, Paul Kirchhof* and others¹². There is some exclusiveness in this line of reasoning, which has consequences for the concept of European constitutionalism: either the Union becomes a state, and as such can have a constitution, or the Member States (sovereign States) which have their own constitution exclude a European constitution. The deeper fear behind this reasoning becomes visible when *Paul Kirchhof* claims that the European Constitution – if it ever existed – would affect the validity of the constitutions of the Member States¹³. It is in that sense that this approach could be coined [*page 64] constitutional conservatism or constitutional exclusivity.

Both strands of constitutional conservatism would lead to a negative answer to the question posed by this symposium, at this point in time at least.

2. Multilevel constitutionalism: constitutional pluralism

If our answer to the question raised by the conveners of this workshop is in the affirmative – yes, Europe can have a constitution and it even has one already – it is mainly because of two assumptions: the first one is that the concept of people related to a State has to be complemented by a concept of the individual within - indeed the citizen of - the union related to European public authority. In a broad sense, ‘people’ simply means a self-defined group of human beings. The logical next step is to go beyond the concept of people and to focus on individuals.

The second assumption is that the concept of constitution is neither linked nor limited to the State. In this reading, a constitution is both foundation and limitation of public authority over those who

Grimm’s ‘Does Europe Need a Constitution?’, *ELJ* 1995, p. 303; *D. Grimm*, The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision, *CJEL* 1997, p. 229; *D. Grimm*, Vertrag oder Verfassung, *Stw&StP* 1995, p. 512.

¹¹ See for example *C. Koenig*, Ist die Europäische Union verfassungsfähig? *DÖV* 1998, p. 268, 275.

¹² *J. Isensee*, Staat und Verfassung, in: *J. Isensee/P. Kirchhof* (eds.), *Handbuch des Staatsrechts*, Vol. I, 1987, § 13 Para. 1; *P. Kirchhof*, Die Identität der Verfassung in ihren unabänderlichen Inhalten, *ibid.*, § 19 Para. 18; *E.-W. Böckenförde*, Staat, Nation, Europa. Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie, 1999, p. 135 et seq.; *D. Murswiek*, Maastricht und der *pouvoir constituant*, *Der Staat* 1993, p. 161, 168 et seq.

¹³ “In dem Moment, in dem man der nationalen Verfassung eine europäische Verfassung entgegenstellt, verliert die nationale Verfassung ihre Verbindlichkeit”, “Zu schnelle Vereinheitlichung gefährdet Europa”, *Süddeutsche Zeitung* No. 275 27./28.11.1999, p. 14 (Interview).

are subjects of and thus subject to that authority. There can be no legitimate public authority beyond the one created by the constitution¹⁴.

Based on these two assumptions, we can understand the European Union in 'non-statal' terms: The core elements of European constitutionalism are, on the one hand, the public authorities that exist both at European and Member State level and, on the other hand, the individuals subject to those authorities. The respective frameworks for these national and supranational public authorities can be understood as two distinct, albeit related, constitutional levels which are complementary rather than in a hierarchical relationship, forming a single constitutional system of *multilevel constitutionalism (Verfassungsverbund)*¹⁵. It is this system as a whole that is 'the European Constitution', which thus turns out to be a composite constitution, its composite parts and the compositional basis itself resting on the will of the individuals in Europe. We will further explore this idea regarding the foundation of the European constitutional order on the individual with the idea of a European social contract (part III below).

There is, at least, one obvious conceptual objection here. How do we overcome the empirical fact that the founding treaties were concluded between States to the exclusion, for the most part, of participation by citizens? The key to answering this is to look more closely at the legitimacy of the respective national constitutional orders. Most Member State constitutions provide for establishing – constituting – a supranational layer of public authority. Even where the constitution is silent on European [*page 65] integration, the Member State's constitution or constitutional order is at least open in that respect. If it is correct that the respective Member State constitutions or constitutional

¹⁴ Cf. *P. Häberle*, Die Europäische Verfassungsstaatlichkeit, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 1995, p. 298 at 300.

