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**„Does Europe Need a Constitution ?
Achievements and Challenges After Lisbon“**

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DOES EUROPE NEED A CONSTITUTION ? ACHIEVEMENTS AND CHALLENGES AFTER LISBON

by
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Introduction

The attempt to give the European Union a “Constitution” has failed. It was as ambivalent as ambitious, since it is possible to argue that the Union already had a constitution even long before the ‘post-Nice-process’ was started and long before the Heads of State and Government of the Member States used the word ‘Constitution’ for the first time 2001 in the Declaration of Laeken.¹ The historic work of the Convention was not useless, however. It first resulted in the ‘Treaty Establishing a Constitution for Europe’, which took the form of a

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¹ Declaration on the Future of the European Union (Laeken Declaration), Annex I to the Presidency conclusions of the Laeken European Council of 14 and 15 December 2001, II forth chapter, titled: ‘Towards a Constitution for European citizens’, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf.

Treaty and enhanced the constitutional character of European primary law substantially. Contrary to the name and the constitutional language used, however, it did not look at all like a Constitution.² With the Lisbon Treaty the name and the constitutional symbolism have been dropped, but the constitutional substance of the reform was salvaged.

Alan Dashwood with other experts have submitted in October 2002 a Draft Constitutional Treaty of the European Union³ with great impact on the later outcome not only of the Convention's work but finally also of the Lisbon Treaty.⁴ It has also contributed to a constitutional understanding of the primary law of the European Union – beyond Lisbon.

Yet, in order to salvage the substantive content of the Constitution for Europe after the negative votes in France and in the Netherlands, the European Council said to have distanced itself expressly from the constitutional concept with the “Brussels mandate” for the IGC 2007:

‘The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’, is abandoned.’⁵

Careful reading, however, allows interpreting this statement as meaning that only a very specific constitutional concept is abandoned: to replace the Treaties by a Constitution. It leaves open the general question of a constitutional character of the primary law in substance. Its aim was to avoid further discussion on whether or not the reform establishes a European state, and to exclude any basis for arguing that another referendum is needed in certain Member States.

The original approach of the Convention, thus, created considerable ‘constitutional confusion’,⁶ while its work has the merit of introducing substantial improvements of the primary law of the Union in terms of transparency, democracy and efficiency, underlining and enhancing its constitutional character in many important respects.⁷

Is there any purpose, then, in continuing to deal with the question: Does Europe need a Constitution?

² See the criticism of JHH Weiler and A Moravcsik to name the Treaty, though it contained merely modest reforms, ‘Constitution’: JHH Weiler, ‘The Constitution of Europe: Resquiescat in Pacem’ in L Silva Morais, P de Pitta e Cunha (eds.) *A Europa E Os Desafios do Seculo XXI: conferência internacional* (Coimbra, Almedina, 2008) 179, 182 f.; id. JHH Weiler, Editorial: Marking the Anniversary of the universal Declaration; The Irish No and the Lisbon Treaty’, *The European Journal of International Law*, 19 (2008), 647, 652: “Treaty which masqueraded as a Constitution...”; A Moravcsik, ‘Europe without Illusions: A Category Error’ (2005) 112 *Prospect*, available at: <http://www.prospectmagazine.co.uk/2005/07/europewithoutillusions>.

³ A Dashwood, M Dougan, C Hillion, A Johnston and E Spaventa, ‘Draft Constitutional Treaty of the European Union and Related Documents’ (2003) 28 *European Law Review* 3, published among other drafts also at the ECLN-Website at: http://www.ecln.net/index.php?option=com_content&task=view&id=18&Itemid=36.

⁴ For an overview on seventeen drafts submitted in this period see: P Häberle, *Europäische Verfassungslehre*, 6th edn. (Baden-Baden, Nomos, 2009) 600-631.

⁵ ICG Mandate, Presidency Conclusions of the Brussels European Council of 21 and 22 June 2007, Annex 1, para. I.1, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf, 16. For comments see: I Pernice, ‘Salvaging the Constitution for Europe – A Reform Treaty for the EU’ (2007) lecture given at the University of Melbourne, available at: <http://www.whi-berlin.de/documents/whi-paper0407.pdf>.

⁶ I Pernice, ‘The Treaty of Lisbon. Multilevel Constitutionalism in Action’ (2009) 15 *Columbia Journal of European Law* 349, 368, also available at: <http://www.whi-berlin.de/documents/whi-paper0209.pdf>.

⁷ Ibid 349, 368 ff, 385-407; see also II.1. below.

Joseph H.H. Weiler has negated the need for a constitution already in 1995, long before the reform process started. In the light of supremacy, direct effect and other ‘constitutional elements’ Europe is in his view yet part of a Constitutional legal order. According to him the European Union does not need a Constitution but an ethos and telos to justify the existing constitutionalism.⁸ Also Grimm’s reply on the question whether the European Union needs a Constitution was negative, insofar at least as ‘Constitution’ is understood as a ‘constitution in its full sense of the term’. This would end up ‘turning the European Union into a State’.⁹ In his reply to Grimm, while sharing the analysis, Jürgen Habermas, however, came to the opposite political conclusions.¹⁰ History, as we have seen, has found its own way.

At least the entry into force of the Lisbon Treaty did apparently not put an end to the debate: In October 2009, the Union of European Federalists has convened a conference and they gave me the honour to talk on Europe’s chances to adopt a Constitution after the German Federal Constitutional Court’s ruling on the Lisbon Treaty’. My answer was clear: There is little chance for the European Union to give itself – or to be given – a Constitution, if this is meant to constitute a European federal state. A European federal state is neither needed nor desirable. The most original and promising feature of European integration is not to copy, on a larger level, the state-model, but to question sovereign statehood and to reinforce effective sovereignty of the people by integrating states into a supranational constitutional compound providing their people an additional, complementary device of political authority to implement policies of common concern which individual states are unable or not efficient enough to implement. This approach would lose its sense if it were to lead to the same kind of statehood it searches to overcome.¹¹ Consequently, there is also no need to have a Constitution in this sense. However, a Constitution in another sense could be necessary.

This depends of how we judge upon three preliminary questions: First: What is a Constitution? Second: What is or what should be the European Union? And third: What would be the added value of a Constitution compared to the existing situation?

I. What is a Constitution?

The term constitution is very complex and controversial.¹² Does it mean a *written* document? Then the United Kingdom has no constitution. Does it mean the fundamental legal order of a

⁸ JHH Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1 *European Law Journal* 219 ff.

⁹ D Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 *European Law Journal* 282, 298 ff.

¹⁰ J Habermas, ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’ (1995) 1 *European Law Journal* 303. For more recent contributions. J Puente-Egido, ‘Braucht Europa eine Verfassung’ in P Häberle, M Morlok and V Skouris (eds.), *Festschrift für Dimitris Tsatsos* (Baden-Baden, Nomos, 2003) 530.

¹¹ For more detail see I Pernice, Zur Finalität Europas, in G Folke Schuppert, I Pernice and U Haltern (eds.), *Europawissenschaft* (Baden-Baden, Nomos, 2005), 743, 763.

