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### **European Constitutionalism and the National Constitutions of the Member States**

#### **Implications for Brexit**

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# European Constitutionalism and the National Constitutions of the Member States

## - Implications for Brexit -

by

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## INTRODUCTION

Celebrating the 40th anniversary of the Constitution of Portugal is an excellent opportunity to reflect on a subject, which is of highest importance these days, more than ever: European Constitutionalism and the national constitutions of the Member States. The referendum on Brexit, whether or not the notice under Article 50 TEU

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will be filed to the European Council, as announced by Theresa May, in March 2017, must be understood as a serious challenge to the idea of European Integration. Nationalist, Eurosceptic and xenophobic movements in other Member States like France, the Netherlands, Hungary, Poland, Austria and even Germany are threatening the achievements of European integration which gave us more than 70 years of peace, freedom and prosperity, and an opportunity for (re-)uniting Europe. These populist-driven movements are splitting the society in a manner we thought European civilisation had overcome after World War Two. Before the upcoming discussion on disintegration<sup>1</sup> takes speed and impact, it seems to be wise to reflect on the conditions, values and benefits of integration. Constitutionalism is deeply related to integration, in some way we can describe it as the legal side and instrument of political integration.<sup>2</sup> But more than this, it is a revolutionary concept based upon fundamental values and principles and striving to ensure human life in dignity.

## 1. The historical roots of constitutionalism

European Constitutionalism cannot be discussed without regard to the roots of constitutionalism. The excellent lecture we just heard from Professor d'Atena on the history of Constitutionalism and human rights led us back to the American Declaration of Independence of 1776. Its key statement is that "all men are born equal". We also heard that the basic ideas of this Declaration were taken up and further developed in the Declaration of Human Rights of 1789, stating in Article 16 that a society without a division of powers and guaranty for human rights has no constitution. These are indeed revolutionary ideas. The rights listed in the Declaration are inherent in human nature, they do not need to be written into the text of a constitution, they are valid *a priori*. Writing them down as guarantees in a constitutional document could mean, as d'Atena explained, that the guarantee were man-made and subject to amendments. A reference to them in a declaration, instead, underlines their pre-existence.

Constitutionalism, thus, appears as a great *transatlantic* achievement. But is it European? Even if those who drafted the American Declaration of Independence had their origin in Europe, it is the achievement of leaving behind the monarchic traditions of old Europe, the distance from Europe – and, in particular, from Britain – that allowed the Americans the new kind of freedom as witnessed in the Declaration of

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<sup>1</sup> See Annegret Eppler/Henrik Scheller (eds.), *Zur Konzeptionalisierung europäischer Desintegration* (Nomos, Baden-Baden 2013). See also Hans Vollaard, *Explaining European Disintegration*, 52 *JCMS* (2014), 1143-1159, at: <http://online-library.wiley.com/doi/10.1111/jcms.12132/abstract> (last access 7 Jan. 2017). For critical comments with more references see: Franz Mayer, *Of Blind Men, Elephants and European Disintegration – What could and what should academics do against the „disintegration of Europe?*, *Verfassungsblog* 26 Mars 2015, <http://verfassungsblog.de/von-blinden-maennern-und-elefanten-was-kann-und-sollte-die-rechtswissenschaft-gegen-die-desintegration-europas-tun/> (last access 7 Jan. 2017)

<sup>2</sup> For the emphasis on the creative/formative function of the constitution (as a process) for political bodies at large, the concept is both, narrower and broader than the concept of „Integration through Law“, coined by Mauro Cappelletti/Monica Seccombe/Joseph H.Weiler, *Integration Through Law. Europe and the American Federal Experience* (De Gruyter, Berlin 1986-2013). With a special emphasis on values: Christian Calliess, *Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?*, 59 *Juristenzeitung* (2004), p. 1033, 1041-5. For an analysis of the role of constitutional courts and the ECJ see: Andreas Voßkuhle, „Integration durch Recht“. *Der Beitrag des Bundesverfassungsgerichts*, 71 *Juristenzeitung* (2016), p. 161, 177-8, originally: *Humboldt-Rede zu Europa* v. 22. Okt. 2015, at: [http://www.whi-berlin.eu/tl\\_files/HRE/Integration%20durch%20Recht%20Berlin%20endg.pdf](http://www.whi-berlin.eu/tl_files/HRE/Integration%20durch%20Recht%20Berlin%20endg.pdf), p. 20-4.

Independence. The question, thus, is what is specifically European in this light, when we talk about *European Constitutionalism*?

## 2. European Constitutionalism: A second revolution

The answer can be found in the more recent history. Since hundreds of years constitutionalism was about people and their political organisation in the form of a state, based upon the assumption that human rights are self-understood, prior to the state. The state was to be organised by the constitution so to make sure that the individual fundamental rights are protected to the greatest possible extent. The horrors of the Holocaust and World War Two, however, made clear that such a state-centred approach is insufficient. European constitutionalism arises from what I would call the second revolution. It is based upon a loss of trust in the state and its effectiveness to protect the rights and fully serve the interest of the citizen.

Indeed, the concept of the sovereign state is not in fact what it was promised to be: a guaranty of fundamental rights, freedoms and peace. Given the experiences of centuries of wars among European states peoples and thus, as Walter Hallstein has put it, given the failure of the Westfalien system in attaining its objective to preserve peace and the insight that states do not always protect, but sometimes are even the greatest threats to human rights, the lesson was learned that states are not the ultimate guarantor of rights and freedoms, nor can their sovereignty and cooperation preserve peace: More is needed, effective provision for the basic human values including peace exceeds national boundaries, additional safeguards need to be established beyond the states. Instruments of international law have thus been developed to this end, starting with the establishment of the United Nations and the San Francisco Declaration of Human Rights of 1948. The International Covenants of 1966 give the rights here confirmed legally binding effect. The European Convention of Human Rights of 1950 even establishes a Court with the power to judge cases of alleged violations of human rights.

While these instruments of international law respect national sovereignty of the participant states and are even understood as an expression of their sovereignty, the real revolution, however, came with Jean Monnet and the Schuman Declaration of 1950: the establishment of the European Coal and Steel Community (1952) and of the European Economic Community and the European Atomic Community (1958). The constitution of supranational authorities is a revolution against the idea of the absolute and sovereign state. Constitutionalism is not limited to states, the European model shows that – in a post-national understanding – it is about political organisation more generally. This is a revolution also in political philosophy for very practical purposes: preservation of peace, freedom and prosperity for people through a new – multilevel – system of government.<sup>3</sup>

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<sup>3</sup> See already Ingolf Pernice, *Die Zukunft des Europarechts. Zwischen Revolution und Alltag*, in: Stefan Grundmann, Michael Kloepfer, Christoph Paulus et al. (eds.), *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin. Geschichte, Gegenwart und Zukunft* (Berlin, 2009), p.1361, 1362-4.

National constitutions in Europe from after 1945, like for Italy or Germany, contain a new kind of provisions that correspond to these revolutionary ideas: They show a remarkable openness for international cooperation and, more specifically, the establishment of inter-state institutions with autonomous powers. Article 24 of the German Basic Law so provides for the transfer of sovereign rights on inter-state institutions. Such provisions have never been seen before. Today, opening- or, as we say, “integration-clauses” can be found in most of the European constitutions, including those of the countries of central and eastern Europe that joined the EU at a later stage.<sup>4</sup> The provisions of the Portuguese Constitution related to international and European law, in particular, witness a particular openness for international relations and for our “joint venture”<sup>5</sup>, the EU. Article 8 (4) of the Portuguese Constitution was introduced in 2004 with the view to the primacy-rule laid down in Article I-6 of the Constitutional Treaty, to not only incorporate EU law into the domestic legal system but also to acknowledge its primacy – “with respect for the fundamental principles of the democratic rule of law”.<sup>6</sup> Although, after the failure of the Constitutional Treaty, this Article I-6 ended up in a Declaration (nº 17) to the Treaty of Lisbon, the primacy-clause in the Portuguese Constitution remains.