¹⁵ See in that context *I. Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: R. Bieber/P. Widmer (eds.), *The European constitutional area*, 1995, p. 225, 261 et seq., and *I. Pernice*, Die Dritte Gewalt im europäischen Verfassungsverbund, *EuR* 1996, p. 27 et seq.; *I. Pernice*, Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and Multilevel Constitutionalism, in: E. Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998*, 1998, p. 40-65; *I. Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, *CMLRev.* 1999, p. 703 et seq.; *A. v. Bogdandy*, Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform. Zur Gestalt der Europäischen Union nach Amsterdam, 1999, p. 13 et seq.; *R. Wahl*, Die zweite Phase des öffentlichen Rechts in Deutschland. Die Europäisierung des Öffentlichen Rechts, *Der Staat* 1999, p. 495, 500 et seq.; for the level-metaphore, see *F. C. Mayer*, Kompetenzüberschreitung und Letztentscheidung, 2000, p. 36.

orders rest, in the end of the day, upon the consent of the people, i.e. the individuals – be it through formal mechanisms of approving constitutions by referenda, or by the *plébiscite de tous les jours*¹⁶ – it is the very same individuals who consent to and thus constitute the foundation of the European legal order through their consent to the national constitutional order. The difference compared to interpretations of constitutional orders such as the US with ‘foundings’ or ‘re-foundings’ (‘constitutional moments’¹⁷) is that European constitutionalism is a process where the reference-point of the constitutional consent of the individual is reshaping the identity of this very individual. In constituting the foundation for the European legal order, individuals give themselves a new, additional identity: beyond that of national citizens, they become citizens of the European Union. These multiple identities of the individual correspond to multiple levels of governance and constitution.

The hallmarks of this concept of multilevel constitutionalism are comprehensiveness and multiplicity. With regard to the European Union, we shall illustrate this concept focusing on four aspects: the European constitutional system, although composed of multiple constitutional levels and – at least technically – autonomous sources of law, constitutes (a) one single, comprehensive system of law and has (b) one single and coherent judicial system.

It constitutes (c) one single political system. The different constitutional levels form (d) a system of reciprocal stability, based on the mutual acceptance of national identity and supranational solidarity.

a) The European Union as a single legal system

Although the jurisdiction of the court emphasises the autonomy of the European legal order¹⁸, national law and European law are closely intertwined. Supranational law is part of the municipal legal orders of the Member States; on the other hand the national legal systems in many respects provide the basis for supranational law and its implementation. Each and every legal question finds an answer either in national law or in supranational legal rules or in a combination of the two.

¹⁶ See in that context *E. Renan*, *Qu’est-ce qu’une nation ?*, Conférence faite en Sorbonne le 11 mars 1882, 1882, p. 26 et seq.: “*plébiscite de tous les jours*” (referring to the nation, though); *R. Smend*, *Verfassung und Verfassungsrecht* (1928), in: *Staatsrechtliche Abhandlungen*, 3rd ed. 1994, p. 119, 136 et seq. (referring to the state).

¹⁷ *B. Ackerman*, *We the people. Foundations*, 1991. Applying the Ackermanian theory to European constitutional settings *P. Weil*, Préface, in: *B. Ackerman, Au nom du peuple*, 1998, p. 9-25; applying it to the EU/EC *N. MacCormick*, *Democracy, Subsidiarity, and Citizenship in the ‘European Commonwealth’*, *Law and Philosophy* 1997, p. 331.

¹⁸ *Bosch* – ECJ Reports 1961, p. 97, 110 et seq.; *Van Gend en Loos* – ECJ reports 1963, p. 1, 25 et seq.; *Costa/ENEL* –

But what if national law and supranational law give conflicting answers? In that case, a rule of conflict applies which, generally, gives primacy to the European rule. The principle of supremacy of European law, defended by the ECJ¹⁹ and, in principle, [*page 66] recognised by all Member States²⁰, is a core element of the European constitution²¹. It is confirmed by the Protocol on subsidiarity which is annexed to the Amsterdam treaty²². What is crucial is that the principle of supremacy does not automatically imply a hierarchy of norms: it is just an answer to the question which norm prevails in case of conflict. A general hierarchy between the respective levels would be typical of a federal state, as we know it. This is not what the concept of multilevel constitutionalism is about.