¹² See only from recent years: P Bastid, *L’idée de constitution*, Collection classiques (Paris, Economica, 1985); M Loughlin, ‘In Defence of Staatslehre’ (2009) 48 *Der Staat* 1, available at: <http://www.atypon-link.com/DH/doi/abs/10.3790/staa.48.1.1>; UK Preuß (ed.), *Zum Begriff der Verfassung: Die Ordnung des Politischen*, Philosophie der Gegenwart no 12246 (Frankfurt/Main, Fischer, 1994); J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander (ed.), *Constitutionalism: Philosophical foundations*, Cambridge Studies in Philosophy and Law (Cambridge, Cambridge University Press, 1998) 152 ff. Concerning the European Union in particular see only P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *European Law Journal* 125; I Pernice,

state? Then the European Union does not have a constitution because it remains a supranational organisation. And calling the basic statutes of certain international organisations, such as the FAO, the UNESCO or the ILO, ‘Constitution’ would be mistaken.¹³ Does a constitution presuppose an existing *people* or nation, which has fought for it in a revolution driven by the enthusiasm of freedom and equal rights – as 1789 in France?¹⁴ Then neither the United States nor Germany would have a constitution. The same is true if we believe that the *people* must have *adopted* it by referendum. Even where not more than the adoption by representative bodies expressing the sovereign will of the people is required; the German Grundgesetz and also the constitutions of Australia and other countries of the British Commonwealth would not be a constitution. Contrary to what seems to be implied in the recent judgment of the German Federal Constitutional Court on the Lisbon Treaty,¹⁵ no sovereign people existed then in Germany to bring the Grundgesetz into effect.

What then are the essential criteria for defining a constitution?

For the present purpose it might be sufficient to recall only some ideas and theories before explaining my understanding of the term ‘constitution’.¹⁶

1. Basic elements: The ‘thin’ and the ‘thick’ constitution

Generally accepted seem to be some minimum basic features which characterise a constitution. A constitution in this ‘thin’¹⁷, more functional sense is an arrangement that establishes and regulates the main organs of government in a legal order, their structure, powers and decision-making procedures as well as the legal rules on the enactment and enforcement of law.

However, these features are not sufficient to describe the concept of a constitution. There is a wide discussion on further criteria to be met. Joseph Raz enumerates seven features to define a constitution in a ‘thick’ sense, and recent study of Jeffrey Dunoff and Joel Trachtman completes this list: Beyond the establishment of the main organs and their powers and the allocation of governance authority in a vertical context, a constitution is meant to be stable, usually written, superior to ordinary law and justiciable. There are special requirements for

‘Europäisches und nationales Verfassungsrecht’ (2001) 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 148, also available at: <http://www.whi-berlin.de/documents/whi-paper1301.pdf>; N Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56 *Political Studies* 519 ff.

¹³ On this issue: A Dashwood, ‘The EU Constitution – What Will Really Change?’ (2004-2005) 7 *Cambridge Yearbook of European Legal Studies* 33, 34. A Peters, ‘The Constitutionalisation of the European Union – Without the Constitutional Treaty’ in S Puntischer Riekmann and W Wessels, (eds.), *The Making of a European Constitution* (Wiesbaden, Verlag für Sozialwissenschaften, 2006) 35, 37.

¹⁴ This is implied by H Hofmann, ‘Von der Staatssoziologie zu einer Soziologie der Verfassung’ (1999) 54 *Juristenzeitung* 1065, 1070; cf. also U Haltern, *Europarecht und das Politische*, Jus publicum no 136 (Tübingen, Mohr Siebeck, 2005).

¹⁵ German Federal Constitutional Court, judgment of 30 June 2009, Case 2 BvE 2/08, BVerfGE 123, 267, available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, in particular para. 217, 228, 233 and 248.

¹⁶ Pernice (n 12) 148 ff., and id., ‘Multilevel Constitutionalism in the European Union’ (2002) 27 *European Law Review* 511, II.1.a, also available at: <http://www.whi-berlin.de/pernice-constitutionalism.htm>, 4 ff.; both articles with further literature; I Pernice, FC Mayer, S Wernicke, ‘Renewing the European Social Contract: The Challenge of institutional reform and enlargement in the light of multilevel constitutionalism’ (2001) 12 *King’s College Law Journal* 61, 68, also available at: www.whi-berlin.de/documents/whi-paper1101.pdf.

¹⁷ Raz (n 12) 152, 153; see also: W Waluchow, ‘Constitutionalism’ in *Stanford Encyclopedia of Philosophy* (Stanford, Calif., The Metaphysics Research Lab, Stanford University, 2007), available at: <http://plato.stanford.edu/entries/constitutionalism/>; P Cane and J Conaghan (eds.), *The New Oxford Companion to Law* (Oxford, Oxford University Press, 2008) 210.

the amendment of the constitution, and the term includes principles such as democracy, federalism and human rights that are ‘generally held to express the common beliefs of the population about the way their society should be governed’, a common ideology and also constraints and means of control of public power.¹⁸

However, this is rather a description of the general features of a western type of constitution than a normative theory. Not all constitutions contain all these features. Above all, this definition does not explain what a constitution must contain and, above all, what gives a constitution real authority.

2. The authority of a constitution

According to Dunhoff and Trachtman this authority ‘rests upon facts external to the constitution’: The ‘settlement regarding the fundamental structure of society’ precedes and determines the structuring of legal constitutions. Therefore, legal constitutions are defined as ‘efforts to effectuate or instantiate the chosen fundamental social structures’.¹⁹

Already Carl Schmitt distinguished between the fundamental settlement, which he named ‘constitution’ and its concrete instantiation by the constitution making power, which he called ‘constitutional law’.²⁰ This positivist concept does not include normative criteria but just acknowledges what decision has been produced by whoever holds effective power in the society. There is no explanation what the will of constitution making power is. It becomes visible and clear only through the Constitution.²¹ With this, the distinction between constitution and constitutional law becomes meaningless and the definition circular.

Loughlin distinguishes between the formal documents (constitution of government) and the substantive constitution which forms a political unity and which is based on a political pact (constitution of the state). The formal constitution is not self-authorising but valid only by virtue of an existing political will, the material constitution.²² This political pact and hence the people are regarded as the ultimate source of sovereign authority.²³

3. The political pact: A contractualist concept of self-authorisation

In locating the source of authority of the Constitution in a political pact, Loughlin makes clear that the constitution is founded upon an act taken by or at least attributed to the people themselves, in which the people attributes political capacity to itself.²⁴

¹⁸ Raz (n 12), 153-154.; JL Dunoff and JP Trachtman, ‘A Functional Approach to International Constitutionalization’, in id., *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009), 18-21.

¹⁹ Ibid., 18.

²⁰ C Schmitt, *Constitutional Theory* (1928), translated and edited by Jeffrey Seitzer (Durham, Duke University Press, 2008), 75 ff. (*Verfassungsgesetz* as opposed to *Verfassung*).

²¹ Cf. P Häberle, *Verfassungslehre als Kulturwissenschaft*, Schriften zum öffentlichen Recht no. 436, 2nd edn. (Berlin, Duncker & Humblot, 1998) 620; Hofmann (n 14); K Sobota, *Das Prinzip Rechtsstaat*, (Tübingen, Mohr Siebeck, 1997) 30 ff.

²² Loughlin (n 12) 1, 9 f.

