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MULTILEVEL CONSTITUTIONALISM IN THE EUROPEAN UNION

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Introduction

The European Union has often been described as a system of multilevel governance. This is not shocking, since by establishing the European institutions and providing powers to them we acknowledge that political life in Europe is governed at two levels (at least): Sovereignty is pooled at the European level, powers are shared between the Member States and their common institutions in Brussels, Strasbourg and Luxembourg. The term „multilevel constitutionalism“, instead, must be shocking for all those who cannot see any justification or value in talking about constitutionalism in the context of European integration. In his speech in Warsaw last year, Tony Blair said that Europe will and shall be a superpower, but in no way it should become a superstate. I do agree and there seems to be nobody around who would disagree to this. But does talking about European constitution imply the vision of a European state or superstate?¹ My answer is clearly no: „multilevel constitutionalism“ means something quite different.

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¹ In this sense: the British shadow foreign state secretary F. Maude, *Networks and Nations: Towards the New Europe*, FCE Spezial, 3/2000, <http://www.whi-berlin.de/maude.htm>, para. 17.

The British Foreign Secretary, Jack Straw, pointed out quite rightly in a lecture of 2001: “Europe simply provides a further layer of identity” to the British.² Thus, we - the citizens of the Member States of the European Union - have multiple identities: local, as a Londoner, regional, as an Englishman, national as a British and, in addition, European as a citizen of the European Union. My submission is that the established levels of political action, in particular the nation states and, as the case may be, their regional subdivisions (*Länder*) and the European Union correspond to various identities of the people. They are instruments in the interest of the people. And action taken at each level is on behalf of the people concerned to meet challenges of local/regional character at this level, challenges of a national dimension at national level and challenges exceeding these dimensions at European or international level. In the “postnational constellation”, as it was described by Jürgen Habermas,³ the State is unable on its own to fulfil certain tasks of common interest, such as the preservation of liberty, peace, security and welfare of their citizens: International crime and terrorism, global trade and financial markets, climate change and unlimited communication worldwide etc. need new structures of governance. The various aspects of globalisation show that classical concepts such as national sovereignty and the belief in unlimited powers of the state are outdated and nothing more than cosy - if not dangerous - illusions.

“Multilevel constitutionalism” is meant to describe and understand the ongoing process of establishing new structures of government complementary to and building upon - while also changing - existing forms of self-organisation of the people or society.⁴ It is a theoretical approach to explaining how the European Union can be conceptualised as a matter and creature of its citizens as much as the Member States are a matter and creature of their respective citizens. The same citizens are the source of legitimacy for public authority at the European as well as - regarding their respective Member State - at the national level, and they are subject to the authority exercised at both levels. The European Constitution would, thus, be composed by the national constitutions and the European Treaties to a bi- or multilevel constitutional system. As a consequence, my view is that Europe has already a constitution and the issue is to improve the existing Treaties in order to improve the system, not to make a new constitution.

I do understand that this view needs some explanation, on its foundations, its consequences and practical impact. Let me proceed in three steps:

- First, I will try to explain why we have in Germany such a strong debate on a European constitution and what are the main streams in this debate
- Second, I would like to give more elements of the concept of “multilevel constitutionalism” so to show how it describes the existing situation of the European Union
- Third, I will draw some conclusions on what follows from this approach for the debate on governance and the post-Nice process.

² J. Straw, *A Europe for its citizens*, Lecture at the Royal Institute of International Affairs, Chatham House, 27 July 2001; see also C. Carter/A. Scott, “Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union”, (1998) 4 *ELJ* 429 at 442: “one might conceptualise being at one and the same time a Scot, a Briton and a European. There is no necessary contradiction between these roles”. It is difficult to follow Karl Doehring’s contribution to the discussion, “Europäisches und nationales Verfassungsrecht”, (2001) 60 *VVDStRL* 357, stating that for him “double identity” was to date for him the classical characteristic of schizophrenia.