Without the principle of supremacy, the system of European law could not function. The equal and unitary application of Community law is the basis of the Community's cohesion. It is necessary for the equality of the individuals subject to European law throughout the Member States. A somewhat monistic approach, therefore, is inherent in the logic of the system, and the respect for the rule of supremacy of Community law, indeed, is an undeniable precondition for each Member State's participation on a reciprocal basis. Compared to international organisations and conventions, however, reciprocity does not mean that Member States may disregard a rule of Community law because other Member States do. It is the function of the legal system of the community, based on the treaty, which gives the Commission and the European Court of Justice the role of guardian over seeing compliance with Community law, to ensure that each Member State respects the supremacy of Community law as an unconditional basis of its membership.

b) One single judicial system

The Court of Justice, therefore, has the final say on the interpretation and, even more importantly,

ECJ reports 1964, p. 1251, 1269 et seq..

¹⁹ Cf. *Costa/ENEL* – ECJ reports 1964, p. 1251, 1269 et seq.; *Internationale Handelsgesellschaft* – ECJ reports 1970, p. 1125, 1135 et seq.; *Simmenthal II* – ECJ reports 1978, p. 629, 644 et seq.; *Factortame* – ECJ reports 1990 p. I-2243, 2473 et seq.; *Nimz* – ECJ reports 1991, p. I-297, 321 et seq..

²⁰ For an overview on the situation in the 15 member states, see *F. C. Mayer, Kompetenzüberschreitung und Letztentscheidung*, 2000, p. 140-271.

²¹ Cf. *S. O'Leary, The Reciprocal Relationship Between Irish Constitutional Law and the Law of the European Communities*, in: T. Murphy/P. Twomey (eds.) *Ireland's Evolving Constitution, 1937-97: Collected Essays*, 1998, p. 293: "The principle remains one of the fundamental pillars of the constitutional architecture of the European Communities".

²² Cf. also *J.-C. Piris, L'Union européenne a-t-elle une constitution? Lui en faut-il une?*, RTDEur. 1999, 599, 603; *N. McCormick, Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, 1999, p. 137 et seq.

on the validity of Community law²³. But the Court of Justice is just one element in the European judicial system. In fact, implementation, application, and interpretation of Community law are first of all in the hands of the national judges. National judges have to apply Community law as a part of their national legal system, and it is therefore their duty to give precedence to Community law where it conflicts with a rule of national law. They are also obliged to verify whether EC-legislation is in compliance with the more general principles of Community law. In case of doubt, they have to refer the question of validity of these provisions to the Court of Justice. To phrase it differently: although national judges are not entitled to disregard a norm of Community law, they have the obligation, in each case, to see that European legislation complies with the European constitution. In this aspect, each national judge is also a European judge. Apart from her national loyalty to the national constitution, each judge has a European loyalty to the European constitutional order to ensure the full application of European community law. [*page 67]

c) One single political system

The decision-making and legislative process also constitutes one single system in which national and European institutions are intertwined and interrelated. This is quite obvious regarding decision-making in the main legislative institution, the Council. The Council consists mainly of ministers of the Member States. Its legitimacy flows from the legitimacy of the national governments. Although each member of the Council arguably pursues a national interest, the sum of the political will of the ministers expressed in the Council is, generally, a sound compromise between the diverging political preferences and interests of the various national governments. In this process of legislation, the role of the Commission and, more and more, of the European Parliament becomes increasingly important. While the legitimacy of the Commission is derived from that of national governments, a new strand of legitimacy has progressively entered into the legislative process as a result of the increasing power of the European Parliament, due to the introduction of qualified majority voting in the Council as well as the co-operation or co-decision procedures by the Single European Act, Maastricht and Amsterdam treaties. And there is another process one can observe: the more control national parliaments have over the positions of their ministers at the Council – see the Danish example²⁴ – the more national parliaments become part of the European legislative process. The more areas are covered by European policies, the more national parliaments act as European parliaments and subjects of European policies will be relevant for national parliamentary elections.

