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## **The European Constitution**

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# **THE EUROPEAN CONSTITUTION**

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*(Summary)*

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***Summary** The Nice Summit was a new step in the Process of European Integration. At least since the famous Humboldt-speech of Joschka Fischer, German minister for foreign affairs, talking of the concept of a constitution for the European Union is not a taboo any more even outside Germany. On the basis of a "postnational" concept of constitution in fact, the European Treaties, as they stand today, may be understood as a constitution which is complementary to that of the national constitutions and is merging them together to a coherent European system within the terms of "multilevel constitutionalism". The Nice-Declaration on the Future of the Union and the "post Nice Process" indicates where to go for reshaping the Treaties which have become more and more complex, to one consolidated text which shall look more like a constitution in the traditional sense and may be accepted by the European citizens more easily as the constitution of the Union. The solemn proclamation of the Charter of Fundamental Rights at the Nice summit was a first step on this way; this charter should constitute the first part of the new consolidated text. The most difficult step in shaping the new Treaty, however, will be to bring the competencies entrusted to the European Union in a new and systematic order, and to define them more clearly. This exercise should aim at providing the citizens more clarity and transparency on which tasks and responsibilities are implemented to what extent, at which level of action, by which institutions, according to which procedures. There should be a general distinction of the categories of exclusive, concurrent and complementary legislative powers, of the matters where the European institutions have direct executive and administrative functions and all the areas where the institutions of the Union perform merely auxiliary functions in the co-ordination of national policies and by encouraging the co-operation of the Member States, including systems of multilateral surveillance. Each category should be introduced by general provisions on the modalities of decision-making to be observed in the given area, and it is clear that the principle of co-decision of the European Parliament should apply to any legislation of the Union. There should be, in addition, a procedural safeguard for the respect of the limits of the Unions competencies and the principle of subsidiarity, and it is suggested to create a Parliamentary Subsidiarity Committee to fulfil this function. It should consist of representatives of the national and, as the case may be, regional Parliaments and be consulted in each case of doubt. This Committee would function as an interface between the European institutions and the national Parliaments, providing them an immediate and active political role in the European decision-making process, without stifling them by the whole workload of European legislation. Its opinion would not be binding for neither the European Parliament nor the Council, but compel these institutions to properly argue why they consider that the competence and subsidiarity requirements are met in the given case. It would not affect the jurisdiction of the Court of Justice, but the public debate on the questions would allow the Court to judge, if necessary, on a more elaborated basis. Whatever the suggested improvements may be, nonetheless, the exercise will be successful only if an adequate procedure is chosen for the preparation of the Intergovernmental Conference of 2004. Quite like for the original foundation of the Community and each enlargement, it is important to understand that it is the preparation and conclusion of a new, revised and enlarged European social contract, to which the citizens of the candidate-countries and their representatives are an integral part. The scenario of parallel negotiations on accession to and the revision of the Treaties, based on an informal convention, could bridge otherwise insoluble contradictions: Its composition should anticipate the enlargement, work informally following the model of*

*the fundamental-rights-convention with the highest possible transparency and public participation, to produce a proposal for a consolidated Treaty, the final text of which would be negotiated and finally adopted by the IGC of 2004 with the formal participation of the first group of new Member States.*

## Introduction

The question of „European Constitution“ has again found an important place, these days, on the political agenda. Yet, the initiatives of the European Parliament of 1984 and 1994 have remained unsuccessful,<sup>1</sup> the debate has got a new impetus not earlier than in 1999. Schäuble/Lamers proposed a „Constitutional Treaty”,<sup>2</sup> and late in 1999 the German Federal President Johannes Rau voted publicly for a “Federal Constitution for Europe”<sup>3</sup>. The real kick-off, however, was given by the famous speech of the German foreign minister Fischer in May 2000 at the Humboldt-University of Berlin<sup>4</sup>. It provoked reactions and comments<sup>5</sup> of different kind, such as by the Italian President Ciampi in Leipzig<sup>6</sup> and Chirac in Berlin<sup>7</sup>, or Prime-Ministers Blair in Warsaw<sup>8</sup>, Lipponen in Bruges<sup>9</sup> and Verhofstadt in

<sup>1</sup> See the draft of *Spinelli* of 1984, EA 1984 D, 209 et seq.; comments: *P.V. Dastoli/A. Pierlucci*, Verso una costituzione democratica per l'europa. Guida al trattato di unione europea, 1984; *J. Schwarze/R. Bieber* (eds.), Eine Verfassung für Europa, 1984; *I. Pernice*, Verfassungsentwurf für eine Europäische Union, EuR 1984, 126. A second draft has been presented with the report of *F. Herman* of 9 February 1994 (RUDH 1995, 457 et seq.); see also the Resolution of the European Parliament of 10 February 1994, containing the text of a draft for a Constitution of the European Union, RUDH 1995, 461 et seq.

<sup>2</sup> *W. Schäuble/K. Lamers*, Europa braucht einen Verfassungsvertrag, FAZ no. 103, 4 May 1999; *W. Schäuble*, Europa vor der Krise? FAZ no. 132, 8 June 2000, p. 10. For comments see: *J. Schwarze*, Auf dem Wege zu einer europäischen Verfassung - Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht, EuR Beih. 1/2000, 7, 28 et seq.

<sup>3</sup> *J. Rau*, Die Quelle der Legitimation deutlich machen. Eine föderale Verfassung für Europa, FAZ no. 257, 4 Nov 1999, p. 16; and recently *J. Rau*, „Wir brauchen eine europäische Verfassung“, Die Welt, 18 September 2000, [www.welt.de/daten/2000/09/15/0915eu1915eu191092.htm](http://www.welt.de/daten/2000/09/15/0915eu1915eu191092.htm).

<sup>4</sup> *J. Fischer*, Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration, FCE-Spezial 2/2000, [www.whi-berlin.de/fischer.htm](http://www.whi-berlin.de/fischer.htm), published in: Walter Hallstein-Institut (ed.), Verfassungsrechtliche Reformen zur Erweiterung der Europäischen Union, 2000, p. 171, and Integration 23 (2000), p. 149.

<sup>5</sup> Cf. e.g. *Christian Joerges/Ives Mény/J.H.H. Weiler* (eds.), What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer, 2000.

<sup>6</sup> *C.A. Ciampi*, Speech on the occasion of the title doctor honoris causa at the University of (5-6 July 2000): „Die europäische Integration ist im Begriff, sich aus einer wirtschaftlichen und monetären zu einem echten Band demokratischer Solidarität auszuweiten. Dieser Prozess macht eine Europäische Verfassung erforderlich“.

<sup>7</sup> *J. Chirac*, Mit Deutschland und Frankreich eine „Avantgarde-Gruppe“ bilden. Die Europa-Rede des französischen Staatspräsidenten *Jacques Chirac* vor dem Deutschen Bundestag in Berlin, FAZ no. 147, 28 June 2000, p. 10, 11.

<sup>8</sup> „Europe's Political Future“, speech by the Prime Minister, Tony Blair, to the Polish Stock Exchange, Warsaw, Friday 6 October, <http://www.fco.gov.uk>: „given the sheer diversity and complexity of the EU, its constitution, like the British Constitution, will continue to be found in a number of different treaties, laws and precedents. It is perhaps easier for the British than for others to recognise that a constitutional debate must not necessarily end with a single, legally binding document called a Constitution for an entity as dynamic as the EU“.