*European* constitutionalism, thus, stands for the development of constitutionalism beyond the state, the multilevel organisation of political power – or public authority – by people pursuing their common interest in conformity with the common values and principles rooted in the American and French revolutions.

### 3. Relationship to national constitutions

This is of great importance to the relationship between European Constitutionalism and the national constitutions of the Member States. The very controversial issue primarily points to the relationship between European constitutional law and the national constitutions, but it embraces even more so the relationship of EU secondary legislation with national law in general. Is it a relationship of subordination – and if so, who is subordinated to whom? -, is it a relation between competing authorities or of peaceful coexistence, or is it a relationship of cooperation and trust? As we all know, there are different approaches to this question in the different Member States and, in particular, in the case law of their respective Constitutional Courts, positions that in part diverge from that of the European Court of Justice and that do not always meet full agreement in academic circles, either.

To find an appropriate answer to the question of the relationship requires a deeper theoretical reflection. We first need to understand what the EU really is in terms of constitutional law (infra I.), before dwelling with the question of relationship (infra

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<sup>4</sup> For an excellent comparative analysis see: Mattias Wendel, *Permeabilität im Europäischen Verfassungsrecht. Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich*, 2011, p. 144-370.

<sup>5</sup> Ingolf Pernice, *The EU – A Citizens’ Joint Venture. Multilevel Constitutionalism and Open Democracy in Europe*, in: José M. Magone (ed.), *Routledge Handbook of European Politics*, 2015, p. 184-201.

<sup>6</sup> For the meaning see: José Manuel M. Cardoso da Costa, *The Portuguese Constitution and European Union Law. Four Notes*, in: Hermann-Josef Blanke/Pedro Cruz Villalón/Tonio Klein/Jacques Ziller (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer, Heidelberg/New York 2015), p. 115, 118.

II.). And as we are living in a difficult period the EU being threatened by the Brexit, let me draw, finally, some conclusions regarding the Brexit-process and its constitutional implications (infra III.).

## I. WHAT IS THE EUROPEAN UNION?

Many understand the EU as a construct of and by states, established under international law as a special type of an international organisation. The thesis I would like to submit to your scrutiny, instead, is that the EU is ultimately a construct of people, though it was established through an international treaty. As a matter of fact, it was established using specific “integration-clauses” that allow to confer sovereign powers to the EU. I therefore propose to look at the EU from a *citizens* perspective: It is a Union of people, first, albeit it is also a Union of states. Being rooted, ultimately, in the will of individual citizens gives the treaties, the primary EU law, their constitutional character. The difference will further be explained in the first of the three following sections. Secondly, the EU is “Rechtsgemeinschaft”: a community of law – or as the ECJ seems to say nowadays, a union of law. Walter Hallstein invented the term, and he explained the three basic elements of this concept and with it the very specific nature of the EU – distinct from a state. With this in mind, finally attention shall be drawn to three principles that made the EU the most successful and legitimate political venture of modern civilisation: The principle of voluntary participation, the principle of subsidiarity, and the principle of open democracy.<sup>7</sup>

### 1. The citizen's Perspective

In a recent article on “Taking (Europe's) Values seriously”, Joseph Weiler<sup>8</sup> reminds us Jean Monnet's famous aphorism:

*Nous ne coalisons pas des Etats, nous unissons des hommes*<sup>9</sup>

This fundamental idea seems to have been forgotten by many political leaders, courts and academics – except very recently the young candidate for presidential elections in France, Emmanuel Macron.<sup>10</sup> Yet, it exactly describes the Union what it is: A Union of men, human beings, people. States and their institutions are instrumental, in the process of “constitution” of what became the European Union. In modern democracies, as all our Member States pretend they be, the citizens only are the source of legitimacy. Only they can be the ultimate source of legitimacy of the EU too. Whoever takes a function in the running of the EU,

- national heads of State acting in the European Council,

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<sup>7</sup> Ibid., p. 187-95.

<sup>8</sup> Joseph H.H. Weiler, Taking (Europe's) Values Seriously, in: Rainer Hofmann, Stefan Kadelbach (eds.), Law Beyond the State. Pasts and Futures (Campus Verlag Frankfurt /New York 2016), p. 93, 94, 111.

<sup>9</sup> Jean Monnet, Mémoires (LirbairieArthème Fayard, 1976), Motto preceding: Première Partie. Échec à la force.

<sup>10</sup> Emmanuel Macron, "The Franco-German relation and the future of the European Union", speech of 10 January 2017, at „Forum Constitutionis Europae“ (FCE), the Humboldt-University of Berlin: <https://plone.rewi.hu-berlin.de/de/lf/oe/whi/forum-constitutionis-europas/archiv/rede-macron>.

- national ministers taking decision in the Council,
- members of the Commission,
- judges of the ECJ and of national courts,
- members of the European Parliament and of the national parliaments and
- civil servants of national and European executive authorities,

they all are directly or indirectly accountable to the citizens of the Member States, who are the ultimate source of legitimacy of any public authority. In other words: the citizens of the Member States, not the states, are the owners of the Union. Institutions at the national and the EU level act on their behalf as their representatives or agents. The European Treaties, thus, are the expression of a social contract, binding together states, peoples and people of Europe, negotiated by governments representing their peoples, and ratified by parliaments if not by referenda on behalf of the citizens of each country.

## 2. A Union of Law (Walter Hallstein)

This perspective of the citizen and the conclusions drawn from it need some explanation: Let me give it by referring to the Hallstein-concept of “Rechtsgemeinschaft” – community of law. He explains the concept of “Rechtsgemeinschaft” as a phenomenon of law in three meanings: The EU is a creature of law, it is a source of law, and it is a legal order.<sup>11</sup>

### *a. Created by law – no violence*

Hallstein stresses the unique character of the European Treaties creating the European Community as a new polity. It is the majesty of law, instead of violence, iron and blood, that was employed as the instrument to create unity: law as a spiritual, cultural power. Unity through law and based upon equality before the law. This is what Hallstein says was the decisive innovation.<sup>12</sup>

And there is another innovative aspect to be taken into account: As opposed to states like Portugal or Germany, there was nothing to be given a constitution before the EU was established. Without the European Treaties we could talk about Europe in geographical terms, we may talk about Europe as a continent with a specific occidental cultural tradition. But the EU as a polity would not exist. There was not even a template for the form of organisation established by law. Only with the Treaties of Paris and Rome, establishing the ECSC in 1950, and the EEC and the EAC in 1957, and their evolution by the Treaties of Maastricht, Amsterdam, Nice and Lisbon, we see texts setting up what we normally only know from state constitutions only:

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<sup>11</sup> Walter Hallstein, *Der unvollendete Bundesstaat* (Econ, Düsseldorf/Wien 1969), p. 33-38: „Sie ist Schöpfung des Rechts, sie ist Rechtsquelle und sie ist Rechtsordnung“.

<sup>12</sup> *Ibid.*, p. 33.

- Institutions each with a specific design and public function, that are
- staffed with persons elected or selected under specific procedures, and
- vested with specific powers of public authority or competences and, accordingly,
- established for implementing specific tasks following well determined procedures, and
- subject to the rule of law and bound to the respect of the fundamental rights
- of people who, by establishing this political body, define themselves as the citizens thereof.

Though these arrangements are made in the form of international treaties, it is the content and the function that allows us – the GFCC, the ECJ and meanwhile the overwhelming doctrine in literature – call them constitutional documents, or the Constitution of the EU.

Member States' constitutions "integration-clauses" are laying down the procedures and conditions of conferring sovereign powers upon supranational entities and so open the national constitutional orders up for a multilevel structure of public authority. So do Article 23 of the German Constitution, or Articles 7 (6), 8 (4) and 112 (8), but also Article 295 of the Portuguese Constitution. It is through such provisions that the EU Treaties, as well as the legislative, administrative and judicial acts of the EU find their way into the national legal orders and – without further ado – create rights and obligations directly applicable to the individual.