²³ *Foto-Frost* – ECJ reports 1987, p. 4199.

²⁴ Cf. *I.M. Jarvard*, The Committee of European Affairs of the Danish Parliament (the Folketing), in: P.P. Craig/C. Harlow (Hrsg.), *Lawmaking in the European Union*, p. 223 et seq.

In addition, national parliaments are subject to European responsibilities in implementing European legislation as well. Where the European Union legislates in the form of directives, their implementation requires the transposition of these directives into national law by national legislation, in doing this; technically national legislators are also European legislators. Failing to legislate adequately is sanctioned on the European level.

The interdependence of the two levels of governance in the European Union, beyond the interdependence of the courts (see under (a) above) is even more visible when it comes to implementation. As confirmed by the declaration on the subsidiarity Protocol annexed to the Treaty of Amsterdam, implementation, as a rule, is a matter for the Member States. This amounts to a genuine vertical separation of powers: European legislation would not have any effect on the citizens of the Member States if the national administrations were not bound and prepared to apply and implement European law at the national level.

d) Enhancing political stability and safeguarding constitutional diversity

One way to look at Articles 6 and 7 of the Union Treaty is to understand them as a mechanism of ensuring political stability within the EU, without ignoring constitutional heterogeneity. According to Article 6 TEU, the European Union is based on the principles of democracy, rule of law and human rights protection. Article 7 TEU even [*page 68] provides for a procedure allowing sanctions in case of disregard of these principles. In our reading, this amounts to limiting Member State's constitutional autonomy. Member States are no longer the masters of their constitutions. If for example Germany abolished the whole fundamental rights protection mechanism laid down in the German constitution, this revision of the constitution would not be void because of the incompatibility with Article 6 TEU. But it would be illegal under European law. This example illustrates the non-hierarchical relationship between the European constitutional level and the Member States' constitutional level and the difference between validity and legality under European law.

Articles 6 and 7 TEU guarantee a minimum of constitutional homogeneity within the EU. On the other hand, Article 6 TEU also expresses the guarantee of national constitutional identity. The comprehensiveness and the multiplicity of European constitutionalism are particularly visible here, where a common ground of constitutionalism is combined with the heterogeneity of Europe.

II. Rethinking the foundations: the European social contract

As we have shown so far, the notion of a European Constitution can explain, if seen from a multilevel perspective, why a constitution does not presuppose the existence of a State but must be understood as an expression of the sovereignty of the individuals participating in the contractual foundation of government. However, the question of legitimacy has so far been left aside. How can the polity of the European Union, a “would-be polity” in the eyes of some²⁵, legitimise a multilevel constitution? If, as shown above, constitutional law at least on the European level separates the notion of the constitution from that of the State, the next logical step with regard to legitimacy is to ask how this process reflects on the *pouvoir constituant* and its hitherto procrustean bed of statehood. We will argue that the notion of the European Social Contract is an indispensable tool to provide for such legitimation, because it reinstates the individual in his own right²⁶.

a) The social contract: The individual and State authority

The justification for choosing a term fraught with political and philosophical connotations²⁷ lies in its modernity. Questioning the sources of legitimacy, explaining who is at the origin of the conclusion of international treaties, and in particular the treaties [*page 69] on the European Union, unavoidably leads to models of modern contract theories²⁸ whereby the individuals of Member States, acting through their respective institutions, contract. There is no legitimacy without individuals. Even if one submits that the legitimacy of the European Union is drawn from the Member States²⁹, given that they are democratic States, their source of legitimacy can only be their

²⁵ See for an early statement *L. Lindberg/S. Scheingold*, *Europe's Would-Be Polity*, 1970, chapter 4; *J.H.H. Weiler*, *Europe after Maastricht - Do the New Clothes have an Emperor*, Harvard Jean Monnet Paper 12/1995; *J. Shaw/A. Wiener*, *The paradox of the European Polity*, Harvard Jean Monnet Working Paper 10/99, p. 12 et seq. separating the institutional from the theoretical development. *D. Chalmers*, *Accounting for Europe*, Oxford Journal of Legal Studies, 19/3, 1999, p. 517.