³ J. Habermas, “Die postnationale Konstellation und die Zukunft der Demokratie”, in: *ibid.*, *Die postnationale Konstellation: Politische Essays* (1998), 91 et seq.; M. Zürn, *The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance*, ARENA Working Papers WP 99/35, www.arena.uio.no; G.F. Schuppert, “Demokratische Legitimation jenseits des Nationalstaates. Einige Bemerkungen zum Legitimationsproblem der Europäischen Union”, in: W. Heyde/T. Schaber (eds.), *Demokratisches Regieren in Europa? Zur Legitimation einer europäischen Rechtsordnung* (2000), 65 et seq. at 76 et seq.: ‘Die postnationale Konstellation oder die EU als dynamisches Mehrebenensystem’.

⁴ For the original concept see I. Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?”, (1999) 36 *CML Rev.* 703.

I. The German and the British debate on a European Constitution

There seems to be a fundamental difference between the British and a German views on what is a constitution and the need for a constitution. Britain has a more or less continuous history and tradition on constitutional values. The key of the British Constitution is the supremacy of Parliament. The unity of the country is concentrated in and the sovereignty is concentrated in the "Queen in Parliament". This principle and numerous conventions have grown up since centuries, and have never really been contested. There is no need for a (written) Constitution.

The case of Germany is different. One reason is history, the other is the federal structure of the country. There is no trust in any convention, unless we have a written document in which all the details on the foundation, organisation and limitation of legitimate public authority are laid down. The Constitution is the expression of a basic consensus, the social contract of the people. For historical reasons, again, people do not trust public authority to respect fully and always human dignity and fundamental rights. Therefore, a catalogue of fundamental rights setting orientation and limits of public power and defining the status of autonomy and liberty of the citizen is so close to the hearts of German people. Because of the federal structure of Germany, furthermore, we need a set of rules on the division of competencies and we need rules of conflict as well as an arbiter or constitutional court, where conflicts of competence between the federation and the federated states are ruled. This constitutional court is also the last resort for the individual in defence of his fundamental rights.

It follows, that German people would have difficulties to conceive a European Union having legislative and executive powers without this authority being clearly defined, limited and subject to the respect of fundamental rights and freedoms of the individual. This is the reason for the pressure exercised by Germans, in particular by the Constitutional Court in Karlsruhe, for the development of a system for the protection of fundamental rights in the EU. This, also, is the reason for the new pressure, coming namely from the German *Länder*, for the establishment of a clear catalogue of competencies of the Union, with a view to preserving them some room for autonomous political action and discretion. Should they loose all of this, there would be no point in maintaining their internal constitutions and parliamentary system of government.

The process of European integration, namely the loss of sovereign power and autonomy by the extension of European policies to almost all areas of public concern may raise similar concerns in Britain. The direct application of the European Convention on Human Rights in Britain may modify the relation between courts and the Parliament. Even the internal process of devolution seems to provoke some thoughts on how the division of powers in the country shall be organised. These are questions of a constitutional character, and may rise the understanding for the move, in some other Member States of the Union, for a Constitution for Europe.

II. The concept of „multilevel constitutionalism“

Also in Britain, however, more and more authors, including Paul Craig⁵ and S.D. Scott⁶, accept that the European Union has a constitution, though Mads Andenas and John Gardener point out that the term is written not with a capital letter.⁷ Alan Dashwood recently titled an article on the law-making procedures of the EC "The constitution of the European Union after Nice: Law-making procedures"⁸ - and the word "constitution" is written with a lower-case "c". In his Warsaw-speech Tony Blair said:

"there is an important debate about a Constitution for Europe. In practice I suspect that, given the sheer diversity and complexity of the EU, its constitution, like the British constitution, will continue to be found in a number of different Treaties, laws and precedents. It is perhaps easier for the British than for others to recognise that a constitutional debate must not necessarily end with a single, legally binding document called Constitution for an entity as dynamic as the EU"

⁵ P. Craig, "Constitutions, Constitutionalism, and the European Union", (2001) 7 *ELRev.* 125.

⁶ S. D. Scott, "Constituting Europe: In Defence of Public Reason", (2001) 12 *KCLJ* 75

⁷ M. Andenas/J. Gardener, "Introduction: Can Europe Have a Constitution?", (2001), 12 *KCLJ* 1 at 3.

⁸ A. Dashwood, (2001) 26 *E.L.Rev.*, 215.