#### *b. Source of law – acting through law*

As opposed to states, the EU is acting by legal instruments only. It is acting through regulations, directives and decisions that are legally binding, and through non-binding recommendations and opinions (Article 288 TFEU). These acts are valid throughout the Union, regardless of national borders, to be applied as uniform law with uniform interpretation in all the Member States. Even in the case of directives that leave the choice of the form and methods to the national authorities, the result to be achieved – and this can be very detailed legislation – must be uniform and the relevant provisions must be given uniform interpretation.

The limitation to acting by instruments of law only excludes, in particular, the exercise of any kind of physical coercion. There are no EU police nor armed forces whatsoever. If law needs to be enforced, it is for the national authorities to provide for the necessary action. The monopoly for physical coercion, thus, remains with the Member States. This absence of force or violence is, perhaps, the most significant feature to distinguish the EU from a state. Citizens in the Member States will not be



confronted with violence from the EU. Nor can the EU or its services enforce physically any act against a Member State. Though financial sanctions may be imposed in certain cases (Articles 126 XI, 260 II, III TFEU), but enforcement against states is excluded (Article 299 I TFEU).

### *c. Constituting a legal order*

Beyond of being a creature of law and acting through law, the EU is to be understood as an autonomous legal order,<sup>13</sup> a system of law in itself created by the Treaties and further developed by legislation through the institutions established by the Treaties. Hallstein stresses that subjects of this legal order are not only states but also the individuals,<sup>14</sup> citizens who are directly concerned by this legal order which not only provide for a functioning common market but also, like a national legal order, for the legality of the acts of its institutions and for effective judicial protection of those subject to European law.<sup>15</sup> The constitutional structure crowned by the Court of Justice acting as a constitutional organ in full sense. In a legal order that is closely intertwined and interrelated with each of the national legal orders and applied by national institutions beside of the internal law: two legal orders in a unique European legal space.<sup>16</sup>

More clearly than ever it is since the Treaty of Lisbon that express provisions ensure that justice is among the basic values to be promoted by the EU. This includes equal rights, non-discrimination, solidarity and social justice as well as the general task of the ECJ to ensure that “the law” is observed. Human dignity and the other fundamental rights are on top of the values listed in Article 2 TEU as well as in the Charter that makes visible the fundamental rights of the person vis-à-vis the EU authorities. True, social justice, in particular, is not among the most elaborated elements of this legal order, nor is solidarity. The financial crisis shows very modest levels of performance in this field. Portugal could certainly be better off if the treaties were less reluctant in conferring powers including for fiscal policies to the EU, to allow effective social policies. Yet, it is an open question, to what extent EU authorities and not our respective parliaments should be responsible for issues of social justice, that means: redistribution, in the Member States.

## 3. Three Basic Principles of the EU

What is it to give the EU legitimacy and makes it attractive for more and more candidate countries, though the citizens of the Union seem to forget about these virtues? Let me briefly explain the three principles already mentioned:

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<sup>13</sup> See *ibid.*, p. 35. The autonomy of this legal order has been stressed by the ECJ in case 6/64 – Costa/ENEL, ECLI:EU:C:1964:66, 1964 ECR 1259, 1270, detailing out ECJ case 26/62 – Van Gend & Loos, ECLI:EU:C:1963:1, 1993 ECR I, 23-5. See also Ingolf Pernice, *Autonomy of the European Legal Order – Fifty Years after Van Gend & Loos*, in: Antonio Tizzano, Juliane Kokott und Sacha Prechal (eds.), *50ème Anniversaire de l’arrêt 50<sup>th</sup> anniversary of the judgment in Van Gend en Loos, 1963-2013, Actes du Colloque Luxembourg, 13 mai 2013 – conference proceedings Luxembourg, 13 May 2013, Luxembourg 2014, S. 55-80*

<sup>14</sup> Hallstein (note 11), p. 35.

<sup>15</sup> *Ibid.*, p. 35-6.

<sup>16</sup> *Ibid.*, p. 36-7.

### *a. Membership: The voluntary principle*

The absence of physical coercion and of any power to exert violence was already mentioned as a fundamental characteristic of the EU as a union of law. More important, yet, is the principle of voluntariness in a broader sense: This regards participation. The EU is open for enlargement, but nothing compels third countries to join. They have a free choice. It is up to the people of each European country to take the sovereign decision to join or to abstain, or even to withdraw.

If people in a European country, “which respects the values referred to in Article 2 and is committed to promoting them” (Article 49 (1) TEU) wish to join and share the rights and obligations of citizenship of the Union with the citizens of all the other Member States, they may vote for a government that is ready to apply for and negotiate accession to the EU. This is a democratic decision and process. The same is true for a withdrawal, though the procedure of Article 50 TEU does not require the consent of the other Member States. But this, again, is due to the regard given to the voluntariness of participation. If consent of the other Member States was required for one deciding to leave, the Union would change its nature.

As soon as the terms of membership are agreed upon, the accession treaty has to be ratified by all the Member States, and by the candidate State, according to their respective constitutional requirements. This means the consent of all peoples supposed to share European citizenship as their common constitutional status. The fact that the accession to – or the withdrawal from – the EU directly affects the individual constitutional rights of the citizens all together, is often left out of sight. It is the freedom to move, the principle of non-discrimination and the right to vote, among many other rights, that people will benefit from or not.

There is, however, an incoherence in the case of withdrawal: If one Member State decides to withdraw, like in the case of Brexit, not only the citizens of this state lose their rights with regard to the remaining Member States, but also their citizens will not benefit from any of the rights granted under EU law in the UK. Their constitutional status changes without them being given any voice. The arrangement to be negotiated within the period of two years may help solving the problems, but there is no protection in the absence of an appropriate arrangement.

### *b. Subsidiarity: The Principle of Additionality*

The legitimacy of the EU is often questioned with the argument that it has too many, too broad and undefined competences, or that the intrusion into national sovereignty and politics is beyond reasonable limits.

David Cameron has started his campaign leading to Brexit with this suggestion, and he initiated the „Balance of Competence Review” conducted by the coalition government in 2012-14 referred to in Cameron’s Bloomberg speech of January 2013.<sup>17</sup> Like in the proceedings of the Constitutional Convention of 2001-3 on the initiative of the

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<sup>17</sup> <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (accessed 13 November 2016).

southern German prime minister Teufel, the result of the very neutral and serious enquiry was zero: None of the powers conferred to the EU was found superfluous or exaggerated.<sup>18</sup> Paul Craig states in an excellent paper on the history of Brexit

„that the Eurosceptics did not get the ammunition that they had hoped for from the review. While the civil service was instructed not to draw direct conclusions from the material, it is nonetheless clear from the reports that the distribution of competence was felt to be about right and that membership on these terms was beneficial to the UK“.<sup>19</sup>

It is the principle of subsidiarity that regulates the competence architecture of the EU. It is laid down in national constitutions – like Article 7 (6) of the Constitution of Portugal or Article 23 (1) of the German Constitution – to guide the attribution of competences to the EU, and we find it also in Article 5 (3) TEU regarding the exercise of EU non-exclusive competences.

Subsidiarity generally means that the EU is not given competences if not needed at the EU level and article 5 (3) TEU states that the EU will only act in exercising her competences if

“the objectives of the proposed action cannot be sufficiently achieved by the Member States... but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

I quote this directly for underlining the great importance of this principle in terms of democratic legitimacy, and even of human dignity and solidarity.

If the idea of human dignity also includes the respect of self-determination of the individual, and if democracy means participation of the individual in the processes of will-formation at all levels of political decision-making, it follows that a proper allocation of powers among these levels is key for democratic legitimacy of the decisions made. Subsidiarity ensures that action is taken at the level that is closest to the citizen, but a higher level intervenes where action at the local, regional or national level respectively would be impossible or ineffective. It is clear that democratic self-determination of the individual decreases the higher the level and the greater the number of people involved: 3 ½ million in Berlin, 80 million in Germany, 500 Million in the EU. It also seems to be clear that loyalty bonds and solidarity among individual citizens of the community at each level decrease with the increasing size of the community, diversity of cultures and lack of common historic experiences.