²³ Ibid. 4 f., 20.

²⁴ Cf. Grimm (n 9) 282, 290, 299.

It is true that, from empirical terms, many constitutions are not based upon express approval of the people.²⁵ But also where parliaments and governments are acting for the people the citizens remain the legitimating subject. Representation is a basic democratic principle and there is no reason to qualify the actual consent given by a people's referendum as single possible source of legitimacy.²⁶

Where the authority of the constitution is based upon the will of the people, we find that contractualism and with it, the concept of the *contrat social* as the origin and continuing basis for the validity of a constitution²⁷ is an appropriate theory for legitimising the constitution and government, at least in democratic societies. Though nobody would argue that people did – and would at any time – negotiate and agree upon a constitution in real terms, the institutions, procedures and allocation of powers laid down in constitutions, the reciprocal rights and duties of authorities and individuals can be constructed as the result of a political process in a given territory, involving people, social powers, sometimes also advice or pressures from the outside.²⁸ They are terms which are finally agreed upon and recognised as the relevant and binding rules of the political process. In this sense a constitution is the expression of a general agreement of the people concerned, a ‘political contract’²⁹, a basic consensus (*Grundkonsens*) in the society reflected in the active participation and support of the citizens. Or as Neil Walker describes it: the meta-democratic claim to self-authorisation, the idea of the people as author and owner of the constitution and the society as dedicated and integrated object of the constitution.³⁰ This concept of constitution is not limited to the adoption of a given legal settlement but rather an open public process³¹, a concretisation, adaptation and recreation by the construction and interpretation in the day-to-day application, the continuous and repetitive confirmation of the basic agreement: as Rénan said: a *plébiscite de tous les jours*³². Constitution therefore means this steadily renewable agreement – or social contract – of the “people”, citizens of the given polity, providing ultimately for the legitimacy of all public authority, which it establishes, organises and limits.

²⁵ See only G Frankenberg, ‘The Return of the Contract: Problems and Pitfalls of the European Constitutionalism’ (2000) 6 *European Law Journal*, 257, 258 f.

²⁶ Cf. Craig (n 12) 125, 137 f.

²⁷ JJ Rousseau, *Du contrat social ou principe du droit politique* (1762); and re-instated by J Rawls, *Theory of Justice* (Cambridge, Mass., Belknap Press of Harvard University Press, 1971), viii, 3, 11.

²⁸ E.g. the German Grundgesetz and the Japanese Constitution, both made after World War II under the supervision of the Allies. For more recent cases: P Dann and Z Al-Ali, ‘The Internationalized *Pouvoir Constituant* – Constitution-Making Under External Influence in Iraq, Sudan and East Timor’ in A von Bogdandy and R Wolfrum (eds.), *Max Planck Yearbook of United Nation Law*, Vol. 10 (Leiden, Nijhoff, 2006) 423.

²⁹ This is the expression used by MP Maduro, ‘From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance’ in D Lewis (ed.), *Global Governance and the Quest for Justice*, Volume 1 International and Regional Organisations, (Oxford, Hart Publishing, 2006) 227, 239 ff.

³⁰ N Walker, ‘Not the European Constitution’ (2008) 15 *Maastricht Journal of European and Comparative Law*, 135, 137, names it the popular and social register of constitutionalism. In N Walker, ‘Reframing EU Constitutionalism’ in J Dunoff and J Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge, Cambridge University Press, 2009) 149, he differentiates even between five frames: the legal order in juridical terms, a set of organs of government in political terms, self-authorization, a integrated community in social terms and finally a common ideology in discursive terms.

³¹ P Häberle, *Verfassung als öffentlicher Prozess*, Schriften zum öffentlichen Recht, no 353, 3rd edn. (Berlin, Duncker & Humblot, 1998) especially at 121 ff., 265 ff.

³² E Rénan, *Qu'est-ce qu'une nation? Conférence faite en Sorbonne le 11 mars 1882* (Paris, Calmann-Lévy, 1882) 26 ff.

This consensus may consist in conventions, as in the United Kingdom,³³ or be laid down in written documents as in most other countries. As soon as legislative powers come into play, constitutional criteria will have to apply. If the term constitution has any particular meaning at all, thus, it is this legitimising effect based, in a self-referential manner, upon the will and acceptance of the individuals who are affected and concerned by the acts of the public authority they have established.

4. Constitution for the State

The traditional polity having institutions vested with such powers is the state. A new setting is the EU. Hence the question arises whether the concept of constitution can be transferred to this supranational organisation or whether it is restricted to the state.

Carl Schmitt has even identified state and constitution.³⁴ In recent years Dieter Grimm has elaborated the origin of the concept of constitution as historically evolved in the frame of the state as the comprehensive political body that encompassed all public power over a territory and its people. The exclusivity of the state power to rule over a territory and the supremacy of the constitution are in his view essential elements of constitutionalism.³⁵ Also Loughlin criticises a ‘free-standing constitutionalism’ as abandoning state theory and questioning the concept of constitutionalism as such.³⁶ The political pact and hence the people is regarded as the ultimate source of sovereign authority. Sovereignty shall be, thus, the absolute legal authority to rule and be both indivisible and inalienable. Not sovereignty, but only governmental powers could be divided or transferred.³⁷ With regard to the European Union the legal nature of the primary law as international treaties implies that the public power emanates not from the people but the Member States. Consequently, the European integration shall not be a constitutionalisation but according to Grimm a mere ‘juridification’.³⁸

5. The changing meaning of constitution in a changing world

But does this restriction of the concept of constitution to the state reflect what the essence of constitution is? If it is about a direct legal relationship between individuals defining themselves as citizens of a political community on the one side, and, on the other side, the public authority so established on their behalf to exercise the powers conferred to it for implementing certain policies, then there is no reason to limit it to the traditional type of political community which is the state. The changes caused by the process of globalisation need to be reflected in changes of minds and terms. States are increasingly unable to serve

³³ Cf. Dashwood (n 13) 33 f.

³⁴ Schmitt (n 20) 59 ff.: ‘The state does not *have* a constitution, which forms itself and functions “according” to a state will. The state *is* constitution.’

³⁵ D Grimm, ‘The Constitution in the Process of Denationalization’ (2005) 12 *Constellations*, 447. On the development of the term constitution see: H Mohnhaupt and D Grimm, *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart. Zwei Studien*, Schriften zur Verfassungsgeschichte no 47, 2nd edn. (Berlin, Duncker & Humblot, 2002). More advocates of a restriction of the term constitution on the state: Pernice (n 12) 148.

³⁶ Loughlin (n 12) 1 f., 26.

³⁷ *Ibid.*, 1, 4 f., 20.

³⁸ Grimm (n 35) 447.

effectively the needs of their citizens regarding peace, security, welfare etc. Supra- and international structures serve as complementary instruments to fill this growing lacuna. The historical development of the constitution as means to limit state power cannot make the state precondition of the constitution nor its exclusive object. Public functions are no longer bundled in one entity but dispersed in different political institutions.³⁹ Supranational legislation, the establishment of individual rights and the degree of integration at the European level are of a nature and impact on the individual life of the citizens which cannot be explained by terms of public international law or the idea of mere juridification.