<sup>9</sup> *Paavo Lipponen*, speech of 10 Nov. 2000 in Bruges, [www.vn.fi/english/speech/20001110e.htm](http://www.vn.fi/english/speech/20001110e.htm):

Brussels<sup>10</sup>. Jacques Chirac calls for a “refoundation” of the EU, which shall lead to the „elaboration of a constitution“<sup>11</sup>, after the Federal Chancellor Schröder yet had taken stake for a European Constitution at the Bertelsmann-Forum Berlin in January 2001.<sup>12</sup> Accordingly, the tcheque President Havel believes that the coexistence of the European States “will have to be organised, sooner or later by a fundamental law”, and even Jacques Delors, who was quite sceptical so far, finds that, “nowadays, there is a strong argument for a European Constitution: The citizens of Europe should take an interest in the objectives of Europe, if possible they should all participate in this debate” – perhaps, the “roundabout of a constitutional debate”, and if this debate paved the way for a European Public and to a lesson on democracy, than he would be in favour.<sup>13</sup> Yet, it must be clear, like the Estonian foreign minister underlined in his recent speech at the Berlin Humboldt-University, that a “constitution” would in no way imply for the European Union, to become automatically a Super- or Supra-State; what is at stake, in contrary, is to clarify the relationship of the citizen to the State, which so far was the monopoly of the nation-state:<sup>14</sup>

„we need to formalise and legally enshrine this relation in a way that everyone knows what can and cannot be done, what are his rights and what are the duties of those structures created to make the Union work“.

What all these leaders have in common is that the word „constitution“ in relation to Europe is not any more a taboo, and that the idea of divided sovereignty, common exercise of it, or „pooling sovereignty“ through the European institutions, is becoming common ground of the political concepts or visions for the future Europe. The conservatives in France already have published a proposal for a European Constitution,<sup>15</sup> and also a British proposal is already on the table.<sup>16</sup> While the European Commission is preparing a white-book on “governance” in Europe to make the structures of political government in Europe more efficient, more transparent and more democratic<sup>17</sup>, the European Council of Nice, with his final Declaration on the Future of the Union“ has given a homework to the Governments and citizens, to encourage wide-ranging discussions on this issue with all interested parties, representatives of national

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„... we need to set in motion a constitutionalisation process, together with the candidate states, involving governments, EU institutions, national parliaments and the civil society“.

<sup>10</sup> *Guy Verhofstadt*, „A Vision of Europe“, Speech of the Belgian Prime Minister of 21. September 2000, [www.theepc.be/About\\_The\\_EPC/EPC\\_Documents/Communications\\_Doc/305.asp?ID=305](http://www.theepc.be/About_The_EPC/EPC_Documents/Communications_Doc/305.asp?ID=305).

<sup>11</sup> SZ, 6 February 2001 (Politik): Chirac wünscht eine europäische Verfassung.

<sup>12</sup> SZ, 22 January 2001 (Politik): „Wenn Schröders Herz spricht. Der Bundeskanzler irritiert Frankreich mit einem Europa-Vorstoß“.

<sup>13</sup> „Gebt Europa eine Verfassung“, *Jacques Delors* und *Václav Havel* - der frühere EU-Kommissionschef und Tschechiens Präsident im Gespräch, *Die Zeit* no. 6, 1 February 2001, p. 3.

<sup>14</sup> *Toomas Hendrik Ilves*, *Constructing a New Europe*“, Speech at the Humboldt-University of Berlin within the Forum Constitutionis Europae, of 5 February 2001, FCE 2/01, <http://www.wi-berlin.de/Ilves.htm>, Para. 43.

<sup>15</sup> The draft called *Juppé/Toubon-Proposal* for a European Constitution, prepared by French Gaullists close to President Chirac has been presented at a meeting of the French Senate on 28 June 2000 by Consellier d'Etat *Dominique Latournerie*, and there is ad detailed constitutional concept of 1 June 2000, on which the speech was based; cf. also: Alain Juppé travaille les thèmes européens, *Le Monde*, 6 May 2000.

<sup>16</sup> Our Constitution for Europe, *The Economist*, 28 October 2000, p. 11 f, 22 et seq.

<sup>17</sup> Cf. [http://www.europa.eu.int/comm/governance/index\\_en.htm](http://www.europa.eu.int/comm/governance/index_en.htm).

Parliaments and civil society, economic and university circles etc., a process to with the participation of the candidate States, aiming at a formal Declaration, late in 2001, of the European Council in Laeken, on four central questions:

1. a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity
2. the status of the Charter of Fundamental Rights of the EU proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne
3. a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning
4. The role of national Parliaments in the European architecture.

It is on this basis and with due regard to the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, that a new Intergovernmental Conference will than be convened for the year 2004, where the Treaties are to be revised accordingly. The Nice-declaration does in no way mention the word “constitution”, but does this mean that it is not at stake (any more)?

My view is: The European Union already has a constitution, and “European Constitution” is the system of two complementary constitutional levels, understood in the terms of “multilevel constitutionalism”<sup>18</sup>. Each revision of the European Treaties implicitly is a revision of the constitutions of the Member States as well. The aim for 2004 must be to improve this “European Constitution”, to bring it more in accordance with the concept of what the citizens can imagine to be a constitution. This also includes the procedural aspect. The four questions listed above indeed all concern the key-issues of all constitutions, and in particular they concern the multilevel-structure of the European Constitution on which more clarity is indispensable: The assignment of competencies to the different levels of action, the legal status of the citizens in relation to the European authorities, the drafting and simplicity of the Treaties and the question of democratic legitimacy and control to be provided – in parallel and supplement to the European Parliament – by the national Parliaments.

Let me first try to explain what, in detail, I mean when I talk about „European Constitution“. I will than give some further thought to the four questions of the Nice Declaration, and, finally, take up the issue of an adequate procedures with a view to designing a possible scenario for the combined progress of the revision of and the accession to the Treaties on the European Union.

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<sup>18</sup> For the concept see: *Ingolf Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, CMLRev. 36 (1999), 703 et seq.; cf. also: *Gunnar Folke Schuppert*, Anforderungen an eine Europäische Verfassung, in: H.-D. Klingemann/F. Neidhardt (eds.), *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung*, 2000, p. 237 (256 et seq.); see also *Armin v. Bogdandy*, A Bird’s Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective, ELJ 6 (2000), 208 (226 et seq.); *Hartmut Bauer*, Europäisierung des Verfassungsrechts, JBl. 2000, 749 (751).

## 1. The Concept of the European Constitution

The idea of constitution is traditionally determined by its relation to the concept of state. The European Union, therefore, could not have a constitution, given that it is lacking statehood.<sup>19</sup> Since there is even no European people, the traditional view is that there is even no constitution-making power. Among those who continue to defend this view the two former judges of the German Constitutional Court Paul Kirchhof and Dieter Grimm are the most prominent. It is on the Congress of the German Association of State-law professors in fall 2000 in Leipzig, where I have undertaken to develop an alternative, “post-national” concept of constitution.<sup>20</sup> It is based on a more functionalist approach, starting from the idea, developed by my own teacher, Peter Häberle, that there cannot exist more public authority, more “state” for a given group of people, than which is established, organised or “constituted” by the constitution.<sup>21</sup> The “state”, therefore, is not pre-existent, not presupposed and “given” a constitution later. But it is, the other way around, the constitution by which any legitimate public authority is established and also limited. Constitution is, ideally, the expression of a tacit or written “social contract” of the persons on a given territory by which they establish institutions, entrust them with competencies and authority, design the form of action and decision-making procedures including the way those who exercise power are elected and controlled, and above all, define themselves as the citizens of the Community so constituted - citizens which are ready to respect binding decisions of the authorities and have, on the other hand, certain rights of participation in the given processes, as well as of defence against such decisions which unduly interfere with their liberties and other individual rights granted. The functions of the state have changed. In the “post-national” era of globalisation the state is unable to fulfil on its own its classical functions: safeguarding peace, internal and external security, liberties, welfare etc. European integration is a consequence of this deficit in search of complementary instruments in the pursuit of the public good. It is time, therefore, to conceptualise in more open way also the notion of constitution. It must be open for the legal description of supra- and international structures having the same purpose and objectives as the state.<sup>22</sup>

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<sup>19</sup> On this basis see also the distinction made by *Udo di Fabio*, Ist die Staatswerdung Europas unausweichlich? Die Spannung zwischen Unionsgewalt und Souveränität der Mitgliedstaaten ist kein Hindernis für die Einheit Europas, FAZ no. 28, 2 February 2001, p. 8, „daß es eine europäische Verfassung im herkömmlichen Sinne staatlicher verfassungsgebender Gewalt nicht gibt, wohl aber einen funktionellen Verfassungsvertrag, den man, um Mißverständnisse auszuschließen, die Europäische Charta nennen könnte“. With more openness: *id.*, Eine europäische Charta. Auf dem Weg zu einer Unionsverfassung, JZ 2000, 737 (739), according to whom „wir uns längst im Strudel des Epochenwechsels befinden, der die Konnexität von souveränem Staat und Verfassung auflöst“, und es nicht mehr erlaubt ist, „auf der klassischen Idee von der Verfassung als Ausdruck staatlicher Selbstherrschaft zu beharren“.