²⁶ For use of the term European Social Contract see *J.H.H. Weiler*, *We will do. And hearken. Reflections on a Common Constitutional Law of the European Union*, in: R. Bieber and P. Widmer (Eds.), *The European Constitutional Area* (1995), p. 413 at 439; *E.-J. Mestmäcker*, *Risse im europäischen contrat social*, in Hanns Martin Schleyer-Preis 1996 und 1997, *Veröffentlichungen der Hanns Martin Schleyer-Stiftung*, p. 53 at 54, *C. Montero*, *A new Social Contract? EU citizenship as the institutional basis of a new social contract, some sceptical remarks*, European University Institute, Working Paper n° 96/48, 1996.

²⁷ The history of the term “*contrat social*” is described in detail by *P. Bastid*, *L'Idée de Constitution*, p. 79.

²⁸ For a critical position as to the contractual foundation see *G. Frankenberg*, *Die Verfassung der Republik*, 1997, p. 50.

²⁹ Cf. *J.C. Piris* (*supra* Fn. 22), linking the legitimacy of the Union to the member states.

citizens, and there is, ultimately, no other possible source of legitimacy than the common will of these citizens who are the citizens of the European Union. Accordingly, the successive treaties are only in a very formalistic perspective treaties of international law, indeed they are an expression of the will of the individuals who define themselves as creators of the new legal order and of common government, fixing its aims and objectives and endowing it with competence.

This view is based on a concept of a constitution as a self-referential process. We will not enter into debate regarding the concept of constitution. For present purposes, we believe that in its essence a constitution is what results if a group of people with regard to a determined territory undertakes to

- organise public authority for common goals by establishing specific institutions and functions (legislative, administrative and judicial), to attribute specific competence to each of these institutions and to fix procedures according to which these institutions act and interact,

- establish and define membership or citizenship or, in other words, define who is part of the people – or demos – and who is not. Moreover, they define the legal status of citizens, notably their fundamental rights, their right of participation in the political process and conditions for equal access to the institutions,

- define the acting group itself as a "pouvoir constituant" in relation to this constitution and the public authority conferred by it (see above I. 2).

Simply put, the constitution is nothing but the expression of the social contract, viz. the stipulation that a certain authority is constituted by and through a given group of individuals. In our understanding, the European social contract is evidence of the relationship between a European citizenry³⁰ and its Community³¹, identical to the relation existing at national level. The European

³⁰ Insofar the terms of the citizenry and the people might be used interchangeable *J. Delbrück*, Global Migration - Immigration – Multiethnicity: Challenges to the Concept of the Nation State, *Indiana Journal of Global Legal studies* 1994, p. 4857 et seq.

³¹ Cf. in this regard *C. Tomuschat*, Die staatsrechtliche Entscheidung für die Internationale Offenheit, in: J. Isensee/ P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VII (1995), § 172 Para. 72.