The understanding of constitution and constitutionalism needed under such conditions is rather functional and pragmatic, it should not to be confused with statehood, but abstract from the form of political unity or system it establishes and organises.⁴⁰ According to a ‘postnational’⁴¹ concept of constitution the definition of constitution includes all instruments – national, sub-national and supranational – for the establishment, organisation and limitation of public authority by the people concerned. The distinctive feature of the constitution as compared to any other law, thus, is its fundamental character to establish an original and basic legal relationship between the established institutions and the citizens. The citizens are considered both, as the authors and the addressees of the authorities so established. A constitution is essentially self-referential, the statute by which people organise their political condition and life of their polity. Contrary to legislative acts, it requires highest authority, is in principle not revoquable and amendable only under particularly restrictive conditions. As Dashwood describes it in short: a set of ground rules organising some form of collective human activity.⁴² And this term is open to be applied to the European Union.

II. Understanding the European Union

In order to assess whether or not the European Union needs a Constitution, it is essential to know what the European Union is. This also is highly controversial. Some argue that it is – or should become – a state.⁴³ Establishing a federal state of Europe was the clear option of the German Christian democrats for many years.⁴⁴ Likewise, Joschka Fischer, former German

³⁹ Cf. Peters (n 12) 35, 43 ff.

⁴⁰ Pernice (n 12) 148, and id. (n 16) 511, II.1.a. See also Dashwood (n 13) 33, 34; A Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin, Duncker & Humblot, 2001) 93 ff.; D Curtin, ‘Civil Society and the European Union’ (1996) 7 *Collected courses of the Academy of European Law* 185; J Habermas, ‘Die postnationale Konstellation’, in id. (ed.), *Die postnationale Konstellation: Politische Essays* (Frankfurt/Main, Suhrkamp, 1998) 91. C Möllers, ‘Pouvoir Constituant – Constitution – Constitutionalization’ in A von Bogdandy and J Bast (eds.), *Principles of European Constitutional Law*, Modern Studies in European law no 8 (Oxford, Hart Publishing, 2006) 183, 195 even states: ‘In European constitutional history any identification of nation-state and constitution is unconvincing.’ K.H. Ladeur, ‘We, the European People...’ (2008) 14 *European Law Journal* 147, 167, oversees this when criticising that “protagonists of a European Constitution... re-evaluate its (sc. the nation state’s) revival at a larger scale”.

⁴¹ Pernice, (n 12) 148, 155; borrowing from J Shaw, ‘Postnational Constitutionalisms in the European Union’ (1999) 6 *Journal of European Public Policy*, 579; with important further thought M A Wilkinson, ‘Civil Society and the Re-imagination of European Constitutionalism’ (2003) 9 *European Law Journal*, 451, 455, 468, 471.

⁴² Dashwood (n 13) 33 f.

⁴³ J Sack, ‘Die Staatswerdung Europas – kaum eine Spur von Stern und Stunde’ (2005) 44 *Der Staat* 67; see in favour of the latter also F Mancini, ‘Europe: The Case for Statehood’ (1998) 4 *European Law Journal* 29.

⁴⁴ H Kohl, former Chancellor of the Federal Republic of Germany, in his State of the Nation Address from 1990, in *Verhandlungen des Deutschen Bundestages, 11. Wahlperiode, Stenographische Berichte, Plenarprotokolle 11/219 - 11/236*, available at: <http://www.kas.de/wf/de/71.4613/>. See also J Rüttgers, Prime Minister of Nordrhein-Westfalen on 18 September 2009, postulating the

foreign minister, called in his Humboldt-Speech in 2000 for the United States of Europe.⁴⁵ However, in its Lisbon-judgment the German Federal Constitutional Court has clearly stated that the German Constitution would not allow this step to be taken.⁴⁶ It rather considers the European Union as an association of sovereign national states.⁴⁷ Armin von Bogdandy proposed to describe it as ‘supranational federation’;⁴⁸ Christoph Schönberger, Olivier Beaud and Jean F. Cohen propose ‘federation’;⁴⁹ Stefan Oeter prefers the term ‘federal union’.⁵⁰ The most common expression, however, is the organisation *sui generis*. In fact, this means that with our traditional terminologies and categories of the state and the international organisation, mainly based upon the theory of Georg Jellinek,⁵¹ we are unable to qualify and explain what the European Union really is, as distinguished from federal states, confederations or international organisations.

1. The features of the European Union

To describe the EU in the absence of a commonly agreed term, it is necessary, first, to summarise its basic features: It is a separate legal entity with its own legal personality, its own aims and powers conferred to its institutions representing the EU both, with regard to the Member States and their citizens, and towards third countries and international organisations. The Union is a body established by law, acting through law and bound to the rule of law – as Walter Hallstein coined: a Community of law (Rechtsgemeinschaft).⁵²

Indeed, the Union was established and developed by international treaties. However, these treaties are special: So procedurally, for ratification of the treaties and for ratifying amendments most of the Member States have to apply special integration clauses of their constitutions providing for the powers and laying down particular procedural requirements and conditions for conferring sovereign powers to the Union. And substantively, the primary law contains many provisions and has many features which differ fundamentally from any other international treaty.

United States of Europe, available at: <http://www.faz.net/s/Rub99C3EECA60D84C08AD6B3E60C4EA807F/Doc~E05BEA75D6C1146438C85BFB8E5582773~ATpl~Ecommon~Scontent.html>.

⁴⁵ Speech of 12 May 2000, available at: http://www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf.

⁴⁶ German Federal Constitutional Court (n 15) para. 228.

⁴⁷ German Federal Constitutional Court, Case 2 BvR 2134/92 and 2 BvR 2159/92, BVerfGE 89, 155, 190.

⁴⁸ A von Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform. Zur Gestalt der Europäischen Union nach Amsterdam*, Forum Rechtswissenschaft no 28 (Baden-Baden, Nomos, 1999) 67.

⁴⁹ O Beaud, *Théorie de la fédération* (Paris, Presse Universitaires de France, 2007); C Schönberger, ‘Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat-Schemas’ (2004) 129 *Archiv des öffentlichen Rechts* 81; JL Cohen, ‘A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach’ (2008) 15 *Constellations*, 456, 465, 470 ff.

⁵⁰ S Oeter, ‘Federalism and Democracy’ in A von Bogdandy and J Bast (eds.), *Principles of European Constitutional Law*, Modern Studies in European law no 8 (Oxford, Hart Publishing, 2006) 53, 85 ff.

⁵¹ See especially: G Jellinek, *Die Lehre von den Staatenverbindungen* (1882) newly edited by W Pauly, Bibliothek des öffentlichen Rechts no 3 (Goldbach, Keip Verlag, 1996), 16 ff, 34, 172 ff., who refers to the sovereign state with unlimited power on all fields, in contrast to the confederation which is established by sovereign states.

⁵² See W Hallstein, *Die Europäische Gemeinschaft*, 1st ed. (Düsseldorf, Econ-Verlag, 1973) 31 ff.; cf. ECJ Case 294/83 – Les Verts, (1986) ECR I-1339, para. 23: ‘The European Economic Community is a Community based on the rule of law’.