<sup>20</sup> *Ingolf Pernice*, Europäisches und nationales Verfassungsrecht, report, VVDStRL 60 (2001), at II. (in print).

<sup>21</sup> *Peter Häberle*, Verfassungslehre als Kulturwissenschaft, 2. Aufl. 1998, p. 620; *id.*, Europäische Verfassungslehre – Ein Projekt, in: *id.*, Europäische Verfassungslehre in Einzelstudien, 1999, p. 16. Taking up these ideas: *H. Hofmann*, Von der Staatssoziologie zur Soziologie der Verfassung?, JZ 1999, 1065, 1066; cf. also *K. Sobotta*, Das Prinzip Rechtsstaat, 1997, p. 30 et seq.

<sup>22</sup> In favour of a concept of constitution which is independent from the state, cf. also *Giovanni Biaggini*, Die Idee der Verfassung - Neuausrichtung im Zeitalter der Globalisierung, ZSR 119

Yet, the European Treaties can be understood as the constitution of the Union. In modern democracies, there is nobody else than the citizens of the Member States who are accountable for the foundation and the acting of the European Community. Represented by their national governments, they negotiated these Treaties and ratified them, in accordance with their respective constitutional requirements after parliamentary consent or a national referendum. While the national constitutions, e.g. Article 23 § 1 of the German Constitution, provide for such “opening” of the state, the conditions and the procedures to be observed for the conclusion of such a new social contract at the European level, the Treaty on the EU fixes in Article 46 the rules for amendment of the Treaties and refer to the said national provisions as a condition for the entry into force of any revision. In spite of the form of an international treaty, these Treaties meet all functions of a constitution mentioned above, except that they are based upon, and complementary to, the constitutions of the Member States. The European Court of Justice rightly, therefore, calls the EC-Treaty the constitutional charter of a legal community.<sup>23</sup> They establish institutions, confer competencies, organise procedures, define the rights and participation of the citizens of the Member States and, thus, their status as citizens of the European Union. Powers which are entrusted to the Union are exercised by its institutions, and the national bodies are limited to participate only through the procedures fixed by the Treaties. The national governments act through their ministers in the Council, they act – in part together with the European Parliament – as European legislator under the control of the national Parliaments, in Germany of the Federal and the State chambers. The other “European” function of these Parliaments consist in the transposition and implementation, where necessary, of European legislation, inasmuch as the national administrations and judiciary bodies are “European authorities” to the extent they have to implement and to give effect to European law in loyalty and with due regard to the European fundamental rights. The European system, therefore, depends on the existence and proper functioning of democratic institutions of the Member States, which respect the rule of law including the European legislation to be implemented effectively, as much as the national constitutions must be read in the context of and together with the complementary constitution of the Union<sup>24</sup> as an integral part of the European Constitution, if they are to be understood in their real meaning. In fact, each revision of the Treaties result, in substance, in a modification of the national constitutions, with no necessary amendment of their texts: Consequently, Article 23 § 1 of the German Constitution refers to Article 79 § 2 and § 3 of this Constitution, but not to its § 1 according to which any amendment of the Fundamental Law requires an express modification of its text.

If the accession to the Union has been considered by the Austrian doctrine as a total revision of the Federal Constitution<sup>25</sup>, the extent is obvious, to which

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(2000), 445 (463).

<sup>23</sup> 1991 ECR, I 6079, 6102 - *EWRI*; and already 1986 ECR, 1339, 1365 et seq. - *Les Verts*; more recently 1996 ECR, I-1759, 1789 - *ECHR*.

<sup>24</sup> Cf. also *Hartmut Bauer*, *Europäisierung des Verfassungsrechts*, JBl. 2000, 749 (756 et seq.).

<sup>25</sup> For details see *Theo Öhlinger*, *Verfassungsfragen einer Mitgliedschaft zur Europäischen Union*, 1999,, reported by *Frank Hoffmeister*, DVBl. 2000, 1296.



membership to the European Union involves substantial modifications of the national constitutions, even if they are not reflected in the texts. Not only the transfer to the Union of the monetary sovereignty, but any assignment of a competence to it, be it for asylum, immigration or visa-policies, for antitrust or state-aids policies, involve substantial changes of the national competence-structures. Each amendment of the European Treaties destitutes or, as the case may be, constitutes legitimate public authority, so: public power on both levels. And it is the principle of primacy of European law which makes sure that in each case of conflict between the national and the European part of the legal system, only one single legally valid solution is produced. In spite of the formal autonomy of European law with regard to the national legal systems, both levels are bound together to one legal entity, forming one multilevel system in which every citizen of the Union is granted equal rights with regard to the European rule of law.

The understanding of the primary law of the Union to be its constitution can be demonstrated also by the example of the fundamental rights issue. Indeed, the question of an effective protection of the rights of the citizens is even not relevant in the context of any international organisation, the members and subjects of which are States only, but not citizens. The rules of European law, understood as the Court of Justice has found already in 1963,<sup>26</sup> as a new, autonomous legal order, create immediate rights and obligations for the citizens of the Member States, and this is why the question of fundamental rights was posed to the Court. The Court was forced, accordingly, to recognise and develop by praetorian law the protection of fundamental rights of the individual towards the European institutions, on the basis of the common traditions of the national constitutions<sup>27</sup> such as they are made explicit and more visible now by the Nice-Charter of Fundamental Rights. Their constitutive value for the European Union and its legal cohesion has been recognised, inasmuch as public conscience is raising slowly of the constitutional character of the existing primary law. If the adoption of any future amendments of the European Treaties were subject to a European-wide referendum, this conscience no doubt would be enhanced, and the citizens would much more clearly understand itself not only as the subject of European law, but also as the subject providing legitimacy to the supranational Community.

Interpreting the national constitutions together with the primary European law as *one single* constitutional system or, as I proposed in 1995 as the composed European constitution (“Verfassungsverbund”)<sup>28</sup>, permits to understand the full

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<sup>26</sup> 1963 ECR, 1 (25) - *Van Gend & Loos*.

<sup>27</sup> Cf. *infra*, note 40.