Union represents the constituted power to the constituency. The pouvoir constituant is “*composed of as many members as the assembly contains votes*”³². [*page 70]

b) The modification of the Constitution

Having established the link between European citizens and the founding treaties, it is now important to observe that not only the conclusion of the treaties of the European Union, via the European social contract, but also each revision of these treaties and, indeed, each act of legislation in compliance with the power given to the European Union, results in a modification of the national constitution. Conclusion and revision of the European Union Treaties are to be seen as a single process constituting supranational power and destituting certain national powers and competences: the supranational level hence reflects on the national social contracts. Hans Peter Ipsen dubbed this process “*a mutation of the national constitution*”³³. This has also been recognised by the German Constitutional Court which regards supranational law-making partly as a material modification of the national constitution. Moreover – and as far as the latest revisions of the Treaties, Maastricht and Amsterdam, are concerned – the express modification of the national constitution has been regarded as necessary in some Member States, like Germany, France and Spain³⁴. The substance of each national constitution can therefore be clarified only by taking into account the integrity of supranational constitutional and secondary law. For this reason alone, the model of European constitution building must include the notion of a European social contract, even if it were reduced to its mythical function. But given that both levels are interdependent and complementary, likewise the supranational Constitution cannot be understood without a look at the provisions of the national constitution. They directly or indirectly guide the development of the European Constitution. The tools to steer this process are the integration clauses in the national constitutions³⁵. These clauses constitute the procedural norms of the national social contract³⁶ for the conclusion and the development of the European social contract. Whatever their exact wording, they are certainly not

³² *J. J. Rousseau*, *The Social Contract or Principles of Political Right*, Book 1, VI, and Derridas question “*How many are we?*”, in *J. Derrida*, *Politics of Friendship*, 1997, p. 1 et seq. Critical of the use of the pouvoir constituant for the European integration: *O. Béaud*, *Propos sceptiques sur la légitimité d’un référendum européen ou plaidoyer pour plus de réalisme constitutionnel*, in: A. Auer/J.-F. Flauss (eds.) *Le référendum européen*, 1997, p. 125, 160.

³³ *H.P. Ipsen*, *Als Bundesstaat in der Gemeinschaft*, in: *E. v. Caemmerer et al.*, (eds.), *Probleme des europäischen Rechts*, Festschrift Walter Hallstein, 1966, p. 248, 264.

³⁴ *I. Pernice*, *Multilevel Constitutionalism*, *supra* Fn. 15, p. 715 et seq. with further references.

³⁵ *Ibid.*

³⁶ *D. Murawiek*, *Maastricht und der pouvoir constituant*, *Der Staat* 1993, p. 161 et seq., underlines the importance of the national pouvoir constituant in the succeeding reforms.

authorising national institutions to delegate national power, authority or sovereignty to the European Union, because no single Member State wields the powers that the European institutions exert. Instead, these powers have been conferred to the European institutions through an original act of the peoples of the Member States acting together and creating the new European public authority. Therefore, the function of the integration clauses lies in opening the national constitutions to this new constitutive act of the people as part of the European people³⁷. As an example, Article 23 of the German Grundgesetz not only empowers, but also obliges German authorities to contribute to the developments of the European Union to achieve this aim. The process of European Constitution building (negating the original treaty-based character) on the basis of these integration clauses is also secured by Article 48 of the Treaty on the European Union which not only secures the involvement of the European institutions in the case of the negotiation and conclusion of a new treaty, but provides for its ratification by the Member States under their respective constitutional conditions³⁸. Therefore, revision (and it should be highlighted: enlargement) of the Treaties on the European Union is a process involving both constitutional levels.

c) The individuals as “masters of the Treaty”

This interdependency leads on the one hand to the conclusion that Member States are no longer masters of their own constitutions. Take, for example, the situation that a Member State is inclined to modify its constitution in order to give a specific competence, which has already been established as a Community competence, to a national institution. Indeed, the supremacy of Community law will hinder such a move. On the other hand – and this should be said in the clearest terms – it is also wrong to pretend that the Member States are masters of the Treaty. Only the members of the European social contract, the European citizens acting as the *pouvoir constituant* and *eo ipso* sovereign³⁹, are entitled to revise the Treaties. If this assumption is valid, there is ample reason to reflect on the possible procedures to include the citizens. There is no doubt that the existing procedure for revision of the Treaties is one possible model for European constitution-making involving both the state and the European levels of government. However, if legally the individuals are the respective authors of the European Constitution at both levels of governance, the procedure

³⁷ Art. 17 EC-Treaty accordingly talks about European citizens. The same idea lies behind the preamble of the German Grundgesetz: it is not at all the German State but “the people” which is resolved to serve international peace by being an equal member of a united Europe

³⁸ Cf. *K. Lenaerts*, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, CJEL 2000, p. 1, 2 referring to the *pouvoir constitué* in Art. 48 TEU.