The Treaties lay down common values, objectives and democratic principles of the Union and the Member States and establish the citizenship of the Union as the fundamental status of the citizens of the Member States.⁵³ The Treaties determine specific rights and duties which are common and equally applicable to all citizens of the Member States and which include democratic political rights and procedural participatory rights, fundamental rights and market freedoms. These rights are binding upon the European institutions and have direct effect in the national legal systems and primacy over national law.⁵⁴ The European institutions are controlled by the European Court of Justice (ECJ) in the exercise of their powers, with the Lisbon Treaty in nearly all subject matters.

Contrary to intergovernmentalist decision-making processes, most of European legislation is adopted both by the European parliament and – on the basis of qualified majority voting – by the Council in the codecision procedure. Only certain sensitive areas like foreign and security policies, economic policies and employment are matters of intergovernmental cooperation and coordination. The Union has very limited or no powers in areas like taxation, social security systems, culture and education. However, in sum, it can regulate and coordinate matters which considerably affect the internal sphere of the Member States and the daily life of the citizens.

This is why not only fundamental rights (Article 6 TEU) but also safeguards of national identity and autonomy have been strengthened by the Lisbon Treaty. Article 4 (2) TEU does not only require the Union to respect the national identity of the Member States, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’ but more precisely states that:

‘It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

This provision reflects the fears of the governments to lose their power even in these areas and thus shows that the Union is exercising real powers, far-reaching enough as to threaten some key areas of traditional national sovereignty. Consequently, it requires the respect for the political structures and diversity of the States and cultures forming the Union as a specific system composed of at least two levels of action. To this point Article 5 TEU lays down the limits for the use of the powers conferred to the Union and the Protocol No. 2 the ‘early warning system’ for the control of subsidiarity by the national parliaments. This mechanism ensures that those who would suffer most of an excessive use of the powers conferred to the Union can effectively intervene by political and also by judicial instruments.

⁵³ ECJ Case 184/99 – Rudy Grzelczyk, (2001) ECR I-6293, para. 30.

⁵⁴ See Van Gend, Costa ENEL, Simmenthal, Factortame and other judgments of the ECJ, accepted by national constitutional courts in principle, though with reservations. For recent comments cf. MP Maduro, L Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010); in particular: FC Mayer, ‘Van Gend en Loos, The Foundation of a Community of Law’, *ibid.* 16; I Pernice, ‘Costa v ENEL and Simmenthal. Primacy of European Law’, *ibid.* 47.

Such provisions for the allocation and use of public authority between two levels of action in a political system are constitutional by their nature. Also the provisions for fundamental rights and on democratic principles of the Union are typically constitutional provisions. They can hardly be regarded as common elements of the statutes for international organisations or confederations. The principles of representative democracy in the Union with a directly elected Parliament composed of representatives of the citizens of the Union and holding legislative powers together with the Council. These features demonstrate that this Union is designed to exercise public authority as it is traditionally known for states only, though in a balanced and limited manner, complementary to that of the Member States. And they also indicate that the legitimacy of the Union and the European policies is rooted in the citizens having multiple identities, e.g. as citizens of their local communities, their respective Member States and citizens of the Union.

Special regard should be given to the functions and powers of national institutions in the political system of the Union such as the new powers of the national parliaments – powers conferred upon them by the European Treaties whereas most of the national Constitutions remain silent about these new powers of their parliaments. Likewise, national ministers meeting in the Council exercise legislative authority at the European level. The administrative authorities and, in particular, judges of the Member States are empowered and bound to display European legislation, and to disapply national legislation in all cases of conflict with European law. This is special to the multilevel constitutional system of the European Union.

The Member States are essential part of the Union and vice versa. The system is based on pooled sovereignty and close interdependence between the European and national levels of action. It could not work without democratically elected and controlled national governments nor could its legislation or policies – and even its judicial system – be effective without functioning national authorities implementing, applying and also scrutinising its action. On the other hand, Member States could not possibly be as effective as they are in acting for the interests of their citizens without this new device created for acting, where necessary, beyond national reach and influence. As the European Constitution is evolving, the national constitutions are progressively ‘europeanised’.⁵⁵

Consequently, the Union cannot be seen in isolation but must be defined as important part of the multilevel system based upon the Member States’ constitutions. It is complementary to them and binding them together with common values, common institutions, common law and for common purposes, with citizens having a common and equal status and equal rights under European law.

The relationship of European and national law, though, is not based on hierarchy between the European and the national level but rather pluralistic and cooperative. European law prevails

⁵⁵ MP Maduro, ‘Intergouvernementalismus contra Konstitutionalismus: Braucht das transformierte Europa eine Verfassung?’ (2007) *Der Staat*, 319, 328.

in the case of a conflict with national law in order to be effective and to ensure equality between individuals from different Member States. On the other hand, supranational law is limited to certain purposes and policies, and complementary to national law; it is not meant to jeopardize the validity of the law of the Member States or, in particular, the fundamental principles of the diverse national Constitutions. Mutual consideration and cooperation as well as regard for the functioning of the European system, and for the basics of national constitutional law, are therefore required.⁵⁶ Any definition, thus, of the Union without regard to the Member States as their very fundament and condition of life would be incomplete, as much as denying that the Union with its powers and opportunities changes the nature and functioning of its Member States and their institutions would be a mistake.

2. The constitutional character of the European Union

What does all this mean for determining whether or not the European Union needs a Constitution?

A theory of the European Union must be based upon these features and aim at giving the system as a whole a comprehensive meaningful name. The provisions of the Treaties mentioned have constitutional character. The Treaties establish a new legal entity, create institutions, confer powers to them, define the legal status, rights and duties of the citizens as well as the powers and duties of the Member States and their institutions in the system, lay down the form and legal value of action, the procedures of decision-making and judicial control etc. The primary law is superior to the secondary law made by the European institutions and has primacy over national law. Even if Member States or national Constitutional Courts still insist in being the ‘Masters of the Treaties’, also the Member States and their governments are subjects of the law, including European law. The Treaties are amendable only according to special procedures and, thus, form a stable legal framework of the European Union. With the Lisbon Treaty important parts of the doctrine of the ECJ have become part of the Treaties, so that it is undoubtable that this constitution is also written. In short: The Treaties fulfil the elaborated features of a constitution in the ‘thick’ sense as developed by Raz.⁵⁷

Hence, even though the founding instruments of the European Union take the form of treaties governed by international law, the Union has evolved and is governed under rules of constitutional law. Not only the ECJ has repeatedly underlined the specific character of the EEC Treaty, which, ‘albeit concluded in the form of an international agreement, none the less

⁵⁶ N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317, 339–40. More detailed on Multilevel Constitutionalism and pluralism: Pernice (n 6) 349, 383 f.; I Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (Berlin, Walter Hallstein Institut, 2006) 49 ff., also available at: <http://www.whi-berlin.de/documents/whi-paper0507.pdf>. Cf. also MP Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003) 501, 542 ff.; M Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 281; Cf. also U Preuss, ‘The Constitution of a European Democracy and the Role of the Nation State’ (1999) 12 *Ratio Juris* 417, 420, who cites the notion of an ‘osmotic relationship’.