<sup>28</sup> *Ingolf Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: R. Bieber/P. Widmer (eds.), *L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area*, 1995, p. 225 (261 et seq.), and *id.*, *Die Dritte Gewalt im europäischen Verfassungsverbund*, *EuR* 1996, p. 27 et seq.; cf. also *Jutta Hergenhan*, *Le fédéralisme allemand et la construction européenne*, *Notre Europa* (ed.), *Problématiques européennes* no. 5, 2000, p. 31; *Ignacio Gutiérrez Gutiérrez*, *Un orden jurídico para Alemania y Europa*, *Teoría y Realidad Constitucional* 3 (1999), 215 (218); *Giovanni Biaggini*, *Die Idee der Verfassung - Neuausrichtung im Zeitalter der Globalisierung*, *ZSR* 119 (2000), 445 (467 et seq.); *id.*, *Eine Verfassung für Europa? Perspektiven europäischer Verfassungstheorie*, *NZZ* no. 264, 11/12 November 2000, p. 57. More recently: *Ingolf Pernice/Franz Mayer*, *De la constitution composée de l'Europe*, *RTDeur*. 36 (2000), 623.

meaning and significance of the questions posed in Nice. It is not about how to organise better any kind of international organisation or an association of States, but what is at stake is the step by step development of a new form of self-organisation, at a level which is transcending the State, of a society which defines itself more and more European without, however, sacrificing the local, regional and national identities of its citizens. Which level is adequate and legitimate to be entrusted with what kind of functions, how should the legal status of the individual be defined with regard to the European authorities, how can the constitution of a multilevel system of governance be designed so to ensure that every citizen can follow and understand who is doing what, who exactly has what rights and duties? How can the political process be organised so to ensure accountability for, and democratic control of, any decision produced by the system with due regard to the national parliaments in their new European function?

This leads us more concretely to the questions raised by the Nice-declaration:

## **2. Assignment and Delimitation of Competencies**

The question, who should be doing what in Europe or, in other terms: the question of a clear assignment and delimitation of the European competencies is one of the key-issues of the composed European constitution. Clarifying the division of powers is one of the conditions for the acceptance and functioning of the European Union. Making clear who is responsible for what is also a condition for an effective democratic control within the whole system. If national bodies – in Germany mainly the Länder and local communities – complain the growing loss of political discretion and room of manoeuvre and feel too much restrained or even patronised by European standards, their issue, however, does not merely seem to be the clarification but rather the limitation of European competencies. Their concern is focussed on their responsibility for services in the general interest being a matter of public action – in France, it is the existence of what they call “public services”. The freedom of action of the public authorities are questioned by the state aids regime as well as by measures of deregulation and liberalisation, such as have been taken with great benefit for the consumers and no damage for local and regional authorities in the sectors of post and telecommunications. Opening the markets and introducing competition in the energy sector, however, touches considerably on vested interests of local and regional bodies, and to apply the provisions on state aids to the public banking institutions or to the public broadcasting bodies, measures taken within the framework of European regional and other structural policies as well as first initiatives of a European special planning are considered to affect classical prerogatives of the Länder in Germany.

A closer look to the provisions of the EC-Treaty, however, makes clear, that – apart from a number of prohibitions such as for discrimination, customs and other restrictions on trade, restrictions of competition, abuse of dominant positions and state aids distorting competition in the internal market, apart also from a set of

guaranties of freedom such as for the movement and establishment of persons, the movement of capital and the provision of services throughout the Union – the EC-Treaty mainly consists of quite precise assignments of competencies in several fields of policies, which are each further qualified by given objectives of action and which are subject to very differentiated provisions on the possible forms of action, on the procedure to be followed and on the modes of decision-making. This applies to the original policy areas of agriculture, transport, competition and external trade as much as to areas which have been added or supplemented later, such as social, environment, consumer protection, education and culture, industry, health, research, development co-operation, monetary, asylum, visa and immigration policies. On the other hand, the areas of economic and employment policies have been kept in the hands of the Member States, subject only to modes of intergovernmental co-operation and multilateral surveillance, such as the areas of foreign and security policies and home affairs are subject, in the second and third pillar of the EU-Treaty merely to common objectives and obligations of co-ordination and co-operation. Safeguarding room for national responsibility and action also seems to be the purpose of a series of “negative delimitation clauses” which exclude in areas like employment, education, culture and health any harmonisation of national legislation, or make clear that the responsibilities of the Member States for the safeguard of the public order and the protection of internal security (e.g. Article 64 § 1 ECT), or the criminal law and jurisdiction of the Member States in criminal matters shall not be affected (e.g. Article 135 ECT). More generally, Article 5 ECT establishes the principle that the Community shall act only within the limits of the powers expressly assigned to it, and subjects any action of the Community to the principles of subsidiarity and proportionality.

These provisions do not lack – compared to the catalogues of competencies in the German or also in the new Swiss constitution – of determination and legal certainty, but they show, at least in part, such a degree of differentiation and complexity that nobody is able to gain a clear picture. There is no systematic, no simplicity of the procedures, no transparency. Only the competence in Article 95 ECT for the harmonisation of legislation aiming at the establishment and functioning of the internal market and the so-called clause for supplementing the Treaty in Article 308 ECT seem to be rather vague and general. The fact, however, that they do not confer unlimited powers to the European institutions, has been made clear by the Court of Justice in its judgement on the directive concerning advertising for tobacco-products,<sup>29</sup> and in its opinion on the accession of the EC to the European Convention on Human Rights.<sup>30</sup> To abolish these provisions, as called for recently by Prime Minister Clement<sup>31</sup>, would deprive the Community of an important tool of efficiency and dynamics. To put limits to its excessive use, however, is not only justified but also necessary. It follows that to find solutions to the question put in Nice, “how to establish and monitor a more precise delimitation of competencies between the European Union and the

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<sup>29</sup> ECJ, Case C-376/98, judgement of 5 October 2000, EuZW 2000, 694 et seq.

<sup>30</sup> ECJ, opinion 2/94, 1996 ECR, I-1759, 1789 = EuZW 1996, 309 - *EMRK*.

<sup>31</sup> *Wolfgang Clement*, „Europa gestalten - nicht verwalten. Die Kompetenzordnung der Europäischen Union nach Nizza“, Speech at the Forum Constitutionis Europae of 12 February 2001 at the Humboldt-University of Berlin, FCE 3/01, para. 22, [www.whi-berlin.de/clement.htm](http://www.whi-berlin.de/clement.htm).

Member States”, courageous steps of systematisation, specification and consolidation are required:

- The powers entrusted to the Community or to the Union should be listed more systematically in categories such as: exclusive, concurrent and complementary legislative powers, powers of direct implementation, administration and execution, and auxiliary functions for co-ordination and multilateral surveillance## of the national policies or the encouragement of co-operation between the Member States; and in doing so, the three pillars should be merged into one Treaty;
- The definition of competencies in each category should be preceded by provisions on the decision-making procedure and mode to be followed, and it should be made sure that legislative acts are generally taken in co-decision and by qualified majority at the Council; in each category the objectives and powers to act should be determined as precisely as possible for each policy area, and negative competence clauses may be added where necessary;
- Decisions related to the co-ordination of the policies of the Member States and to the application of general clauses providing for action where specific powers are not (yet) assigned to the Union and the limits of the powers given are unclear (e.g. Article 308 ECT) may continue to be subject to the consensus at the Council; in these cases the consent of the European Parliament should be required, and perhaps even that of the Parliamentary Subsidiarity Committee (see below);

The experience of the various federal States – including Germany – indicates, however, that abstract catalogues of competencies hardly prove to be appropriate to limit the normal process of centralisation and, as a consequence, the erosion of competencies of the subnational or regional entities.<sup>32</sup> As to the European Union, the governments, which are not subject to a very efficient parliamentary control, sometimes even are using the “roundabout through Brussels” to enforce policies which they failed to achieve at the national level – the former German chancellor Kohl has admitted this very clearly at a public conference in 1996.<sup>33</sup> In practice, the construction and use of provisions on competencies is largely a matter of the political process. Availing a European competency and, as it may happen, setting aside specific national or regional interests, must be justified in a concrete case by a clear added value of action in the common interest. To ensure this, it seems to be necessary to ensure a system of political “soft control” by the national and regional levels being involved more directly in the European political process. The national and regional Parliaments are much more qualified to take this role than the national governments, since any encroachment on the limits of European

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<sup>32</sup> For another view: *Ilka Boeck*, Die Abgrenzung der Rechtsetzungskompetenzen von Gemeinschaft und Mitgliedstaaten in der Europäischen Union. Zur Notwendigkeit und zu den Vorteilen bzw. Nachteilen der Aufstellung eines Kompetenzkataloges in den Gemeinschaftsverträgen, 2000, p. 160 et seq., 245 et seq., holding that a catalogue of competencies is necessary and advantageous with regard to stability and legal certainty.