³⁹ Cf. *Conseil d'État français*, N° 92.312 of September 2nd, 1992: “Le pouvoir constituant est souverain”.

of constitutional change in the European Union needs further development, away from the intergovernmental approach. One probable model is a convention, like the one created for the drafting of the charter of fundamental rights. A convention constituted on similar lines could develop the terms of a European Constitution. Such a unitary text, still dependent on the interplay between national and European level, should be scrutinised and endorsed by the Intergovernmental Conference and, finally, for its entry into force, adopted by a Europe-wide referendum⁴⁰. And most importantly: during such process, as might be triggered by the developments after the Nice Treaty, consciousness will be raised that the European citizens have the final say, as the "pouvoir constituant" of the European Union.

III. Consequences for the institutional reform

1) The necessary inclusion of the candidate countries

The institutional reform of the European Union, launched 14 February 2000, is meant to prepare the European Union for its enlargement by up to 15 new Member States. It has been said many times and in many places before that this will be a process [*page 72] of profound modification of today's European Union. Reform and enlargement are closely interrelated, indeed. Enlargement is impossible without prior institutional reform, covering aspects such as the composition of the Commission, the principle of Qualified Majority Voting (QMV) in the Council, and the votes accorded to the various Member States. On the other hand, without the pressure of enlargement there will be no institutional reform, no effort to make the European Union more democratic and its institutions more efficient. It is a desirable side-effect that the European Parliament achieves substantial additional power as a result of this process. The European Parliament has to express its consent to both enlargement (Article 49 TEU) and (as a matter of fact, albeit not of law) to the revision procedure under Article 48 of the TEU. The procedures of revision and enlargement are thus necessarily parallel. As Günther Frankenberg has already pointed out, the views of the candidate countries have to be taken into account during the institutional reform process. Clearly, the body of law to which the new members will adhere is certainly not the "acquis communautaire" on which negotiations were based in 2000. The new members will be Member States of a substantially altered European Union. The whole process is due to fail, if the reformed Union is not

⁴⁰ Prominent German supporters of referenda include - in case of a constitutional treaty *Herta Däubler-Gmelin* (Minister of Justice), *Forum Constitutionis Europae* 8/2000, http://www.rewi.hu-berlin.de/WHI/deutsch/fce/fce800/bericht_gmelin.htm, p. 11 and apparently *J. Fischer*, *Süddeutsche Zeitung*, September 9/10, 2000, p. 13; with regard to the fundamental rights charter *G. Hirsch*, *Ein Bekenntnis zu den Grundwerten*, *Frankfurter Allgemeine Zeitung*, October 12, 2000.

in compliance with what the acceding States had in mind when they decided to apply as candidates for accession.

2) The institutional system

It is not possible to define today the necessary amendments to prepare the Union for enlargement. Given that most of the new acceding Member States have only recently attained sovereignty, democracy and respect for the rule of law including fundamental rights, at least some institutional requirements must be achieved during the process of negotiation. It is common ground that the institutional system, including its procedures of decision-making, will have to meet the objectives of enhanced democratic legitimacy, increased transparency and accountability of those acting on behalf of the European citizens. Enhanced democracy can be achieved by including the European Parliament generally and more effectively into the decision-making process. Co-decision should be the rule of every legislative area under QMV. Transparency requires that negotiation and decision-making within the Council are made public, with each government explaining in public its particular position as regards a Commission proposal. Efficiency requires that QMV is the general rule. With few unavoidable exceptions, no Member State should have a veto to block legislation. Moreover, efficiency also requires that the Commission remains one single independent European body. In this perspective, Commissioners cannot be regarded as “representing” their Member States but as European agents, acting independently of national interests, loyal only to Europe. Consequently, there is no need to keep the number of Commissioners equal to the number of the Member States. The Commissioners should instead be nominated by the President of the Commission according to his political program and political priorities, respecting geographical or original representation but on a general level. The election of the President of the Commission by the European Parliament, itself elected on the basis of the respective political programs, would enhance democratic legitimacy and thereby motivate the electorate to participate in European elections. Citizens will not be interested in participating in elections unless there is a real political choice. [*page 73]