⁵⁷ See also Craig (n 12) 125, 128 ff.

constitutes the constitutional charter of a Community based on the rule of law'.⁵⁸ Also the German Federal Constitutional Court has recognised this special character in the early times of 1967 already,⁵⁹ but also in its recent judgment on the Lisbon Treaty.⁶⁰ And the national governments accepted this development long time ago and intended to codify in the Treaty Establishing a Constitution for Europe what had been constitutional reality already for a several decades. In a broader sense, at least, the European Union, thus, has a constitution.⁶¹

3. Discussing constitutionalism for Europe

This understanding, however, is not undisputed. Loughlin concedes to the European Union to have a 'constitution of government' but he rejects the thesis that it has original and autonomous authority. Firstly, sovereignty itself is in his view indivisible and inalienable⁶². Second, he cannot imagine a European social contract. My assumption that the European Union is based on the common decision of the peoples of the Member States is in his eyes an exercise of pure representation.⁶³

Loughlin is right insofar as the European Union has no sovereign power like a state, i.a. it is a Community of Law and not based on force. However, in his statement he overlooks that the Union is from its basic function merely complementing the national legal orders enabling the Member States to effective policymaking in the era of globalisation. Moreover, Loughlin's understanding of state and sovereignty does not explain the system of a federal state, since also the states part of a federal state have their own, original constitutional authority.⁶⁴ Multilevel systems of governance can hardly be explained with this theory of sovereignty.

Furthermore, if he rejects the idea of a European social contract as being based on the pure idea of representation, then the same would be true for the German Constitution and many other constitutions adopted by other procedures than referendum. Even if the European law rests formally upon international treaties, does this exclude that European public authority is understood as deriving from the will of the people which have constituted this Union under procedures laid down in their respective constitutions in common with the people of the other

⁵⁸ ECJ Opinion 1/91 – European Economic Area, 1991 ECR I-06079, summary, para. 1.

⁵⁹ German Federal Constitutional Court, Case 1 BvR 248/63 and 216/67, BVerfGE 22, 293, para. 11, stating the the EEC-Treaty represents something like the Constitution of this Community.

⁶⁰ German Federal Constitutional Court (n 15) para. 231: 'In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states.'

⁶¹ See also A Dashwood, 'The Constitution of the European Union after Nice: Law-making Procedures' (2001), 26 *European Law Review*, 215; A Dashwood, 'The elements of a constitutional settlement for the European Union' (2001) 4 *The Cambridge Yearbook of European Legal Studies* 1, only few of many authors are: JHH Weiler, *The Constitution of Europe: Do the new clothes have an emperor? and other essays on European integration* (Cambridge, Cambridge University Press, 1999) 221 ff.; E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; Peters (n 40); Craig (n 12) 125, 128 ff.; A Moravcsik, 'What can we learn from the Collapse of the European Constitutional Project?' (2006) 47 *Politische Vierteljahrszeitschrift* 219, 220, available at: <http://www.princeton.edu/%7Eamoravcs/library/PVS04.pdf>, speaking of a 'de facto constitution'. See also Pernice (n 16) 511, II.1.a; id. (n 12) 148, with further literature.

⁶² A view which corresponds to the classical notion of sovereignty but which has become more and more questionable as the Czech Constitutional Court recently has pointed out in its second Lisbon-judgment, Case ÚS 29/09 Lisbon II [2009], para 147 et seq, English translation available at: <http://www.concourt.cz/file/2506>.

⁶³ Loughlin (n 12), 1, 19.

⁶⁴ German Constitutional Court, Case 1 BvR 201/51, BVerfGE 1, 13, 34; Case 2 BvH 1, 2/82, 2 BvR 233/82 BVerfGE 60, 175, 207; B Grzeszick, in: Maunz/Dürig, *Kommentar zum Grundgesetz* (München, C.H.Beck, 2006) Art. 20 IV para 15-16.

Member States? Is it possible, in democratic systems, to call the states ‘Master of the treaties’? Who is the people if not the citizens of each state? Governments negotiate treaties on behalf of their citizens; the treaties are ratified by the parliaments, representing the citizens, if the authorisation is not given directly by a popular vote. Thus, the constitution-making power ultimately rests with the citizens, also for the European Union, acting through their respective representatives.⁶⁵ Insofar, the Union can be understood as having original authority,⁶⁶ based on a social contract between the Member States in their identity as citizens of the European Union.⁶⁷

This constitutionalism not only distinguishes the European Union from other transnational systems; it is the basis of the functioning of the European Union. As Weiler described it already in 1999: ‘Constitutionalism is the DOS or Windows’, the ‘operating system’ of the European Union which is the condition of effective governance in all specific policies from the internal market to criminal law.⁶⁸ And this constitutionalism was even strengthened by the Lisbon Treaty giving the Charter of Fundamental Rights the same legal value as primary law, abolishing the pillar structure and extending the direct effect of European legislation as well as judicial review to measures regarding criminal law, providing for democratic principles, a citizens’ initiative, strengthening the European Parliaments and giving the national parliaments an institutional role and responsibility in the legislative process.⁶⁹

III. A Constitution for the European Union ?

Given that for all these reasons the European Union must be understood as already having a constitution: What could the adoption of a ‘real’ Constitution, written and structured in the traditional way and using constitutional language as we are familiar with from our national Constitutions, reasonably add?

1. Some questions and opinions

Already during the Convention’s discussion on the Constitution for Europe this was highly controversial, even among those who advocated that the European Treaties already have a constitutional character. It could be argued that, in substance, an express Constitution is simply redundant. It could be questioned, whether it is possible at all to reduce the existing primary law into a single self-contained documentary Constitution, which respects the organic development and complex richness of the European aquis.⁷⁰ One of the aims of making a

⁶⁵ More detailed: Pernice (n 19) II.2.b, and Pernice, Mayer and Wernicke (n 19) 61, 68.

⁶⁶ I.a. Dashwood (n 13) 33, 48; P Badura, ‘Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften’ (1964) 34 *Veröffentlichungen der deutschen Staatsrechtslehrer*, 34, 57; HP Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr, 1972) 58 ff.; A von Bogdandy and M Nettesheim, in E Grabitz and M Hilf (eds.), *Kommentar zur Europäischen Union: Vertrag über die Europäische Union, Vertrag zur Gründung der Europäischen Gemeinschaft*, Art. 1 EGV (München, Beck, 1994), para. 9.

⁶⁷ Cf. also Weiler (n 61) 346, with a specific concept of ‘multiple demoi’.

⁶⁸ *Ibid.* 221.

⁶⁹ Cf. also Pernice (n 6) 349.

⁷⁰ Walker (n 29) 149, 150.