Also the European constitution, and my contention is that there is already one, indeed is to be found in a number of different Treaties, laws and precedents. It is what we call the primary law of the European Union, laid down in the Treaties on the European Union, the European Community and Euratom, it is the precedents or the law made by the European judges in Luxembourg as well as – insofar my approach is really new – the national constitutions and the related jurisprudence of the national constitutional courts. The European constitution, thus, is one legal system, composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent, one cannot be read and fully understood without regard to the other. Where conflicts between the European rule and a national rule arise in a given case, it is inherent in this system and a condition of its proper functioning, that one rule prevails.⁹ The view of the Court of Justice, as it was expressed as early as 1964 and repeatedly confirmed later,¹⁰ and as it is very broadly recognised by national courts¹¹, is that the European rule prevails and the national courts as well as the national administrative bodies are bound to disapply the conflicting national rule even if it is an act of the national Parliament.

The concept of multilevel constitutionalism was developed to explain the functioning of this system as a result of a process of establishing progressively a supranational level of public authority based on the national constitutions and binding them together to one composed constitutional system: A divided power system to meet the challenges of globalisation in the “postnational” era. I will first explain some important elements of what multilevel constitutionalism means in detail, and, second, summarise some of its most important implications

1. *Five basic elements of the concept of “multilevel constitutionalism”.*

Multilevel constitutionalism is based on a contractual approach on how political institutions are established and organised by those who they are designed to act for: The people or society of a certain country or territory forming a community and organising itself by free decision. On this basis the concept of “multilevel constitutionalism” may be summarised by the following five elements and understandings:

a. „Postnational“ concept of „Constitution“

In the process of globalisation, states are increasingly unable to meet the challenges and serve effectively the needs of their citizens regarding peace, security, welfare etc. The “postnational constellation” described by J. Habermas requires supra- and international structures serving as complementary instruments to fill this growing lacuna. On the basis of a functional, “postnational” - concept of constitutionalism¹², it does not seem appropriate to assume that only states can have a constitution. More generally, the term rather means the legal instrument by which the people on a certain territory agree to create institutions vested with public authority, i.e. powers to achieve certain objectives in their common or general interest, and define their respective rights with regard to such institutions and their status as citizens of the organisation, “community” or polity so created.¹³ The people of the EU Member States have done so for their respective state, and by concluding the European Treaties also, and in addition, for the European Union.

⁹ For the doctrinal justification see below II.2.d.

¹⁰ Case 6/64, *Costa/ENEL*, [1964] ECR 1141; see also Case 106/77, *Simmenthal II*, [1978] ECR 629.

¹¹ See most recently the decision of the German Constitutional Court in the bananas case, BVerfGE 102, 147, and the comments by I. Pernice, “Les bananes et les droits fondamentaux: La Cour constitutionnelle allemande fait le point”, 2001 CDE 427. For the case of the United Kingdom see P. Craig, “Report on the United Kingdom”, in: A.-M. Slaughter/A. Stone Sweet/J.H.H. Weiler (eds.): *The European Court and National Courts – Doctrine and Jurisprudence* (1998), pp. 195-224

¹² See I. Pernice, “Europäisches und nationales Verfassungsrecht”, (2001) 60 *VVDStRL*, 148 et seq. at 155 et seq.

¹³ For the application of this concept to the constitutional tradition of the United Kingdom see Thym, “European Constitutional Theory and the Post-Nice Process”, in: M. Andenas/J. Usher (eds.): *The Treaty of Nice, Enlargement and Constitutional Reform* (forthcoming).