<sup>33</sup> *Helmut Kohl*, Europa auf dem Weg zur politischen Union, in: Konrad Adenauer Stiftung (eds.), Europa auf dem Weg zur politischen Union. Dokumentation eines Kongresses der KAS, 1993, p. 11 (14 et seq.); cf. also *Ingolf Pernice*, Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ 2000, 866 (874).

competencies or any infringement of the principle of subsidiarity decided by the ministers at the Council would be at their expense. Monitoring the delimitation of competencies between the Union and the Member States should, therefore, be organised the following way:<sup>34</sup>

- establishing a Parliamentary Subsidiarity Committee (PSC) would provide a procedural safeguard to the normative delimitation of competencies; the PSC could be heard on questions of competencies and subsidiarity in any case of doubt; its opinion would not be binding upon the Council and the Parliament, but would compel these institutions using a certain competence to enter an intensive public discourse upon its arguments;
- facilitating, in doing so, the task of the Court of Justice, which would continue to exercise its function to finally judge upon cases brought to it alleging that the limits of competencies have not been respected. The Court could rely on a much broader exchange of arguments and find if, on that basis, the use of a competency is sufficiently justified. There is no need to create a specific “chamber of competencies” at the Court or beside of it, even if it were enlarged<sup>35</sup> or composed<sup>36</sup> by judges of the national Constitutional Courts – it would not add to, but complicate the judicial function in these matters.

Possibly, the main problem in the debate on competencies is not the power to legislate, but the informal restriction of the national room for action caused by the conclusions of the European Council (e.g. Lisbon-process) or the specific programs of financial support using resources which otherwise, to a great extent, the Member States would dispose of for implementing their own policies. However, as far as the European Council is concerned, it is an organ of intergovernmental co-operation which, in conformity with the objectives of Article 2 EUT and according to Article 4 EUT shall give the Union the necessary impetus##, without taking any legally binding decisions. There is no need for more precise assignments of competencies related to this general function of co-ordination and orientation, and the Heads of States and Governments can hardly be denied the rights to talk and to come to common conclusions on common problems. This function can only, but it should also more strongly subject to the political control of the national and, as the case may be, regional Parliaments, and the principle of subsidiarity in Article 2 § 2 EUT, which refers to Article 5 ECT, may constitute an important criterion also for this control.

What seems to deserve more attention in the debate on competencies, however, is the financial constitution. There is no reason, in fact, why the regional policy within the Member States shall be channelled through Brussels, as far as this means rather patronising national action than a real and transparent transfer of resources, visible and accountable to the public. Prime Minister Clement rightly

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<sup>34</sup> See already my proposals in: *Ingolf Pernice*, Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ 2000, 866 (874, 876).

<sup>35</sup> In this sense, Prime Minister *Clement*, op. cit. supra, note 31, para. 28

<sup>36</sup> Cf. *Udo di Fabio*, op. cit. supra, note 19.

stresses this point.<sup>37</sup> The claim and objective to preserve and reinforce national room for action imply new approaches also in this context:

- Resources for financial support and intervention of the structural funds should be limited to the amount needed to ensure a real transfer to the poorer Member States, and this transfer must take the form of a global allocation the use of which is left to the recipient countries.
- As far as Member States are “donor”-countries, they should administer their own resources in their own responsibility. There should be common principles, nevertheless, applying both to donor- and recipient countries and guiding their policies without discrimination.

There should be, on the other hand, an enhanced supervision of state aids at the European level, and this should be less influenced by politics. It would seem possible, by such measures, to strengthen the transparency and democratic control of the financial flows, to enhance the financial autonomy and responsibilities of the Member States, and to avoid unnecessary administrative costs and risks of fraud. Yet, the financial autonomy and democratic accountability of the Union is not to be achieved without assigning to it its own – though limited - power of taxation.<sup>38</sup>

### 3. The Legal Status of the Charter of Fundamental Rights

It was at the Intergovernmental Conference of Nice where the European Charter of Fundamental Rights was solemnly proclaimed by the institutions of the Union: the Council, the Parliament and the Commission – except the European Court of Justice.<sup>39</sup> This is the result of intense negotiations in the framework of a convention, which was created by the European Councils of Cologne and Tampere, and to which thirty representatives of the national Parliaments, sixteen representatives of the European Parliament, fifteen representatives of the national governments and one agent of the President of the European Commission were convened. A representative of the European Court of Justice and another of the Strasbourg Human Rights Court have participated as observers. The presidency was assumed by Roman Herzog, who gave the convention the decisive impulses for its successful work. One of them was the idea to draft the charter – without prejudice to its final status - in a way “as if” it had to become a binding instrument. Both, the composition of the convention, and its solemn proclamation gave it a certain legitimacy. Yet, claims to integrate it into the EU-Treaty, remained unheard. And the proposal of the European Parliament, to include, at least, a reference to the Charter in Article 6 § 2 EUT, was not followed by the

<sup>37</sup> *Wolfgang Clement*, op. cit. supra, note 31, para. 25.

<sup>38</sup> In this sense: *Michaele Schreyer*, Die Europäische Finanzverfassung vor der Erweiterung, FCE 2/00, [www.whi-berlin.de/schreyer.htm](http://www.whi-berlin.de/schreyer.htm), para. 25 et seq.; cf. already: *Ingolf Pernice*, Welche Institutionen für welches Europa? - Vorschläge zur Reform der Europäischen Union im Jahre 2000, WHI-Papers 2/99, [www.whi-berlin.de/](http://www.whi-berlin.de/), Thesis 6.

<sup>39</sup> For the implications see also: *Ingolf Pernice*, Eine Grundrechte-Charta für die Europäische Union, DVBl. 2000, 847 et seq.

Intergovernmental Conference. The legal fate of the Charter, therefore, remains open. Its status is deemed to be clarified until the year 2004.

According to the mandate of Cologne and in conformity with its preamble, the Charter was not to create new fundamental rights, but to make more visible the common values of the peoples of Europe and the fundamental rights binding the Union. In terms which are close to those of Article 6 § 2 EUT the Preamble of the Charter specifies:

„This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights“.

This frame of references corresponds to that of the Court of Justice when it developed its jurisprudence on the protection of fundamental rights against the Community and the authorities of the Member States insofar as they are implementing European law, on the basis of the general principles of Community law.<sup>40</sup> This jurisprudence is referred to in Article 6 § 2 EUT, which explicitly compels the institutions to respect the fundamental rights so developed. There is good ground for assuming that national courts as well as the Court of Justice, each within their jurisdiction, in cases of alleged violations of fundamental rights by a legal act of the Community, will refer from now on to the Charter being an expression for what is the contents of the general principles of law binding the Community. The readiness to do so is already visible today: The Spanish Constitutional Court in a decision of 1<sup>st</sup> November 2000 on data protection referred to Article 8 of the Charter<sup>41</sup>, while Advocate general Alber in its conclusions in case C-344/99 – *TNT Traco*, concerning services of general economic interest, recently made reference to Article 36 of the Charter.<sup>42</sup> Advocate general Tizzano, finally, founded its conclusions in case C-173/99 that the right to paid annual leave constitutes a fundamental right on Article 31 § 2 of the Charter:<sup>43</sup>

„I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right“.

<sup>40</sup> Cf. e.g. *Hans-Werner Rengeling*, Grundrechtsschutz in der Europäischen Gemeinschaft, 1993.