‘real’ Constitution could certainly be to further simplify and clarify the constitutional law of the Union and to integrate the doctrine of the ECJ.⁷¹ This would include clarifying what the European Union really is. Rather than representing a simple reform a Constitution would be a statement of identity, of ideals, of the type of society and polity it establishes and organises.⁷²

On the other hand, Weiler doubted already in 2003 the possibility to embed the *acquis* in a formal Constitution respecting the *acquis* and not converting the Union into a federal state.⁷³ He rejects also the idea of a new Constitution. Even if legally it is still correct to speak of a constitution, after the failed attempt the vocabulary and concept of the constitution has been deeply damaged politically. A new try would have to go much beyond a mere reform treaty to be accepted as a real Constitution if it shall not confirm the policy of deception.⁷⁴

Others doubt whether a new constitutional debate would re-open the dispute on how far the European integration shall go. As it was shown in the case of the Constitution for Europe for some the further integration does not go far enough, whereas for others it goes too far because they think that, already now, it takes too much power away from the Member States and threatens their identities.⁷⁵

For Andrew Moravcsik a new constitutional debate would be not only difficult but even counterproductive. He conceded already the – failed – constitutional reform to have little legal and substantive justification because of the merely minor changes, not worthy to name it Constitution.⁷⁶ Therefore, the failure of the Constitutional Treaty was in Moravcsik’s view not coincidental and reversible. It was not so much the substance of the Constitution’s modest institutional reforms that attracted opposition but its style and symbolism.⁷⁷ A relaunch of the project as proposed for example by Michael Zürn⁷⁸ is in his eyes doomed to failure. He rather proposes to depoliticise the European constitutional evolution and to return to a ‘Europe of results’ of which Commission President Barroso has spoken.⁷⁹ But do results legitimise action if those who are concerned do not understand the system producing these results nor feel themselves adequately participating and represented in the policies led on their behalf? Every result benefits some and leaves behind others. To find general acceptance the rules of the game providing equal participation and equal opportunities to all must be generally accepted. This is what a constitutional settlement is about.

⁷¹ Craig (n 12) 125, 135; R Bellamy, ‘The European Constitution is dead, long live European Constitutionalism’ (2006) 13 *Constellations* 181, 181. Cf. also Dashwood (n 13) 33, 45.

⁷² Weiler (n 2) 179, 182.

⁷³ JHH Weiler, ‘In defence of the status quo: Europe’s constitutional *Sonderweg*’ in JHH Weiler and M Wind, *European Constitutionalism beyond the state* (Cambridge, Cambridge University Press, 2003) 7 ff.

⁷⁴ Weiler (n 2) 179, 183 f.

⁷⁵ Bellamy (n 71) 181.

⁷⁶ Moravcsik (n 61) 219, 238.

⁷⁷ Moravcsik (n 2).

⁷⁸ M Zürn, ‘Zur Politisierung der Europäischen Union’ (2006) 47 *Politische Vierteljahresschrift* 242, 245-247.

⁷⁹ Moravcsik (n 61) 219 ff., 237 f. with reference to J M Barroso, Press Release IP 06/595/, 10 May 2006, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/595&format=HTML&aged=0&language=en>.

Therefore, a European Constitution which takes into consideration the popular and social registers of constitutionalism, as Walker describes it,⁸⁰ is still necessary in order to fill the legitimacy and efficacy gaps. In the longer term, at the latest with the next Treaty reform, it will be inevitable to ‘resurrect’ some version of a thicker constitutionalism for Europe and to ‘un-abandon’ the constitutional concept. Even if constitutionalism was originally a state-shaped and state-fitting discourse the mere criticism on the reference to constitutionalism for the EU does not compensate the absence of any adequate conceptual alternative. Constitutionalism defines how to do politics; that means determining what is in public interest. This can be applied to the policy-making in the EU.⁸¹ Furthermore, the ‘constituency’ of the European Union has changed. With the increase of European competences and implication of the citizens the meta-democratic presumption that the European nation states alone represent the peoples in the EU is challenged and the European constituency can also be represented as a compound people alongside the discrete peoples. The consequence would be: sooner or later Europe needs a ‘real’ Constitution.

2. The added value of a Constitution: The perspective of the citizen

In order to assess an added value of a Constitution it is necessary to take the perspective of those by whom and for whom the European Union is finally made: the citizens. For democratic countries as the Member States are, the establishment, development and action of the Union is and must ultimately remain based upon the will of its citizens. Giving the European Union – expressly – a ‘Constitution’ would give the primary law the name that it deserves, in conformity with the constitutional reality of the Union. It would emphasise that the citizens are at the origin of its authority, whatever may have been the way in which their will has originally been formed for establishing or joining the Union. The form of a treaty, democratically ratified by states according to their respective constitutional procedures is not an uncommon way to make a Constitution.⁸²

Furthermore, the European citizens are not in general against a Constitution. Polls taken in the initial years of the reform process have shown that up to 79 per cent of the citizens of the EU-25 were in favour of a Constitution for the European Union, even in Britain there was a slight majority.⁸³ However, nobody expected a text of 400 pages, a Constitution clothed in an international treaty with protocols and declarations etc. Submitting such texts to national referendums is a provocation. 11 per cent of the citizens surveyed complained about the

⁸⁰ Walker (n 30) 137.

⁸¹ Ibid.

⁸² For the example of the United States of America see: M Tushnet, *The Constitution of the United States of America: A contextual Analysis* (Oxford, Hart Publishing, 2009) 9 ff. For the German constitution see: K Hailbronner and M Kau, ‘Constitutional Law’ in M Reimann and J Zekoll (eds.), *Introduction to German Law*, 2. edn. (München, Beck, 2006) 53 ff.

⁸³ EOS Gallup Europe, *The Future of the European Constitution*, Flash Eurobarometer 159 (Wavre, European Commission 2004), 21 et seq, available at: http://ec.europa.eu/public_opinion/flash/fl159_fut_const.pdf; 159/2, 29 et seq., available at: http://ec.europa.eu/public_opinion/flash/fl159_2en.pdf.

complexity of the draft, 20 per cent about the lack of information.⁸⁴ It was a great surprise, therefore, that the 2004 Treaty establishing a Constitution for Europe found the great support of the voting peoples it did. The citizens, thus, would be in favour of a Constitution.

Would it then be undemocratic to start a new initiative?⁸⁵ Would it reverse democratic principles? Even if the French and Dutch referendums could be understood as votes against the idea of a Constitution for Europe – which does not seem to be the case⁸⁶ – democracy is an open process of forming and reforming political will in a public discourse with no limits except those laid down in the Constitution. This includes that any issue, even if one attempt to find a solution has failed, may be brought on the table again. It is for the people to decide whether or not they are ready to think about.⁸⁷ Therefore, continuing the debate on a Constitution for Europe is not undemocratic but rather the opposite: living democracy.

3. What kind of Constitution ?

However, as Weiler said, giving the European Union a ‘real’ Constitution only makes sense if it makes a difference to the existing situation. Three questions seem to be among the most important to be answered:

- The first question would be whether a new Constitution could realise and garanty the equal participation of all citizens.
- The second question regards the conditions and limits set by the national Constitutions concerning a European people.
- The third question relates to the language and terminology: Is it possible to use the term Constitution without making the European Union a state?

a. The principle of equal participation

John Rawls defining the ‘justice of the constitution’ requires the constitution to be a ‘just procedure satisfying the requirements of equal liberty’:

‘The precept of one elector one vote implies, when strictly adhered to, that each vote has approximately the same weight in determining the outcome of elections. And this in turn requires, assuming single member territorial constituencies, that members of the legislature (with one vote each) represent the same number of electors’.⁸⁸

The principle of degressive proportionality governing the composition of the European Parliament is clearly contrary to the idea of equal liberty. It is also the reason why the German Federal Constitutional Court in its judgment on the Treaty of Lisbon does not recognise the European Parliament as an institution able to provide sufficient democratic legitimacy to

⁸⁴ EOS Gallup Europe, *The Future Constitutional Treaty. First Results*, Special Eurobarometer 214 (2005) 15, available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs214_en_first.pdf. Cf. Dashwood (n 13) 33, 45.