b. European Constitution-making as a process driven by the citizens

There are many ways, historically, how constitutions have been made. One, if not the most appropriate and attractive, could be - and was - to empower representatives of the groups of people concerned to negotiate a draft that is later submitted to ratification. This is exactly how, on the basis of the integration clauses, conditions and procedures set out in the constitutions of the Member States, the European Treaties have been adopted and developed: as an expression of the common will, as an instrument to pursue certain common goals, the citizens of the Member States - through their respective governments and constitutional processes have agreed to create and agree to develop further supranational institutions, entrust them with certain competencies to be exercised according to the procedures laid down in the Treaties, and define their own common status as citizens of this Union, their rights and freedoms.¹⁴ The statehood of the Member States and national citizenship are not called into question, but a new constitutional layer establishing a complementary public authority has been added for matters of common interest, drawing its legitimacy from the subjects who are also subject to its policies: the citizens of the Union. In a democratic system, there cannot exist another basis for the legitimacy of public authority but the citizens, and this is what we find in the European Union. And this new constitutional layer, step by step, develops to the common constitutional frame for national constitutions which, in parallel and as a consequence, mute their character each from the basic instrument of a sovereign state to the constitutional charter of a "Member" State.

c. The constitution of the European Union and national constitutions

This process has strong impacts on the realities of national constitutions, the powers and the functions of the institutions of the Member States and on the national legal systems in general. Every revision of the European Treaties, which the Court so rightly calls the "constitutional charter of a Community based on the rule of law",¹⁵ entails an implicit or explicit modification of the national constitutions, it may "destitute" and modify powers at the national level and constitute others, new powers at the European level. Although "autonomous" in their origin, both constitutional levels strongly depend on each-other: the European authority could not function without the national institutions and legal systems on which it is based, and the national authorities have to rely on and operate through the European institutions if they want to achieve the results which they on their own, would not be able to reach. Thus, in applying European law which prevails over conflicting national law, national authorities act as European agencies, while regarding European legislation, national governments in the Council have the decisive power and the national parliaments in many regards do or, at least, can participate very actively. It is important to note that these European functions of the national governments and parliaments are not reflected in the texts of the national constitutions nor sufficiently in the textbooks on them, but in practice they more and more outweigh their national responsibilities.¹⁶

d. The multiple identities of the citizens of the Union

As a result of European integration, the citizens of the Member States have given themselves a new citizenship, as citizens of the European Union (Article 17 EC) as the expression of their common legal status. They enjoy equal rights and have equal obligations in accordance with the provisions of the Treaties and the European legislation, they enjoy the liberties of the internal market and the rule of non-discrimination as citizens in whatever Member States they

¹⁴ Pointing out the observation, that "the legitimacy of the various levels of government does not derive one from the other, given that each level has its own legitimacy", M.P. Chiti, *The EU legal order*, in: EuropEos (ed.), *Institutional reforms in the European Union. Memorandum for the Convention* (2002), p. 131 at 144.

¹⁵ See advisory opinion 1/91, *European Economic Area I*, [1991] ECR I-6079 at 6102; and already Case 294/83, *Les Verts*, [1986] ECR 1339 at 1365 et seq.; more recently advisory opinion 2/94, *accession to the ECHR*, [1996] ECR I-1759 at 1789.

¹⁶ For the qualification of the national parliaments as European parliaments see: I. Pernice, "The Role of National Parliaments in the European Union", in: Melissas/Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (2001), p. 73.

live or act. They are citizens of the Union, have the right of vote at local and European level, and the national administrations and courts are bound to ensure that such rights are given effect in each case. More generally, the citizens of the Member States have adopted multiple identities - local, regional, national, European - which correspond to the various levels of political community they are citizens of. Such identities are based respectively on the social contract which is agreed with the people concerned for certain purposes of local, regional, national and European dimension and character, thus establishing a self-referential legal order which is the Constitution of the corresponding political system. None of these systems is covering all possible questions of public concern, but they are complementary to each-other and bound together by provisions regarding the attribution of the respective powers and responsibilities, the participation and representation of one in the functioning of the other, and rules of conflict which make sure that, at whatever level decisions are taken, the system produces for each case only one legal solution.

e. The European Union as the Union of the European citizens

In the light of its historic evolution the process of European integration, consequently, can be conceptualized as a process of “multilevel constitutionalism”, in which the allocation of powers shared by the national and European levels of government is continuously reorganised and re-shifted, while all public authority - national or European - draws its legitimacy from the same citizens. This may help to rising the citizens awareness upon the fact that the European Union is as much their instrument of political action as are the Member States and their regions, and that the Union is not a foreign, nameless power. It is part of the political and constitutional system established to meet the challenges of globalization, by the citizens on their behalf. Its “constitution” has changed the reality of the national constitutions, the functions of the institutions they establish, the political identity of the citizens. It is the multilevel character of this system which must be taken into account when the question of governance in Europe is taken up and when a revision of the European Treaties is discussed with the aim to bring them into a format which is more democratic, more efficient and better understood by the citizens.