<sup>41</sup> Cf. <http://www.tribunalconstitucional.es/STC2000/STC2000-292.htm>, judgement STC 292/2000 of 30. November 2000, at II.8.

<sup>42</sup> Advocate general *Alber*, conclusions of 1 February 2001, case C-344/99, *TNT Traco*, note 94.

<sup>43</sup> Advocate general *Tizzano*, conclusions of 8 February 2001, case C-173/99 - *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, para. 26 et seq., 28.

If the Court of Justice, in its established jurisprudence and in accordance with its task under Article 220 ECT, to “ensure that in the interpretation and application of this Treaty the law is observed”, develops and protects as a part of the general principles of law, the fundamental rights as the expression of the common constitutional traditions of the Member States, it will not be able to ignore, in future, the Charter whenever it is to state what are the contents and the limits of these rights. Though it is not formally bound and may even go beyond the standards set by it, but as an expression of the common values and due to the fact, that the institutions of the Union have declared themselves bound by it, the Charter indeed does provide the citizens, the courts and institutions within the Union, including the national administrative and jurisdictionary bodies, important indications on what the contents of the common fundamental rights shall be. The Charter reflects the unity, in substance, of the law in the composed constitutional system of the Union<sup>44</sup>, such as it has been established progressively by the Court of Justice in its jurisprudence on the primacy of Community law and the protection of fundamental rights<sup>45</sup>.

Yet, it remains an open question, whether the Charter enlightens upon the principles referred to in Article 6 § 1 EUT, on which the Union is founded and which are relevant for the procedure under Article 7 EUT aiming at the safeguard of a minimum of homogeneity of the European constitutional system altogether. On the one hand, Article 51 of the Charter expressly states that the Member States are not bound by it, and Articles 6 § 1 and 7 § 1 EUT refers only to the “principles” of freedom, democracy etc. On the other hand, it is difficult to see, what is the contents of these principles in concrete, if not what the Charter defines as human rights and liberties. Only serious and continuous violations or, as provided for in Article 7 I EUT, revised in Nice, “a clear risk of a serious breach by a Member State of the principles mentioned in Article 6 (1)”, however, can lead to sanctions under this provision; the standards which are binding for the institutions under Article 6 § 2 EUT and the obligations of the Member States under Article 6 § 1 EUT therefore remain different, nevertheless. In any event, any remaining uncertainty on this question is independent from the legal status of the Charter.

Sometimes it is submitted that the adoption of the Charter as a part of European primary law would imply that the Treaties became a constitution and the Union would change into a state<sup>46</sup>. But, as it has been shown above, the

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<sup>44</sup> For more details see: *Ingolf Pernice*, *Europäisches und nationales Verfassungsrecht*, report, in: *VVDStRL 60 (2001)*, para. II.3 (in print).

<sup>45</sup> For first signs of a *ius commune europaeum* related to the constitutional law see *Jürgen Schwarze*, *Auf dem Wege zu einer europäischen Verfassung - Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht*, *EuR Beih.* 1/2000, 7 (14). For the idea of a *ius commune* („gemeineuropäisches Verfassungsrecht“) cf. already *Peter Häberle*, *Gemeineuropäisches Verfassungsrecht*, *EuGRZ* 1991, p. 261 et seq.; *id.*, *Gemeineuropäisches Verfassungsrecht*, in: *R. Bieber/P. Widmer (eds.)*, *L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area*, 1995, p. 361 et seq.; *M. Heintzen*, *Gemeineuropäisches Verfassungsrecht in der Europäischen Union*, *EuR* 1997, 1 et seq.

<sup>46</sup> In this sense the British reservations expressed by *Francis Maude*, "Networks And Nations: Towards The New Europe", Speech at the Forum Constitutionis Europae of the Humboldt-University of Berlin on 8 June 2000, para. 30.



Treaties already have the quality of a constitution, and talking about a constitution by no means implies that it is for a state, no further discussion is needed on this point. Another current objection is the relationship of the Charter to the European Convention on Human Rights. It is argued, that the cumulation of both would create legal uncertainties and not add anything to the protection of the individual. But it is wrong talking about cumulation. The European Convention on Human Rights does not bind the Union, and the Charter does not bind the Member States – except where they implement and are bound by Community law which pre-empts contrary national law including national fundamental rights and the ECHR.<sup>47</sup> It has an impact only on the validity and application of such Community law. The Charter, therefore, strengthens the system of effective protection of fundamental rights of the Union and, thus, is in line with the requirements to which the Member States are subject under the ECHR. Indeed, it is the jurisprudence of the Strasbourg Court<sup>48</sup>, that the Member States are bound to ensure that the supranational institutions or bodies they create do equally respect the rights granted under the Convention.

If the formal adoption of the Charter as a legally binding instrument would not add too much to the effective protection of the rights granted therein, to refuse its integration into a consolidated Treaty or constitutional Charter of the Union would be a signal, that the Member States do not take serious these fundamental rights. This signal would be catastrophic for the citizens as well as for the candidate countries, and would jeopardise the credibility of the Union internally and to the outside world.<sup>49</sup> Already the Declaration of Laeken should, therefore, confirm the strong determination of the European Council to include the Charter as a binding part in the EU-Treaty, as an expression of the common basis of values and inalienable rights of the citizens of the Union, and as a clear standard and orientation of its policies within under all the three pillars to be merged into one single organisation.<sup>50</sup>

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<sup>47</sup> So recognised as a principle by the German Constitutional Court, cf. BVerfGE 89, 155 (174 et seq.) - *Maastricht*, with the idea of a relationship of co-operation. For more details see: BVerfG EuZW 2000, 702 (703 et seq.) - *Bananas*, crit. For the continuous acceptance of a national competence for reviewing European law *Franz C. Mayer*, Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung, EuZW 2000, 685 et seq. The problem has been discussed also by the President of the German Constitutional Court in: *Jutta Limbach*, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur - Ein Beitrag zur Bestimmung des Verhältnisses von Bundesverfassungsgericht, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte - [www.whi-berlin.de/limbach.htm](http://www.whi-berlin.de/limbach.htm), para. 17 et seq.

<sup>48</sup> See namely the decision of the European Commission for Human Rights of 9 February 1990 *Melchers*, Decisions and Reports 64, 138 et seq., and also the judgement of the ECHR of 18 February 1999, NJW 1999, 3107 - *Matthews*; for comments *Christian Busse*, Die Geltung der EMRK für Rechtsakte der EU, NJW 2000, 1074 (1078 et seq.).

<sup>49</sup> In favour of a legally binding instrument to be integrated into the EU-Treaty: *Siegfried Magiera*, Die Grundrechtecharta der Europäischen Union, DÖV 2000, 1017 (1019 et seq.), who has some criticism, however, regarding the contents of the Charter which in his opinion is not yet ripe for adoption (ibid., p. 1024 et seq.).

<sup>50</sup> What is not intended, is a „restructuring of the European legal order“ in the sense exposed, but largely rejected, recently by *Armin von Bogdandy*, Grundrechtsgemeinschaft als Integrationsziel?, JZ 2001. 157 et seq. (170). It is important to note, by the way, that the objectives of the Treaty already express in a proactive manner the common constitutional values of the Member States as they are founded in the various charters of fundamental rights, cf. for details: *Ingolf Pernice*,

#### 4. Consolidating and Simplifying the Treaties

The Charter should be on top of a new, consolidated Treaty, so, to which the primary law of the Community is merged together with the provisions on the common foreign and security policy and on police and judicial co-operation in criminal matters. Nothing but the continuous illusion of national sovereignty in most of the Member States can explain the maintenance of the split of the law of the Union into the two modes of co-operation, supranational and intergovernmental for which the exclusion of parliamentary<sup>51</sup> and judicial control<sup>52</sup> strikingly contradicts the principles laid down in Article 6 EUT, of democracy, the rule of law and the respect of human rights and individual freedom. The complexity of the existing architecture and legal system of the Union is far above of what a citizen and even specialists in European law can understand: Since Maastricht the question of legal personality of the Union remains unclear<sup>53</sup>, its differentiated and complicated instruments of action, its areas of action and competencies interlacing with those of the Community, the creation of new and additional institutions – such as the High Representative for the common foreign and security policy, Europol or Eurojust - in- or outside the framework of the Treaties, or the creation and later integration into the Treaties of the Schengen acquis, again with exceptions and reservations for some of the Member States. Should the new provisions decided in Nice on enhanced co-operation be used in practice, the law of the Union would be turning from a coherent legal system to a normative chaos, where any oversight, effective political control and possibility of identification would be put at risk.