⁸⁵ Walker (n 30) 135 f.; Weiler (n 2) 179, 183 f.

⁸⁶ See only Dashwood (n 13); Zürn (n 78) 245-247.

⁸⁷ With regard to the Lisbon Treaty: Pernice (n 6) 349, 359-364.

⁸⁸ J Rawls, *A Theory of Justice* (Cambridge, Mass., Belknap Press of Harvard University Press, 1971), 221 ff.

European legislation and policies and accepts it only as an additional or complementary source of democratic legitimisation.⁸⁹

However, as made clear in Article 10 (2) TEU, legitimacy of EU policies is not only rooted in the directly elected European Parliament, but also in the Member States as functioning democratic states with their respective – just – constitutions. Their national governments act in the Council and are accountable to their respective national parliaments. Losses in equal participation in the European Parliament are compensated by the additional weight of the citizen's will represented at the Council. This complex, intervoven structure of the Union, thus, does not follow the constitutional logic of nation-states, but finds its own ways of fair representation. Apart from shere comparison of figures, evidence for a lack of equal liberty in the practice of the European constitution has yet to be produced. This does not prevent, however, looking for more adequate devices to achieve in a future Constitution what Rawls develops as conditions for a constitution to be just.

b. Constitutional limits for creating a European people

Achieving equal liberty and participation for all citizens of the European Union at this level might create a European demos and thus lead to formation of a federal state. This, however, would, according to the German Federal Constitutional Court substitute the subject of constitutional legitimacy and not be covered by the German Grundgesetz. Due to the irrevocable transfer of sovereignty and the loss of the right to self-determination it would require the directly declared will of the German people, in other words a new Constitution.⁹⁰

Though this argument has little foundation in the Grundgesetz, the question comes to what is the ultimate source of legitimacy of the Union and its policies. The Constitutional Court's construction is basically that it is the collective will of the respective national peoples, or more clearly: of the Member States which remain the Masters of the treaties. With a European people, however, legitimacy of the Union policies would have its own source, and the Member States and their peoples would slip into a secondary role.

But this conclusion is valid only on the basis of a dichotomie between the Union being either an international organisation or a state – *tertium non datur*. As explained above, the constitutional reality of the European Union is different – or *sui generis*. Citizens may have two or more political identities. With regard to European areas of competence they are Union citizens, with regard to national politics they are citizens of their respective Member States, and in federal states they may be Bavarian or Berlin citizens regarding such areas of competences which remain at the sub-state level. Thus, as the former British Foreign Secretary, Jack Straw, pointed out correctly: 'Europe simply provides a further layer of

⁸⁹ German Federal Constitutional Court (n 15) para. 271, 274.

⁹⁰ Ibid., para. 228.

identity'.⁹¹ Acknowledging the European identity as co-existent with the citizen's local, regional, national and European political identities, and ensuring the principle of equal liberty at each level, by no means establishes any hierarchy of legitimacy in the Union.

c. Implications of constitutional language and terminology

The most difficult question is the third one regarding language and terminology. We have no other linguistic instruments for describing the institutions, their function and powers, the decision-making processes, the interdependence between national and European level and the principles governing the European Union as those available from the tool-box developed for state constitutions. Yet, the use of any of these terms – democracy, legislation, fundamental rights etc., even the word constitution itself – immediately implies a reference to the state. This is what we are used to. A considerable effort of abstraction is needed to dissociate this terminology from the state and to make clear that the context wherein it is used is a different and that the system to which it is applied is not a state but a supranational Union with its own logic and implications.⁹²

4. Guiding principles for drafting a Constitution for Europe

To fulfil its purposes a Constitution for Europe deserving its name would have to be short and clear in terms and concepts in order to make it accessible for the citizens, allowing them to take ownership of what they may otherwise continue to consider being just the subjects of. Like the Treaty on the European Union – except for its provisions on foreign and security policies – it should contain open and general provisions only, all details being dealt with in organic laws separated from the Constitution.⁹³ It should underline the complementary character and subsidiary nature of the European Union and the Member States, but make clear also that both levels of action, including their constitutions, are part of one intertwined system, a composed political community. It must substantiate that the citizens, not the states, are the origin and the Masters of the Union (and its Constitution) and that with regard to the formation of will and the legitimacy of European policies, the Member States, their parliaments and governments are instruments to express the collective will of their citizens at the European level, while the will of the citizens – with their European identity as citizens of the Union – finds direct expression through their representatives at the European Parliament.

⁹¹ J Straw, *A Europe for its citizens*, Lecture at the Royal Institute of International Affairs, Chatham House, 27 July 2001 ; see also C Carter and A Scott, 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union'(1998), 4 *European Law Journal* 429, 442-444; and more detailed: Pernice (n 12) 148, and id. (n 16) 511, II.1.a.

⁹² This is the problem of 'translation' as described by Weiler (n 61) 270. Cf also E de Wet, 'The International Constitutional Order' (2006) 55 *International Comparative Law Quarterly* 51, 51, 52; A v Bogdandy, 'Zur Übertragbarkeit staatsrechtlicher Figuren auf die Europäische Union – Vom Nutzen der Gestaltidee des supranationalen Föderalismus anhand des Demokratieprinzips', in M Brenner, *Der Staat des Grundgesetzes – Kontinuität und Wandel: Festschrift für Peter Badura zum siebzigsten Geburtstag* (Tübingen, Mohr Siebeck, 2004), 1033.

⁹³ For proposals in this sense regarding the competencies see I Pernice, 'Eine neue Kompetenzordnung für die Europäische Union' in P Häberle, M Morlok and V Skouris (eds.), *Festschrift für Dimitris Tsatsos* (Baden-Baden, Nomos, 2003) 477, 502 ff. Cf. also Zürn (n 78) and the complete draft of F Cromme, 'Die Zukunft des Lissabon-Vertrages – Ein kurzgefasster und dynamischer Verfassungsvertrag' (Baden-Baden, Nomos, 2010).

Pooling sovereignty this way, thus, can be explained as a substantial gain in political influence and effectiveness, compared to national governments only, internally as well as at the global level.

Conclusions

The Laeken Declaration did not intend to say that the reform process initiated in Nice should lead to a Constitution for the European citizens as a first step, but it asked whether it might 'lead in the long run to the adoption of a constitutional text in the Union'.⁹⁴ The 'long run' is not finished yet. The work of the Convention and the Lisbon Treaty resulting from it was a first important achievement. Further steps need to be taken. The Constitution of the European Union is an ongoing process.

The next step would be to initiate a broad and thorough European-wide debate about a Constitution for the European Union of the kind described. When the debate is concluded and the public opinion is ready for a new attempt, a draft should be prepared by a Constitutional Convention in an open and transparent process, it should be revised and adopted by the European Council and ratified by all the Member States. It should be submitted to a European-wide referendum to bring it into effect. Such a Constitution for the European Union could make a real difference.

After such process, including the preparation of the referendum, people would be more familiar with the European Union, its aims and its structures and might be able to participate more consciously and critically in the political life of the Union, as active citizens taking ownership of their Union.

⁹⁴ See n 1 above.