2. European Constitution in a new light: traditional understandings revisited

As a result, it is important to note the consequences of this approach for a number of traditional understandings regarding the European Union. Only the four most striking-ones may be mentioned here:

a. European Union as an international organisation ?

Though the European Treaties are concluded in the form of international treaties, the European Union is not an international organisation in classical terms. It is not a state either, though it shows some characteristics of state structures. It could be called, as many do without saying too much, just an organisation *sui generis*, or, as Eijsbouts and Thym now propose in translating what I call “Verfassungsverbund”, a “Constitutional Federation”¹⁷. Contrary to the strong arguments based on the concept of a *Grundnorm* which must necessarily be the national constitutions, made by Trevor Hartley,¹⁸ the European Union should be distinguished from international organisations, at least for the following four reasons:

- in no international organisation the citizens have their own political representation and say in the decision-making process;

¹⁷ See W.T. Eijsbouts, ‘Classical and baroque constitutionalism in the face of change (Review essay)’, (2000) 37 *CMLRev.* 213 at 218 and Thym, *supra* note 13, section I.C.4.

¹⁸ T. Hartley, “The Constitutional Foundations of the European Union”, (2001) 117 *L.Q.R.* 225 at 226: “Thus, Community legislation and the judgements of the European Court owe their validity to the Treaties, and the Treaties owe their validity to international law and the legal systems of the Member States... The Constitution of the United States is a *Grundnorm*, the basic Treaties of the European Union are not. “If the Kelsenian approach of the *Grundnorm* were accepted, the remaining question, however, is: why could a *Grundnorm* not be created by an international treaty?”

- no international organisation provides for direct legal action against individuals by directly applicable legislation or decision, and consequently
- in no international organisation the question of protection of fundamental rights against such “international” power has been – and needs to be - raised, and
- no international organisation provides for legal remedies of individuals against measures of that organisation, since there is no action having direct effect to the individual.

The European Union, in its very substance, is not (only) an organisation of states but, before all, an organisation of citizens although it has the appearance, at first sight, of an organisation between states.

b. Who are the “masters of the Treaties” ?

The concept of multilevel constitutionalism implies that European public authority, just like the national public authority established, organised and limited by a Member State’s Constitution, is original. It is not derived from national sovereignty but directly from the will or the sovereignty of the people which have constituted the Union through the procedures laid down in their respective constitutions: While the citizens did entrust generally all powers to the national authorities, by the conclusion of the European Treaties they have re-arranged the system and vested – in common action with the people of the other Member States - certain powers and responsibilities also with the newly constituted supranational, European authorities. The saying, that the masters of the Treaties are the Member States¹⁹ is misleading inasmuch as in modern democracies states are not “masters” but instruments of the self-organisation and self-ruling of the society. The “masters of the Treaties”, if any, can only be the citizens, not the Member States. Given the obligations of homogeneity under Article 6 TEU and the procedure under Article 7 TEU, it is even doubtful whether we can say that the Member States, each, still are the sovereign masters of their constitutions.

If the progressive “constitution” of the European Union is matter, not of States but of the people who through this process not only create common institutions for their common goals, but also define themselves as the citizens of the Union and provide themselves a common, European political and legal status, there is, finally, no room for a consideration for one Member State or the other, to leave the Union by an unilateral action. The British parliament would not, therefore, have the right to decide that the European Communities Act of 1973 is revoked and the United Kingdom would cease to be a Member State of the European Union. Even if this were admissible under international law, the constitutional logic of the Union does exclude this option. It would deprive not only the British citizens and companies the rights they are granted in other Member States as well as regarding the European institutions, but above all, it would negate the rights of the citizens of the Union from other Member States within the United Kingdom. Since all these rights originate in the common will of the citizens of the Union, to withdraw from the Union would legally be admissible only on the basis of an *actus contrarius* of the European citizens in the form of another treaty under Article 48 or 49 TEU.

c. “Competence-competence”?