For this reason EU competences and action are limited to what is beyond the reach of national action: Peace, prosperity, economies of scale in the internal market, environment policies, climate change, shaping globalisation etc. The competences of the EU also mirror the solidarity that citizens of Member States, and states, are ready

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<sup>18</sup> "Review of the Balance of Competences between the United Kingdom and the European Union" (July 2012), Cm.8415, <https://www.gov.uk/review-of-the-balance-of-competences> (accessed 13 November 2016).

<sup>19</sup> Paul Craig, Brexit. A Drama in Six Acts, 2016 ELRev. 447, 451.

to offer to each-other in the EU.<sup>20</sup> As far as we can show that Member States are unable to act effectively, thus, EU action would not intrude but add to sovereignty, at least from the perspective of the individual; it would allow the pursuit of objectives that the state alone cannot achieve. Even if the level of individual democratic influence for each citizen is lower at the EU level, this “deficit” would largely be outweighed – for, without the EU, citizens would not have any instrument for action at all.

As an instrument for achieving objectives that are beyond the reach of the individual states, thus, the EU would not replace the states, nor would the Treaties that form the constitution of the Union replace the national constitutions. Instead, as we learn from Articles 9 TEU and 20 TFEU on the citizenship of the Union that “shall be additional to and not replace national citizenship”, the Union is additional to the Member States, it is build upon their constitutions adding a new instrument and new options of action to what national constitutions can offer and what is available to national authorities.

### *c. Legitimacy: The Principle of Open Democracy*

As can be shown, democracy is not absent at the EU level, but it is organised in a manner that differs from democracy in a state. It is shared among national and European processes and agents. As we can see from Article 10 TEU, it has a dual character, and national parliaments play as important a role as the European parliament. In addition, Article 11 TEU provides for the civil society and the citizens directly to be given a voice in the political processes.

As I have developed in an earlier piece of work,<sup>21</sup> the internet offers a great potential for enhancing democracy at the European level. In spite of multiple threats to privacy and cyber security, the internet particularly facilitates real time information and transparency, citizen’s participation, it promotes the emergence of a European public sphere and allows for a better implementation of citizen’s initiatives as provided for in Article 11 (4) TEU. Open democracy could be an appropriate term, taking up the opportunities offered by the internet for enhancing the public discourse as well as crowd-sourcing, inter-active problem solving and direct participation in decision-making processes. E-voting, as already practiced successfully in Estonia, could enhance participation in elections, but also give people a voice on specific matters whenever deemed to be appropriate. This

Complaints regarding the democratic deficit often rely on concepts of democracy in the national context and ignore the specific character of the EU that is not a state,

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<sup>20</sup> For more details see: Ingolf Pernice, *Solidarität in Europa. Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union*, in: Christian Calliess (Hrsg.), *Europäische Solidarität und nationale Identität - Überlegungen im Kontext der Krise im Euroraum* (Mohr Siebeck, Tübingen 2013), p. 25-56, also available as WHI-Paper [01/2013](#).

<sup>21</sup> Ingolf Pernice, *E-Government and E-Democracy: Overcoming Legitimacy Deficits in a Digital Europe*, Vortrag auf der 11. ECLN Conference Thessaloniki 2015, Makedonia Palace Hotel, May 21-22, 2015, in: Lina Papadopoulou/Ingolf Pernice/Joseph H.H.Weiler (eds.), *Legitimacy Issues of the European Union. Lessons from the Financial Crisis*. Dimitris Tsatos in memoriam, i.E. 2017, auch als [WHI-paper 4/2015](#) und HIIG Discussion-Paper [2016/01](#).

but additional to the states. As already mentioned, it was established as a new political form for the pursuit of goals and interests common to the citizens of the Member States all together at a level beyond the states. Thus, new forms of organising democracy are needed – allowed and available – for ensuring legitimacy in an open democracy at the European level.

## II. THE RELATIONSHIP IN THE LIGHT OF MULTILEVEL CONSTITUTIONALISM

The relationship between European Constitutionalism and national Constitutions, so far, is constructed – from a citizen’s perspective – on the basis of the concept of a Community of law and of the three principles of voluntary participation, of subsidiarity and of open democracy. But these pieces need a comprehensive theoretical underpinning,

The citizen’s perspective suggests a multilevel approach, as it is reflected by “multilevel constitutionalism” (infra 1.). It translates, for the case of the EU, the concept of “Verfassungsverbund” that offers an explanation for the unity in substance of the EU system that is composed of the diverse constitutions at the national level and the EU constitutional frame (infra 2.). What follows for the relationship between the two levels is a legal system with a pluralistic structure, kept together by mutual respect and cooperation at a level playing field instead of claims for superiority or a right to the last word (infra 3.).

### 1. Multilevel constitutionalism and European constitutionalism

Multilevel constitutionalism is a normative theory to conceptualise – from the perspective of the individual – the relationship between, and the interaction of the constitutional settings of communities established at different levels under the guise of the principle of subsidiarity. It suggests that constitutions can exist beyond the state, and for the sake of clarity and distinction, the qualification “post-national” constitutionalism seems to be appropriate. It suggests a pluralism of legal orders, constitutions being related, interwoven, linked or bound to each-other so to form a composite to serve the interests of the citizens who have conferred powers to each level – local, regional, national, supranational – as appropriate for best achieving the desired results.

Contrary to what seems to be implied for some critiques, the term “multilevel”, thus, does not mean hierarchy or subordination; but it does reflect that the supranational level of the EU encompasses the Member States, that each state may encompass a number of regions which do so, in turn, for a number of local communities. There is

no *a priori* relationship between such levels. All depends upon the respective constitutional arrangements. In the EU it is a pluralistic approach.<sup>22</sup>

## 2. European Verfassungsverbund: Unity in Diversity

European constitutionalism can be understood as a specific case of multilevel constitutionalism, the case of Europe. It encompasses both, national and European constitutions as a composite, unit or compound. Both levels are interdependent, bound together, components of what is – to use the German expression difficult to translate – the “Verfassungsverbund”. Both constitutional levels are interdependent, with regard to the institutions, their composition and their tasks, but also in terms of substantive law. One cannot completely be understood and work without a look at the other. This means that the EU could not function properly without the Member States having

- democratically elected and controlled governments represented at the European Council and the Council of the Union;
- political cultures rooted in common values, as enshrined in Article 2 TEU, as a condition for democratic elections to the EP;
- democratic legislative and effective administrative processes providing for the implementation of EU law at the national level;
- national courts, including constitutional courts ensuring the respect of the rule of law and effective legal protection in fields covered by EU law.

EU constitutional law and, in particular, the general principles developed by the case law of the ECJ, are informed by concepts, rights, principles and national constitutional traditions. And European constitutional and legal concepts, rights and principles find their way back into national constitutional law through legislation, the judicial dialogue under Article 267 TFEU, and a system of “best” practices elaborated and shared at all levels. Mattias Wendel admirably describes the “permeability” of the constitutional orders in the EU bound together in the “Verfassungsverbund”.<sup>23</sup>

Andreas Vosskuhle, President of the GFCC, has developed further the idea of “Verfassungsverbund” qualifying the relationship between the GFCC, the ECJ and the ECHR as the European “Verfassungsgerichtsverbund”, translated with “multilevel

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<sup>22</sup> See Franz C. Mayer/Mattias Wendel, Multilevel Constitutionalism and Constitutional Pluralism, in: Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, Oxford and Portland 2012), p. 127-151.