Already the Declaration (no. 42) to the Treaty of Amsterdam stresses the necessity of consolidating the Treaties and provides for the continuation of the “technical” work already undertaken, combined however with the rather strange statement that the results of this technical work shall not have legally binding effects. After the “three wise man” had submitted their proposal to split the Treaty into one fundamental and another more technical part, which latter contained, nevertheless, the provisions on competencies and the diverse policies of the Union<sup>54</sup>, a series of concrete proposals for the consolidation of the Treaties have

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Grundrechtsgehalte im Europäischen Gemeinschaftsrecht, 1979, in particular p. 20 et seq., 211, 221, 224 et seq.

<sup>51</sup> To the rather weak role of the Parliaments in the framework of Common foreign and security policy see: *Meinhard Hilf/Frank Schorkopf*, Das Europäische Parlament in den Außenbeziehungen der Europäischen Union, EuR 1999, 185 (194 et seq.).

<sup>52</sup> Cf. *Matthias Pechstein*, Die Justiziabilität des Unionsrechts, EuR 1999, 1 et seq.

<sup>53</sup> German Constitutional Court, cf.: BVerfGE 89, 155 (195) - *Maastricht*, and *M. Pechstein/C. König*, Die Europäische Union, 2<sup>nd</sup>. ed. 1997, para. 55 et seq., on the one hand, and *A.v.Bogdandy*, Die Europäische Union als einheitlicher Verband, EuR Beih. 2/1998, 165 (167 et seq.), on the other hand; cf. also *I Pernice*, „Europäische Union“ - die Sprachverwirrung von Maastricht, ZeuP 3 (1995), 177 (178 et seq.); Article 24 para 6 EUV as amended in Nice, seems to comfort the theory that the Union has already legal personality; it provides that agreements concluded under the conditions of this Article are binding on the institutions of the Union.

<sup>54</sup> Cf. *R. v. Weizsäcker/J.-L. Dehaene/D. Simon*, Die institutionellen Auswirkungen der Erweiterung. report to the European Commission, 18 October 1999, FAZ no. 244, 20 October

been worked out and discussed.<sup>55</sup> One of these studies on the reorganisation of the Treaties has been worked out by the European University Institute of Florence, where a “Basic Treaty” is proposed which contains the complete EU-Treaty and some of the most substantial provisions of the EC-Treaty, partly in a summarised or abbreviated form, to represent something like a constitutional extract which shall exist in parallel with the remaining EC-Treaty the provisions of which are also referred to by the “Basic Treaty” in many instances.<sup>56</sup> It is doubtful whether this would lead to a real simplification or, as it seems to be the case for a number of provisions, rather to duplications and more complexity. Instead of a new splitting the Treaties into two parts, as it has been proposed also by the Bertelsmann Policy Research Group<sup>57</sup>, there is no other way to achieve simplification of the Treaties, than more or less radical steps of consolidation and reorganisation of the primary law.

Both, the Treaty of Amsterdam and the Treaty of Nice already show provisions which reflect a gradual move towards approximation of the procedures and forms of action on the common foreign and security policy as well as on police and judicial co-operation to the system of the Community. A real simplification, however, will not be possible without important amendments of the Treaties also in substance. It would finally make sense only if it led to a single Treaty to which the Charter of fundamental rights is integrated, where the competencies are brought into a systematic order, as outlined above, and where the institutional provisions are revised with a view to achieve more Transparency, more efficiency and more democratic accountability.

## 5. The European Function of National Parliaments

Which is the role of the national Parliaments in the European Union and how can this role be enhanced? At present, three important functions can be distinguished: First, they have an important role to play in the constitution-making or -revision process. Second, they are providing legitimacy, and participate at least indirectly to the European legislation to which they also give effect at the national level. Thirdly, they give legitimacy and, to a limited extent, control the decisions on the appointment of people to the leading posts of some of the European institutions. This is to be explained shortly more in detail:

The national Parliaments are European constitution-making bodies insofar as they control their governments when they negotiate the European Treaties or any amendments to them, and have the power, in conformity with the national

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1999, p. 9 et seq.

<sup>55</sup> For a critical overview: *Christoph Schmid*, Konsolidierung und Vereinfachung des europäischen Primärrechts - wissenschaftliche Modelle, aktueller Stand und Perspektiven, *EuR Beih.* 2 (1998), 17 et seq.

<sup>56</sup> European University Institute (ed.), *Ein Basisvertrag für die Europäische Union. Studie zur Neuordnung der Verträge*, 2000.

<sup>57</sup> Bertelsmann Forschungsgruppe Politik am Centrum für angewandte Politikforschung, Munich: *Ein Grundvertrag für die Europäische Union - Entwurf zur „Zweiteilung“ der Verträge*, May 2000.

constitutions, to decide upon the ratification of any Treaty negotiated by the IGC (e.g. Article 23 § 1 of the German constitution). There has been created a special committee at the German Federal Chamber for matters of the European Union (Article 45 of the German constitution), a committee which has considerably intensified its work during the last years, in particular regarding the constitutional developments of the Union.<sup>58</sup>

The national Parliaments are more or less important actors also regarding the legislation of the Community, in that they provide legitimacy also to the ministers who negotiate at the Council and give them orientation for what the result should be<sup>59</sup>. Protocol no. 9 to the Treaty of Amsterdam, on the role of the national Parliaments in the EU takes the measures necessary to enable the Parliaments to do this more easily, and also includes provisions on the conference of the committees for European affairs of the national Parliaments, which may submit opinions and questions to the institutions of the Union.

Another important role of the national Parliaments is their function in the process of bi-level legislation, where European directives have to be transposed into national legislation, i.e. their objectives have to be integrated into the national legal systems so as to be effectively implemented. Whether and how European policies, in a given case, come really into effect very largely depends upon the national Parliaments; the authorities and procedures created and organised by them are decisive for the proper implementation of Community law as well as for effective legal protection according to – but also against, as the case may be – legal acts of the Community.

Numerous key posts of the European institutions, such as for judges and advocate generals at the Court of Justice, the president and the members of the Commission, the president and the members of the Executive Board of the European Central Bank, and even the members of the Committee of Regions are appointed by common accord of the governments of the Member States or by the Council on the proposal of the Member States. Even if there is no parliamentary debate on this in practice, it is through the national Parliaments how they draw their legitimacy, and the Parliaments can even be actively involved, like under Article 23c § 2 of the Austrian constitution, in the choice of the persons to be appointed.

The proper functioning of the European Union, indeed, depends on the parliamentary-democratic structures and the rule of law in the Member States, and this is why the clauses of homogeneity in Article 6 § 1 EUT and of solidarity under Article 10 ECT are of such high importance. The possibilities and also the responsibilities of the national Parliaments are generally under-estimated. If it is

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<sup>58</sup> Cf. Deutscher Bundestag, Ausschuß für die Angelegenheiten der Europäischen Union, Texte und Materialien, Bd. 17 (2001). See also the comments of the president of the Committee: *Friedbert Pflüger*, Die fortschreitende europäische Integration und der Europaausschuß des Deutschen Bundestages, *Integration* 23 (2000), 229 et seq.