“Competence-competence” means the power to decide independently and freely on the attribution of competencies to a public authority.²⁰ The multilevel structure of the European

¹⁹ See in this sense the German Constitutional Court BVerfGE 75, 223, at 242, as well as in the its judgement on the Treaty of Maastricht, BVerfGE 89, 155 at 190. See also the crit. Remarks of U. Everling, Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?, Festschrift für H. Mosler, 1983, p. 173; with more references: I. Pernice, Comments on Article 23, note 21, in: H. Dreier (ed.), Grundgesetz Kommentar, vol. II (1998).

²⁰ The term is used in this sense by the German Constitutional Court in its judgement on the Treaty of Maastricht, BVerfGE 89, 155 at 181, 192, 195 et seq.; P. Lerche, “Kompetenz-Kompetenz’ und das Maastricht-Urteil des Bundesverfassungsgerichts”, in: Festschrift Heymanns-Verlag (1995), p. 409 at 415 et seq., however shows that this use is unspecific and doubtful; Craig, *supra* note 11, at 206 et seq. uses it in a much narrower sense for the question which court is competent to finally judge on the question of supremacy of a given European rule over national law. Similarly, but qualifying this use by the words “judicial Kompetenz-Kompetenz“: F.C. Mayer, *Kompetenzüberschreitung*

constitution implies that there is no competence-competence of the Member States nor of the Union. The real sovereign are the peoples who entrust specific powers and competencies to the institutions they agree to establish in the constitution-making process. Each responsibility and competence attributed to the respective level of political action is limited by its nature, and is subject to the provisions of the respective constitution. The competence to create new functions or competencies is – with due respect to the protection of human rights and freedoms – the sovereign power of the people, neither the states nor the European Union dispose of it.

If the instrument by which legitimate public authority is created, defined and allocated to certain institutions, at whatever level it may be, is the constitution, any change requires a revision of the Constitution. Within the framework of the European Union and its constitution the revision of national constitutions must conform, as it has been showed above, with the provisions of European law. Consequently, the key of the constitutional process of and – to the extent Member States' constitutional autonomy is subject to constraints under European law – also within the European Union is Article 48 EU together with national integration clauses, including the procedures and conditions laid down therein. Any revision of the Treaties, be it for streamlining the institutional structure, be it for the attribution of new or the limitation of existing competencies of the Union will result in implicit changes of the national constitutions, while certain modifications of the constitutional setting in the Member States may require a modification of – if it is not excluded by – the European treaties.

d. Hierarchy of norms or functional supremacy of European law ?

In the light of “multilevel constitutionalism” the relationship between European and national law is not a hierarchical but a functional one²¹: Member States must be democratic and respect the rule of law as well as the fundamental rights, because this is the basis of the political system at the EU level, and the condition for the proper use by the citizens of their rights in each Member State. Since the origin of the European public authority are the citizens of the Union as much as these citizens are the subjects and source of legitimacy of their respective national constitutions, there is no *a priori* supremacy either of European law or of the national constitutions. The mere facts that the European constitution is based upon and includes the national constitutions, or that it is based on the common will of the citizens of all the Member States, as such do not imply any hierarchy. Both legal orders are co-existing, but they are part, however, of one system which must produce ultimately one legal answer to each case. This system is, from its origin and construction, necessarily non-hierarchical.²²

Consequently, it is left to the national and the European courts and their judicial co-operation whether, in a given case, European law or the national rule is applicable. The concept of co-operation, as developed by the German constitutional court in its decision on the Treaty of Maastricht,²³ in practice does avoid the answer in the (theoretical) case of conflict. Giving priority to the European rule against conflicting national acts, however, follows not only from the need to preserve the functioning of the European legal system, but above all from the very substance of the concept of law: The general rule of law requires equal application to all cases where the conditions of the rule are met, with no regard to the nationality or Member State in question. This is the very condition for the legitimacy and acceptance of European law at all: A Member State and its citizens would not feel bound by, and comply with a rule if they had no assurance that the others also do so.