<sup>23</sup> Mattias Wendel, *Permeabilität im Europäischen Verfassungsrecht. Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich*, 2011.

cooperation of the European constitutional courts”.<sup>24</sup> And he conceptualizes the underlying idea of “Verbund” as meaning more than cooperation, but rather compound or even Union.<sup>25</sup> Voßkuhle writes:

„The concept of Verbund helps to describe the operation of a complex multi-level system without determining the exact techniques of the interplay. The term Verbund makes it possible to do without over-simplistic spatial and hierarchic concepts such as ‘superiority’ and ‘subordination’. Instead, it opens up the possibility of a differentiated description on the basis of different systematic aspects such as unity, difference and diversity, homogeneity and plurality, delimitation, interplay and involvement. The idea of Verbund equally contains autonomy, consideration and ability to act jointly“.<sup>26</sup>

We find here important elements for establishing the relationship in the EU between the European and the national constitutional levels. They give a hint also to what the GFCC may have meant when it used the concept of “Verbund” in its judgment on the Treaty of Maastricht in 1993, when referring to the openness of the German Basic Law for commitments in a “narrower legal association” – the translation of “engerer Rechtsverbund”.<sup>27</sup> More recently the GFCC went a step further in its judgment of December 2105 on a European arrest warrant of a person convicted in absentia. The GFCC held that the extradition of the plaintiff violated the guaranty of human dignity and ordered a new examination of the case.<sup>28</sup> Arguing that the identity review exercised by the GFCC would not violate the principle of sincere cooperation but rather be inherent in the concept of Article 4 (2) TEU and correspond to the special nature of the EU, the court emphasises that

„The European Union is an association of sovereign states (Staatenverbund), of constitutions (Verfassungsverbund) [translator’s note: sometimes referred to as multilevel constitutionalism], of administrations (Verwaltungsverbund) and of courts (Rechtsprechungsverbund) [translator’s note: sometimes referred to as multilevel cooperation of courts ].<sup>29</sup>

These same terms were also used in the final judgment of the GFCC in the OMT-case where the Constitutional Court accepted, with some conditions, the preliminary ruling of the ECJ on that matter.<sup>30</sup> Advocate General Pedro Cruz-Villalón referred to the

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<sup>24</sup> Andreas Voßkuhle, Multilevel cooperation of the European constitutional courts. *Der Europäische Verfassungsgerichtsverbund*, in: 6 *EuConst* (2010), p. 175, 184.

<sup>25</sup> So translated by Jan-Herman Reestman / Leonard E.M. Besselink, Editorial, 12 *EuConst* (2016), p. 213.

<sup>26</sup> *Ibid.*, p. 183-4.

<sup>27</sup> BVerfGE 89, 155, 183 – Maastricht (C.I.1.2.a., margin number 94), English translation in: [1994] 1 C.M.L.R. 57.

<sup>28</sup> BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14, at: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215\\_2bvr273514.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215_2bvr273514.html) (accessed 13 11 2016). See the comments by Mathias Hong, Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi, in: 12 *EuConst* (2016), 549.

<sup>29</sup> *Supra* note 28, para. 44: „Die Europäische Union ist ein Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund“.

<sup>30</sup> BVerfG, of the Second Senate of 21 June 2016 - 2 BvR 2728/13 – para. 140, at: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rs20160621\\_2bvr272813.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rs20160621_2bvr272813.html) (accessed 13 11 2016). See CJEU case C-62/14, ECLI:EU:C:2015:400 – Gauweiler, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0062&qid=1479067889831&from=EN>.

concept of the ‘European Verfassungsverbund’ already in the famous ECJ case Åkerberg-Fransson when assessing the applicability to a national measure of the rights guaranteed by the European Charter of Fundamental Rights.<sup>31</sup>

There is some hope, hence, that the „Verbund“-concept has found its way into the practice of the courts, with all the implications for the relationship between European and national constitutional law.<sup>32</sup> It is a relationship that does not follow the hierarchical mode but operates in the spirit of mutual respect, loyalty and cooperation.

### 3. The Principles of Mutual Respect and Cooperation

At least the words used by the GFCC do not imply claims for superiority nor for having the last word in each case, though the court continues to claim that the Member States are the masters of the treaties.

They reflect the insight that the principles of primacy and direct effect of EU law established by the ECJ in the Van Gend and Costa/ENEL case law as early as in the sixties of last century, and latest confirmed by Declaration 17 to the Treaty of Lisbon, are conditional for the proper functioning of the Union. They do, on the other hand, insist upon a balance between the two regimes. Member States are not delivered without reservation to the authority of the ECJ. National identity – given expression by certain key provisions in the national constitutions – would constitute an ultimate limit for the European authority, as Article 4 (2) TEU confirms.

It is clear that this jurisprudence is a challenge to the unconditional autonomy-claim of the ECJ. How to accommodate these two conflicting positions?

The ECJ has undoubtedly the role to defend the common European law, and it does so with all the authority that is given to it by the Treaties. With a view, however, to the self-consideration and role of the national constitutional courts to defend the fundamental values enshrined in the national constitutions, it does not seem unreasonable to accept that national constitutional courts are entitled to be considered limits of the ECJ’s authority too. There is a shared but common responsibility of the constitutional courts at both levels to ensure the respect of the law, a specific system of constitutional checks and balances based upon the principle of loyal cooperation.<sup>33</sup> In accordance with the concept of “Verfassungsverbund”, thus, where the citizens are represented at both levels, as citizens of their Member State and as citizens of the Union the autonomy-claim of the ECJ cannot be absolute, nor does the claim

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<sup>31</sup> Pedro Cruz-Villalón, Opinion on case [C-617/10](#), ECLI:EU:C:2012:340 - Åkerberg-Fransson, paras. 35, 38.

<sup>32</sup> For details see Ingolf Pernice, *Europäisches und nationales Verfassungsrecht*, Bericht, in: 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (Berlin, De Gruyter 2001), p. 148-193. Spanish translation (by A. Lopez-Pina): *Derecho constitucional europeo y Derecho constitucional de las Estados miembros*, in: 8 *Revista española de Derecho Europeo* (2003), p. 601-638.

<sup>33</sup> For more details see Ingolf Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (Berlin, De Gruyter 2006), and id., *Einheit und Kooperation: Das Gemeinschaftsrecht im Lichte der Rechtsprechung von EuGH und nationalen Gerichten. Randbemerkungen zu einem ungeklärten Verhältnis*, in: Albrecht Randelzhofer, Rupert Scholz, Dieter Willke (Hrsg.), *Gedächtnisschrift für Eberhard Grabitz* (Beck, München 1995), p. 523-550.



of national constitutional courts to have the last word. It seems to be appropriate, therefore, to qualify the autonomy of EU law as an “embedded autonomy”.<sup>34</sup>

If the common goal is not to destroy the European Union as a unique and, in some way, revolutionary achievement of modern civilisation, it a matter of mutual respect, of loyalty and sincere cooperation of the constitutional courts at both levels to find, in each case of conflict, the solution that is the least offensive possible to the functioning of the entire system. This common and shared responsibility is what the GFCC seems progressively to be striving to when emphasising the “co-operative relationship” with the ECJ,<sup>35</sup> and what the ECJ, in turn, seeks to implement when it is taking fundamental constitutional sensitivities of national courts more and more seriously.<sup>36</sup>

If this is so, and if courts continue to follow this line, no too much worry should exist that people turn away from the EU and play again national sovereignty and propagate it as “the promised land”.

### III. BREXIT IN THE LIGHT OF EUROPEAN CONSTITUTIONALISM

This, however, is what we experience actually, the tragedy that is – or could turn to be – Brexit: In search for sovereignty and splendor of the past, a large part of the UK people was misled in democratic disguise by political leaders grabby for personal avail and power, with the possible result to achieve the opposite of what they promised. The top Brexiter, Nigel Farage, celebrated the 23<sup>rd</sup> June 2016, the day of the referendum on Brexit, as the UK’s “independence day”.<sup>37</sup> “Make Britain great again”, in analogy to the populist proclamation of the President elect Donald Trump, seems to be the thrust of what the successor of the hapless Prime Minister Cameron, Theresa May, promises for the UK.<sup>38</sup> But does a new *splendid isolation* from the EU allows her to “build a truly global Britain”, as she promised at the Davos Global Economic Summit 2017, “a great trading nation”?<sup>39</sup> Economic figures since the referendum as well as analyses from before advise to be cautious. More importantly, from the perspective of multilevel constitutionalism the isolation from the EU will necessarily result in a loss of sovereignty, freedom and economic prosperity.