3) The procedure of revision

A second consequence of the inclusion of citizen participation is the need for a new procedure for revising the treaties. As George Berman pointed out, it must be clear what is the “constitution-making” assembly, who will propose a draft to the *pouvoir constituant*. It does not seem useful, however, just to create a convention and give it the task of working out the text of the European

Constitution to be adopted by a European referendum (or a set of national referenda). The intergovernmental process is adequate for a system which is based on the existence and continuation of Member States, guarding their national identity. Nevertheless, involving the citizens at the very beginning of the constitution-making process is of utmost importance for any constitutional development and can, as we have said before, be achieved only by way of the adoption of a revised treaty by national and/or a Europe-wide referendum.

4) Areas of concern

The drafting and proclamation of the fundamental rights charter cannot be overestimated in their value for the European Union and its enlargement. They promote an all-European public discourse on common values and rights, thus forming the basis of the continuing integration of the European Union. It is important for future Member States to know the basis and orientation of public powers. Of course, many questions will remain outstanding before a fundamental rights charter could be integrated into the treaties, for example, the precise role and function of fundamental rights besides protecting liberty and equality of the European citizens, or the perceived danger of new competences of the European Union as a result of social, cultural or environmental rights. These questions are still unresolved after the Nice Treaty, and it is uncertain whether the European Court of Justice, already under a heavy workload, will be able to provide an effective protection of the rights included in the charter, regardless of its precise legal status (interpretative tool or legally binding instrument). Nevertheless, we consider this path to be the most promising one.

Another important question is how to delimit national and European competences. Joseph Weiler considered this to be a precondition for QMV. To proceed by copying the German model, namely by delimiting functional competences, seems to be an unacceptable solution for many Member States. It is also improbable that it would provide more protection for the Member States than the actual system, based primarily on the purpose of a given norm, since most German Länder permanently complain of the expansion of competences at federal level. However, some structure in the field of attributed competences could be helpful, for example clearly defining which competences are exclusive, or whether a given competence might serve as a basis for harmonisation, for co-ordination or just for financial support. Lastly, it also seems appropriate in this regard to give up the three pillar structure of the European Union and develop a coherent system of competences, into which competences for foreign and security policies and for home affairs are integrated.

[*page 74]

Conclusion

We understand the European Union as a multilevel constitutional system involving two constitutional levels, complementary to each other. The creation and revision of the Treaties, involving both the national constitutional level and the European constitutional level, signify a continuously developing European social contract. The process of institutional reform and enlargement are matters for all of us, they form “our Europe”. The state, mythical in its roots, is nothing but an instrument for the people to deal with particular questions of public concern. So is the European Union. It was created to cope with challenges of international peace, of environmental integration, to combat terrorism and organised crime, to steer globalisation, in short to address any problem beyond the influence of a single Member State. European citizens will increasingly become aware of the fact that the accession of new Member States will not only lead to the inclusion of new citizens into the existing group. At the same time all the citizens of the original Member States will enjoy the rights and obligations of European citizenship in the new Member States. Forming a Union of approximately 30 States out of the current 15 Member States, thus increasing the population from 320 to some 450 million people including at least 10 new languages and numerous cultures, is a common challenge for everybody in Europe. We will all participate in a political discourse which will fashion the Community and determine its constitution. Bearing in mind the uncertainties of this development, it would be wise to be aware of the essence of current reform: to re-found and extend the European social contract to all citizens of the European Union in the old and in future Member States.