<sup>59</sup> Cf. Article 23 II, III of the German constitution, Article 23e of the Austrian constitution, Article 88-4 of the French constitution; Article 6 II of the Danish Accession Act of 11 October 1972; see also for an overview: *Ingolf Pernice* in: H. Dreier, *Grundgesetz Kommentar*, Bd. 2, 1998, Art. 23 para. 13, with more references.

true that around 80% of the relevant economical and social legislation in the Member States are determined by directives of the Community<sup>60</sup> - an even higher percentage applies probably to environmental law – it is at least astonishing to observe that the public attention in politics continues to be focussed merely on internal matters of each Member State. National parliamentary elections, instead, should much more be focussing on European themes, the interest of parliamentarians should concentrate much more on the control of the heads of government acting in the European Council and of the ministers acting in the Council, who should be made accountable much more expressly for their political achievements at these instances before the national Parliaments. It is through these Parliaments, how the public discourse also on the policies of Brussels should be stimulated, it is to a large extent still through the national Parliaments that democratic legitimacy is provided to these policies, and it is up to them, as proposed, to monitor the respect of the limits of European competencies and the principle of subsidiarity.

The question is, which institutional or procedural arrangements are possible to enhance this role of the national Parliaments and, consequently, indirectly at least also the democratic legitimacy of the Union. Three proposals shall be submitted for further consideration:

- The meetings of the Council should be public, as far as it acts in its capacity as legislator. This additional transparency already claimed for by the European Parliament may well weaken the capacity of the Council to come to a compromise, but it would bring European legislation closer to the citizens and would enable the national Parliaments to exercise a more efficient control on the behaviour of their ministers.
- The establishment of a Parliamentary Subsidiarity Committee, as already mentioned, would combine the advantage of a more direct involvement of the national Parliaments in the decision-making procedure, with an effective control-function for the respect of the limits of European competencies as well as of the principle of subsidiarity - in a way as it was proposed by the British Prime Minister Tony Blair in his Warsaw-speech, to be the role of a Second Chamber of the European Parliament.
- The PSC could be given even more political significance, if its consent were required, as proposed above, for any measure to be taken by the Council under provisions like Article 308 ECT which confer competencies to the Union which are not clearly defined and limited. It would be, in such cases, up to the national constitutions to determine how the representatives of the national Parliaments are appointed to the PSC and how their positions are co-ordinated within the national Parliaments.

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<sup>60</sup> Statement of the German constitutional court, BVerfGE 89, 155 (173) - *Maastricht*, referring to the speech of the former President of the European Commission, *Jacques Delors*, at the European Parliament of 4 July 1998, EC-Bulletin 1988, No. 7/8, p. 124), and to the former Member of the Commission, *Martin Bangemann*, in: Brückner (ed.), *Europa transparent: Informationen, Daten, Fakten, Hintergründe*, 1991, p. 5.

- Participation of elected representatives of the national Parliaments in the preparation of amendments to the Treaties following the model of the Convention for the Charter of fundamental rights<sup>61</sup>: Using this method would not only strengthen the democratic legitimacy of that constitutional process, but also adapt it to the requirements for democratic procedures applicable to modern constitution-making.

When ratifying the Treaty of Nice, the national Parliaments should seize the opportunity to compel their governments to adequately adapt the Convention-procedure on the basis of the practical experiences gained so far, and to make use of it for the preparation of the Intergovernmental Conference in 2004.

### **Conclusion: A Scenario for the Enlargement of the European Union**

To transform the existing Treaties into a consolidated Treaty and to shape this in accordance with the principles and proposals listed above, would indeed go beyond the capacities of an Intergovernmental Conference in the traditional form. With a view to the enlargement, moreover, it seems to be indispensable to include at least the first group of candidate-countries in the this next step of the process of European constitution-making. What all this is about, is a revision of the European social contract and its extension to the citizens of the new Member States<sup>62</sup>; the future Constitution of the Union cannot be imposed upon, but must be negotiated with them, if it is to be a solid basis of general agreement.

There are good reasons, therefore, to design a scenario for the parallel processes of the accession to, and the revision of the European Treaties until the year 2004, were the candidate-countries are fully included, even before they become Member States of the Union. The process can be described with six steps:

1. Creation of a convention, in which the representatives of the present and of the future Member States are requested to work out a proposal for a consolidated EU-Treaty. This informal, but democratically legitimate body could start its work without any amendment of the Treaties, and work in parallel to the negotiations on enlargement. A provisional proposal should be ready by January 2003.
2. Conclusion of the negotiations for accession by January 2003; it should be clear that, although it is the accession to the EU-Treaty as amended by the Treaty of Nice, the Treaties will be revised on the basis of the proposal

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<sup>61</sup> For the proposals of the European University Institute, cf. its publication: *Reforming the Treaties' Amendment Procedures. Second Report on the reorganisation of the European Union Treaties, 2000*, p. 24 et seq., developing this as an alternative to a modified procedure for amending the Treaties based on a „super-qualified majority“.

<sup>62</sup> For the formula of a European social contract Cf. more in detail: *Pernice, Kompetenzabgrenzung* (op. cit. supra, note 33), p. 870, with more references. Cf. also *Ingolf Pernice/Franz Mayer/Stephan Wernicke, Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism*, in: M. Andenas et al. (eds.), *Can Europe Have a Constitution?* Kings College London, February 2000 (in print).

made by the Convention. National parliamentary elections during the period until 2004 should be held with due regard to the works of the Convention.

3. Ratification of the accession-treaties and implementation of the enlargement during the year 2003 in a way to allow the first group of new Member States to participate already to the European elections. During that period, a broad public discourse should be opened on the proposal of the Convention. The future shape of the Constitution of the Union should be one of the themes for the European elections.
4. Early 2004, the Convention should be convened, partly in its new composition, and review the provisional proposal in the light of the ongoing public debate, with the aim to find the broadest possible consensus, in co-operation with the national Parliaments and governments, for the general concept as well as for the various provisions. The final proposal should be ready by October 2004.
5. A new Intergovernmental Conference of the old and new Member States should be convened for the end of 2004. It should, in a manner comparable to the way the Council is generally working on the basis of a proposal from the Commission, discuss the pro's and con's of the proposal, provide for the adaptations necessary in order to achieve consensus and adopt the new Treaty.
5. Ratification of the new Treaty in accordance with the respective constitutional requirements of the Member States, while the negotiations with the second group of candidate-countries continue. Consideration should be given to the question whether or not the new consolidated Treaty should include a provision for a European referendum to which its entry into force is subject. The apparent risks of such supplementary condition may be outweighed by the positive effects of a referendum in terms of necessary information and explanation to the public, and positive effects of political education and active democratic participation.

The procedure along these lines, which has its basis in the Declaration of Nice and should be set up in the Declaration of Laeken, could indeed lead to a Treaty, which is developed from the existing law of the Union and may be proclaimed, as Jacques Chirac has envisaged in his Berlin-speech in summer 2000, to be the Constitution of the European Union.<sup>63</sup> With a view to the final referendum, this consolidated Treaty would be considered, from the beginning of the preparatory works, as a matter of the citizens, would be negotiated in public with their active participation and would, therefore, have the chance to be finally accepted by these citizens as the expression of a new, European social contract on a Union which is a Union of States, but above all, a Union of the citizens of Europe.

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<sup>63</sup> *J. Chirac*, Mit Deutschland und Frankreich eine „Avantgarde-Gruppe“ bilden. Die Europa-Rede des französischen Staatspräsidenten Jacques Chirac vor dem Deutschen Bundestag in Berlin, FAZ no. 147, 28 June 2000, p. 10, 11.