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<sup>34</sup> See Pernice, *Autonomy* (note 13), p. 63-4, 70.

<sup>35</sup> First in BVerfGE 89, 155, 175 (para. 70) – Maastricht (at: <http://www.servat.unibe.ch/dfr/bv089155.html>): „Kooperationsverhältnis“. Unofficial Engl. translation available at: [http://www.judicialstudies.unr.edu/JS\\_Summer09/JSP\\_Week\\_1/German%20ConstCourt%20Maastricht.pdf](http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf) (accessed 17 January 2017): „co-operative relationship). See also the account of the jurisprudence of the GFCC aiming at a cooperative and balanced relationship by Voßkuhle (note 2), p. 161-8.

<sup>36</sup> A particularly telling example seems to be ECJ judgment of 5 April 2016, joint cases C-404/15 and C-659/15, PPU – Aranyosi & Caldaru, ECLI:EU:C:2016:198, compared to BVerfG judgment of 15 December 2015, 2 BvR 2735/14, Solange III available in English at: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215\\_2bvr273514en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html) (accessed 17 January 2017). With an emphasis on the cooperative spirit of the ECJ: Hong (note 28), p. 561-3.

<sup>37</sup> Nigel Farage, Victory Speech, in: *Independent*, EU referendum: Nigel Farage's 4am victory speech - the text in full: Let June 23 go down in our history as our independence day., at: <http://www.independent.co.uk/news/uk/politics/eu-referendum-nigel-farage-4am-victory-speech-the-text-in-full-a7099156.html>.

<sup>38</sup> See in particular Theresa May, Speech to the Conservatives, 2. Oktober 2016 in Birmingham, at: <http://www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexiteu-a7341926.html>.

<sup>39</sup> See Stephen Castle and Steven Erlanger, *New York Times*, Jan. 17, 2017 on the Davos-speech of Theresa May, at: [https://www.nytimes.com/2017/01/17/world/europe/brexit-theresa-may-uk-eu.html?\\_r=0](https://www.nytimes.com/2017/01/17/world/europe/brexit-theresa-may-uk-eu.html?_r=0).

To be sure: One of the fundamental principles of the Union, as indicated above, is the principle of voluntary participation. Article 50 TEU was inserted in the Treaties exactly with a view to underline this as a principle. Nobody, yet, had ever thought that, one day, it would truly be made use of. The right of withdrawal is fundamental to the supranational constitution of the EU, for it underlines that the EU is different from a federal state. Nothing allows assume, however, that to withdraw from the Union an easy operation. It is a serious constitutional rupture, with important implications for the constitution both, of the EU and of the UK.<sup>40</sup> The EU is not a golf club you can join and leave at will. It is a Union of citizens who build their life on the legitimate expectation that their rights created by the Constitution of the Union last and that their common project for peace, freedom and prosperity persists without being exposed to threats caused by short-sighted political games of certain political leaders or even governments. And people can expect that the decision to withdraw to be well thought through by all those responsible.

Assessing the political and legal implications of Brexit under the premises of multi-level constitutionalism requires taking the perspective of the individual citizens of the Union (infra 1.). This explains why specific procedural safeguards are provided for in Article 50 TEU, with the aim to allow for a mitigation of the disruptions caused by a withdrawal (infra 2.). It also allows to understand that, far from giving sovereignty back to the UK, her withdrawal from the EU could reset the UK back in a situation of weakness and unknown dependency on the preparedness of its trading partners to enter into fair cooperation (infra 3.).

## 1. The Perspective of the Citizens

It is a serious incident, contrary to the objectives of political and economical integration and the opposite the idea of an “ever closer union among the peoples of Europe”, laid down in Article 1 (2) TEU. Apart from economical<sup>41</sup> and political disruptions it may cause, it disunites people, contrary to the fundamental concept, explained by Jean Monnet “nous unissons les homes”, aimed to be a guaranty for peace in Europe. And it has a constitutional dimension.

The withdrawal of a Member State, thus, is to be taken more seriously in the case of the EU than in the context of international law. Though most of the Treaties establishing international organisations permit the withdrawal of member states, after a period of notice,<sup>42</sup> the case of the EU is special because of the citizens involved.<sup>43</sup> An international organisation has no citizens, no legislative bodies and directly applicable law, nor fundamental rights and judicial protection for the individual against the acting of the organisation and against violations by Member States of the individual

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<sup>40</sup> See Michael Gordon, Brexit: a challenge *for* the UK constitution, *of* the UK constitution?, in: 12 EuConst, p. 409-44.

<sup>41</sup> See for an account of the discussion Iain Begg, Brexit: warum, was nun und wie?, in 39 Integration (2016), p. 230-241.

<sup>42</sup> See Michael Akehurst, Withdrawal from International Organisations, in: 32 Current Legal Problems (1979), p. 143.

<sup>43</sup> See, however, Felicity Vabulas, Brexit isn't all that special. Here's why nations leave international organizations, in: The Washington Post July 1, 2016, [https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/01/brexit-isnt-all-that-special-heres-why-nations-leave-international-organizations/?utm\\_term=.64280c023b61](https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/01/brexit-isnt-all-that-special-heres-why-nations-leave-international-organizations/?utm_term=.64280c023b61) (accessed 9 Jan. 2017).

rights granted in EU law. If a Member State withdraws from an international organisation, this puts an end to the rights and obligations of States under its charter. The notice under Article 50 TEU, instead, withdraws citizen's rights: non-discrimination and free movement, the active and passive right to vote in the country of residence at the local level and at European elections, judicial protection against any violations of fundamental rights and liberties.

## 2. Procedural safeguards for withdrawal

The seriousness of the step allowed by Article 50 TEU finds recognition by the provision for negotiations of an agreement "setting out the arrangements" for the withdrawal. The agreement is needed not only for mitigating the legal, political and economic problems created by the withdrawal of a Member State from the Union, but it is also necessary, in particular, with regard to the protection of the individual rights of the citizens of the Union. The provisions for these negotiations, thus, are necessarily different from what we know as the "cooling off period" regularly provided for in international agreements, a period that can be used and has been used in practice for revocation of the notice.<sup>44</sup> The obligation of the European Union, under Article 50 (2) TEU, to "negotiate and conclude an agreement" with the Member State leaving has other objectives. It is the expression of a remaining bit of the spirit of cooperation and solidarity, as required by Article 4 (3) TEU, given the complexity of the situation in the case of a withdrawal from the EU. It aims to avoid disastrous disruptions both in economic and legal terms, including the rights of the citizens.

If the Treaty specifies, as a legal obligation, that the Union shall negotiate this agreement "in the light of the guidelines provided by the European Council" under the procedure set out in Article 218 (3) TFEU, it gives the European institutions the responsibility to represent the general interest of the EU and its citizens of the Union. The question is whether this includes the citizens of the UK once the notice under Article 50 TEU is filed. Article 50 (4) TEU expressly states that the member of the European Council or of the Council representing the withdrawing Member State is excluded; the remaining Member States and their citizens only are represented, it is their interests the EU institutions have to pursue, while the withdrawing state and its citizens are represented by their government. As confirmed by the reference to the Article 218 (3) TFEU, the EU immediately switches to the negotiation mode established for agreements of the EU with third countries as soon as the notice under Article 50 TEU is filed: This is how the EU will negotiate with the UK once the Brexit is triggered. Though the UK remains Member State during the two years period, with regard to the negotiations it is treated like a third country.

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<sup>44</sup> See the argument of Carlos Closa Montero, *Is Article 50 Reversible? On Politics Beyond Legal Doctrine*, *Verfassungsblog* 4 Jan. 2017, <http://verfassungsblog.de/is-article-50-reversible-on-politics-beyond-legal-doctrine/> (accessed 9 Jan. 2017).

This means: Out is out. There is no room for second thoughts after the notice, and there is no room for a withdrawal of the notice.<sup>45</sup> The notice takes Britain out, definitively, with or without an arrangement. This means that not only the constitutional implications of the Brexit at the EU level and for the status of Britain in relation to the EU need to be carefully considered before the notice is given, but also the constitutional and legal implications for and in the UK. The Parliament, in particular, would be required to revoke and enact a number of legislative acts, including the European Communities Act 1972 (ECA) and its subsequent amendments ordering EU law to be applied directly with primacy over UK law<sup>46</sup> in Britain.<sup>47</sup> The ECA has a constitutional nature<sup>48</sup> and is different from traditional treaties that can be withdrawn by the government under the executive's prerogative. In the case of a traditional international treaty the withdrawal means that the treaty does not bind the UK any more,<sup>49</sup> but it does have no direct effect upon laws applicable in Britain and rights of people. In the case of the EU Treaties the withdrawal would directly affect rights of citizens in the UK and require the Parliament to unmake law that it had given binding force to.<sup>50</sup> It would directly remove rights of UK citizens in other Member States thanks to EU law. It would similarly affect the rights of foreign EU citizens in the UK, including fundamental rights, such as non-discrimination on the ground of nationality. It is difficult to reconcile such an act of the government with the fundamental principle of parliamentary sovereignty.<sup>51</sup>

The UK High Court has adopted this view in the recent judgment on the question whether or not the Government needs authorization by an act of Parliament before sending the notice to Brussels<sup>52</sup> - and was confirmed so by the Supreme Court after

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<sup>45</sup> This is also the common and undisputed view of the parties in *R (Miller) -v- Secretary of State for Exiting the European Union*, High Court judgment of 3 November 2016, available at: <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>, and „Common ground“ of Judgment of 24 January 2017 of the Supreme Court on the appeal in this case, available at: <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>, para. 26. See, nonetheless, the thoughtful arguments of Paul Craig (supra, note 19), p. 463-5, and Closa (note 44), for the opposite position. The EU-Treaty does not provide for a withdrawal of the notice. The practice in international law, Closa refers to, does not seem to be relevant for the EU, as it has a special nature. The solution is indicated in Article 50 (5) TEU, that opens the way for negotiating new membership under new conditions. A question might be, however, whether Article 4 (3) TEU – and political reasons – would require the 27 to accept a withdrawal if, after political changes in the UK, it took back the notice. The possibility of withdrawal, on the other hand, could be used as an inappropriate tool in the negotiations; furthermore, once the notice was withdrawn, nothing excludes that the same Member State changes its view times and again, so producing a unended situation of uncertainty for citizens and business.

<sup>46</sup> On this principle, and the limits of primacy following UK case law see Roman Kaiser, *Auf dem Weg zum „Brexit“ – Die Europäische Union im britischen Verfassungsrecht*, in: 51 *Europarecht* (2016), p. 593, 595-9.

<sup>47</sup> For examples see Gordon (note 40), p.423-30.

<sup>48</sup> Gordon (note 40), p. 428, talks about „its fundamental constitutional importance“. See meanwhile the Supreme Court (note 45), para 67: „The 1972 Act accordingly has a constitutional character“, indication the consequences regarding the application of EU law in the UK. This is already explained in the distinction, *ibid*, para. 62: „The 1972 Act did two things which are relevant to these appeals. First, it provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of its domestic law. Secondly, it provided for a new constitutional process for making law in the United Kingdom.“

<sup>49</sup> For the analogy to this case see Paul Craig (supra, note 19), p. 462-3.

<sup>50</sup> See Supreme Court (note 45), paras 79-83.

<sup>51</sup> *Ibid.*, para. 77: „...we consider that, by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom's membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties“, with extensive explanation of the principle of the parliamentary sovereignty, *ibid.*, paras. 40-46.

<sup>52</sup> *R (Miller) -v- Secretary of State for Exiting the European Union*, High Court judgment of 3 November 2016, available at: <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>. For comments see *The Guardian*, 5 Nov 2016, available at: <https://www.theguardian.com/commentisfree/2016/nov/06/high-court-ruling-brexit-not-sabotaging-parliamentary-democracy-best-deal-britain>. On the preceding discussion: Gordon (note 40), p. 419, with the position that „new primary legislation is not required as a matter of domestic constitutional law to authorise a withdrawal

the appeal filed by the Government. It was no surprise that the High Court stated that this follows from the sovereignty of parliament, “the most fundamental rule of the UK’s Constitution”.<sup>53</sup> Indeed, “Brexit is a crucially constitutional phenomenon”, as Michael Gordon rightly states.<sup>54</sup> And the Supreme Court emphasises that the withdrawal from the EU

„involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom“.<sup>55</sup>

It is the reverse side of the accession, as the concept of multilevel constitutionalism suggests, that, like any amendments of the Treaties directly impact and change the national constitutional law.<sup>56</sup> If the UK Parliament has decided with the European Communities Act that EU law is part of the law applicable in the UK, to make this law inapplicable in the UK cannot be understood as being covered by the “royal prerogative”, even after an advisory referendum.<sup>57</sup>

As Article 50 TEU provides for a period two years only for negotiating the agreement “setting out the arrangements” for the withdrawal it is difficult to see how the desired result can be achieved. The aim of the provision seems to be to ensure some legal certainty, clarity and stability. And the Treaty puts pressure upon both sides: Endless negotiations would mean an endless period of uncertainty. When the period of two years is over, the withdrawal is definitive, with all the consequences. Clarity is given priority. While Article 50 (3) TFEU allows for an extension of this period, the requirement of unanimity in the European Council is unlikely to be met, except in case of a really satisfying agreement beneficial for all the Member States, and for the UK, is in sight and likely to be completed – and ratified – in a foreseeable future. Yet, the unanimity rule offers a great potential of blackmail for each of the governments of the remaining 27, so that an extension of the two-years period cannot be expected.

Why is it that, opposed to Article 49 TEU on the enlargement Article 50 TEU does not require the ratification by all the Member States but – beside of the consent of the EP – simply a decision of the Council, acting by qualified majority? One answer is that it makes it easier to find an agreement, for the EU is based upon cooperation and good relationships, inside as well as with third countries. The other answer relates to a deeper consideration: Brexit does not only affect British citizens, but it affects the constitutional status, the rights and obligations of all the citizens of the Union, their European identity and – if any – bonds of solidarity and unity. Thus, like

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decision“; this is difficult to understand, though, if on the other hand he states that, notwithstanding, „the Parliament will be the appropriate forum, and possesses the necessary authority, to construct the UK’s new relationship with the EU, whatever that may be, as a matter of domestic constitutional law“.

<sup>53</sup> High Court (note 52).

<sup>54</sup> Gordon (note 40), p. 416, 439.

<sup>55</sup> Supreme Court (note 45), paras 78, 81.

<sup>56</sup> For the German integration clause in Article 23 (1) of the Basic Law as a characteristic of the „Verfassungsverbund“, see: Pernice (note 32), p. 178-81.

<sup>57</sup> See also Supreme Court (note 45), paras 69, 81-2,90.

in the case of other international agreements it is for the European institutions representing this unity – not for the Member States – to negotiate and conclude the agreement. Qualified majority is the ordinary mode chosen by Article 218 TEU for decision-making on agreements with third countries.

### 3. Sovereignty regained – or lost?

The fundamental misunderstanding that led to the Brexit is that the powers of the EU are powers that formerly existed at the national level and were transferred to the EU. If this was true, the Brexiters could indeed strive to take the powers back and so restore sovereignty. Yet, when Theresa May comes home from Brussels after the two years negotiations, with or without an agreement, she may arrive with an empty bag- even worse: instead of re-gaining sovereignty, there will be a loss.

Why? It follows from the nature and justification of the EU in the light of the principle of subsidiarity, as explained above. Competencies conferred to the European Union are powers that did never exist at the national level; they are new in kind, specific, supranational. The picture of a transfer, comparable to a shift of a cabinet from one room to the other, or the transfer of an amount of money from one account to another, does not reflect reality: No Member State ever had the power to preserve peace in Europe, to establish the internal market or to develop a common agricultural – or environmental, trade, research or energy policy, to harmonise legislation at a European scale etc. With the principle of subsidiarity, if taken seriously, the EU has competence and is acting only in so far as matters are at stake that cannot be dealt with effectively by the Member States. This is the very *raison d'être* of the EU. The Union so adds sovereign power to the citizens, they did not have before, and this is the only valid reason for why action at Union level can be accepted as legitimate, notwithstanding the reduced share of democratic influence and self-determination citizens of a polity with more than five hundred million people have compared to eighty million or less at national level. After Brexit the British citizens will not have this added sovereignty any more. Thus, Brexit finally means a loss of sovereignty.<sup>58</sup>

True, the flipside of membership to the EU and participation in policy-making at the European level with all the additional options for action, including enhanced power and influence at the global level, are certain restrictions of political autonomy at the national level. Protectionist barriers to trade cannot be established without violating the Treaties, nor can citizens of other Member States making use of their freedom to move or to establish a business be discriminated, state aids are subject to a severe control regime. Many more limits to the free choice of policies follow from the Treaties directly and from the great amount of EU legislation. Member States having the Euro, in particular, cannot choose to have another currency nor lead their own monetary policy, they are subject to restrictions regarding public financing, and

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<sup>58</sup> See also Gordon (note 40), p. 441, discussing possible results of Brexit, such as the UK being „formally outside the Union, but within related structures such as the single market, and consequently subject to fields of EU law“, stating, that „it would be an open question whether this could amount to a restoration of sovereignty in any sense. Indeed, one might suggest that in such circumstances the UK’s power to control its own affairs would be diminished, given the loss of influence over EU law-making this would necessarily entail“.

the mechanism for the coordination of economic policies aiming at convergence and stability requires budgetary discipline has even been tightened since the beginning of the financial crisis. Member States have even to pay financial contributions to the EU budget.

To get writ of all these burdens and the Brussels bureaucracy is what Article 50 TEU allows for all Member States at any time. So it is easy to proclaim the promised land of sovereignty just by using these examples. But this land is built upon lies. It is the great temptation, an ideal political arena for populists and those who are unable to learn from history. The sovereignty Britain would regain is not that of an Empire that had colonies around the world, a nostalgia from the nineteenth century. The world has changed since, great powers emerging outside Europe may play their own game of globalisation without taking too much note of the interests of little countries at the edge of the European subcontinent.

The challenge for those who resist Brexit and have understood the blessings of European integration and the constitution of supranational institutions responsible to implement common policies for the common interest of diverse people, peoples and states on the basis of the respect for each-other, of human dignity, freedom and solidarity, the challenge is to not only defend this extraordinary project of civilisation but also to adapt and reform it so to make it deliver what the citizens of the European Union have created it for, and expect it to achieve. A Union that is able to do so in full compliance with the principle of subsidiarity is the condition for the self-determination of its citizens even in a globalising world. It means acting together in the form of democratic processes at all levels, including the global.<sup>59</sup> This is what sovereignty is about.

## CONCLUSION

After all, it is still not clear, if the Brexit process will start; and there are good reasons for the British people to think twice – and to vote again. With the view to the Judgment of the Supreme Court of January 24, 2017, Mrs. May will have to search the authorisation of the Parliament before the notice is given. The Parliament may reject the authorisation, or condition it so to ensure not only close involvement in the shaping of the arrangements to be negotiated with the EU, but also with some substantial issues to be achieved. From the EU citizen's perspective and, to some extent in the light of European constitutionalism with a view of the rights of the citizens it is imperative that existing rights and legitimate expectations of citizens are not frustrated. The UK Parliament, thus, should not ignore the implications of a withdrawal from the EU both, for the UK citizens living in other Member States and for the citizens of the other Member States living in the UK and having based their existence

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<sup>59</sup> Some thoughts on this can be found in: Ingolf Pernice, Global Constitutionalism and The Internet. Taking people Seriously, in: Rainer Hofmann & Stefan Kadelbach (eds.), *Law beyond the State. Past and Futures*, Reihe des Frankfurter Exzellenzclusters (Campus-Verlag Frankfurt am Main, 2016), p. 151-206, also as HIIG Discussion Paper Series No. 2015-01, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2576697](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576697) (accessed 20 January 2017).

on the trust in the persistence of their constitutional rights. Particularly the aspirations of the young generation that had taken the freedoms and rights under the Treaties for granted and see their own future as a European one should be honoured and their fundamental rights be protected also in the post-Brexit age, whatever it may be.

Should the Brexit process be triggered, however, there is no justification for the EU to reject proposals for close cooperation with the UK also in the future. Many, perhaps even most of the people in the UK – and the British civil servants working in the EU institutions – are and remain friends of the European dream. The EU and its Member States should resist any attempt and movement splitting the Union into parts. Governments and the EU institutions should be very sober-minded, instead, and define very carefully and clearly, and, defend rigorously the EU interest in the negotiations following a possible notice under Article 50 TEU. And this interest is a close trans-channel partnership.

What has been taken so far as a dramatic crisis for Europe can also be understood as an unexpected opportunity for the EU to not only achieve a reasonable arrangement and a better relationship with the UK in the future, but also – without the UK – relaunch the integration process in the best possible sense. This means that the EU and the remaining 27 Member States should without delay elaborate a strategy towards a win-win solution to the crisis and, in particular

1. very clearly and courageously define what would be beneficial and the best solution for the EU and its citizens regarding trade, non-discrimination, environmental and all policies, where close cooperation with the UK would be more beneficial for the EU than just separation and isolation;
2. with no delay initiate a bottom-up process of political reflection on the reform of the EU so to adjust it to the expectations of people regarding the democratic legitimacy and effectiveness of its policies, in particular regarding the functioning of the EMU after the financial crisis <sup>60</sup>.
3. Strive to maintain close cooperation with the UK in foreign and security policies, so to ensure that Europe participates effectively in the process of shaping globalisation in conformity with the European values. Also a strong partnership in global trade policies could be of great benefit for both sides.

If it is true that the UK has often made it difficult to develop a European democracy in accordance with the idea of a European social model, through the constitution of a supranational polity based upon the Charter of Fundamental Rights, time has come

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<sup>60</sup> See in this sense Macron (note 10). See also Ingolf Pernice, Financial Crisis, National Parliaments and EMU Reform, in: Davor Jancic & Damian Chalmers (eds.), *Resilience or Resignation: National Parliaments and the EU* (Oxford University Press 2017), forthcoming. See also id., Die Vorschläge der Fünf Präsidenten zur Reform der EU. Eine neue Verfassungsdebatte der Europäischen Union im Lichte der fortwährenden Krise, in: Institut für Europarecht der Universität Freiburg (ed.), *Die Schweiz und die europäische Integration – 20 Jahre Institut für Europarecht / La Suisse et l'intégration européenne – 20 ans de l'Institut de droit européen*, 2015, p. 115-140, also available as [WHI-paper 3/2015](#).



to go ahead without the UK now, even before and while the notice and, eventually, negotiations for an agreement with the UK under Article 50 (2) TEU are under way. Whatever the result of the Brexit-process may be, a strong reform of the EU is overdue, a democratic bottom-up process – uniting people, primarily, not states – with a view to establish, as Macron has suggested in his speech at the Humboldt-University the 10<sup>th</sup> of January 2017, “a Europe of sovereignty”.<sup>61</sup>

This European Union will be a gain in scope of action and sovereignty for all the citizens of the Union, its constitution and power is complementary and additional to that of the Member states, both levels share a responsibility to achieve the agreed common objectives, and accountable to the citizens. Europeans both sides of the Channel, thus, should understand Brexit, if it needs to come, as an opportunity for taking new steps towards integration, should take ownership of Europe as our way to defending our common values and the respect of the universal human rights, on the basis of functioning democracies in the Member States and the respect of the rule of law, a Union designed according to the principles of multilevel constitutionalism.

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<sup>61</sup> Macron (note 10): On „Building a Europe of sovereignty“ with the explanation: „This sovereignty must be complete. It must encompass all the common interests and challenges that we can better address together, at the European level. It must rely on a true democratic revival.”