This reciprocity is the contractual basis for the validity of each general norm. It is the condition also for the functioning of the system at all, which is in the common interest of the Member States and their citizens, and implied in the integration clauses of national

und Letztentscheidung Das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra-vires-Akte in Mehrebenensystemen. Eine rechtsvergleichende Betrachtung von Konflikten zwischen Gerichten am Beispiel der EU und der USA (2001), p. 28 et seq.

²¹ For more details see Pernice, *Europäisches und nationales Verfassungsrecht*, op.cit. supra note 12, p. 182 et sequ., 185.

²² Thym, *supra* note 13, section I.A.4. See also Mayer, *supra* note 20, p. 37 who proposes to understand the term „Ebenen“ (levels) as platforms, which co-exist at an equal footing.

²³ BVerfGE 89, 155.

constitutions such as Article 23 (1) of the German Grundgesetz. I understand that it is in this sense if Paul Craig, after quoting Lord Bridge from the Factortame II-judgement of the House of Lords, identifies the relevant arguments for the supremacy of European law as being essentially *contractarian, a priori and functional*.²⁴ His conclusion is that on the doctrinal front, “Community law has had a marked impact on traditional constitutional orthodoxy” in Britain.²⁵ The “reciprocity” mentioned does not result in countermeasures of one state against the other in case of a violation of a contractual obligation. Contrary to the international law approach, in the European Union reciprocity is situated at the level of the citizens, the basis of validity and recognition of law; like within a national legal system, to enforce compliance with the common rules is entrusted to and the matter of common institutions – the Commission and the Court of Justice - following common procedures, and this is the very foundation of the great success of the European Union.

III. European governance and the post-Nice process in a new light

In the light of multilevel constitutionalism, many of the issues actually discussed in the European arena appear differently: The relevant perspective must be that of the citizens, for whom the development of the European constitution goes in hand with changes of the national constitutions. The “integrative” approach, thus, takes more adequately into account the implications on the national constitutions of any modification of the European constitutional framework. Implications of this are important both for the debate on European governance and for the post-Nice-process in which the Declaration of Laeken of December 2001 was a most promising step.

1. Implications for the debate on European Governance

The European Commission has issued, in summer 2001, a “White Paper on Governance in the European Union” in which it analyses the existing system with all its problems and proposes some careful steps to improve it as far as this is possible without a revision of the Treaties.²⁶ The White Paper, however, provides a very narrow, institution-, state-, government-centred definition of governance: “Reforming governance addresses the question of how the EU uses the powers given by its citizens. It is about how things could and should be done. The goal is to open up policy-making to make it more inclusive and accountable”²⁷. If any reform is to catch relevant changes of societal and political life, governance should, instead, be defined as all the sets of means of self-rule of a society; the states as well as the European Union, so the constitution of public authority, are only one of those means. In an approach of multilevel governance, we should not centre on institutions but on citizens. We should couple this with a consideration of how the European society organises itself in the EU as an instrument, in addition to the Member States, to cope with challenges which exceed the capacities of individual States and, in particular, new global issues.

a. The „intermediary room“: bargaining networks and communication

This implies that the discussion on governance should consider more carefully the “intermediary room” both, between the private individual and the public authorities and between national and European levels of governance. It is the sphere of the civil society and public opinion, of pluralism and free communication. There is no clear reference in the White Paper to what role this “intermediary room” is playing and how it can be structured. It is the room which links the society to the political institutions, the room where the society communicates on its political will and the public discourse takes place. Items to be addressed under this heading would be the formation of European political parties, lobbying and participation of groups, the role of NGO’s or – more generally - civil society in the decision-making process, but also the self-rule of the society such as the social partners on labour

²⁴ Craig, *supra* note 11, at 203, 208.

²⁵ Ibid. 224, leaving open, however, „how the national courts within the United Kingdom will deal with the problems of *Kompetenz-Kompetenz*“.

²⁶ COM(2001) 428.

²⁷ Ibid. p. 8.

conditions or, as it was proposed, the business and the ecologic organisations on environmental standards of production and consumption.²⁸

If, on the other hand, the usual regulatory approach in government actually seems to cease ground in favour of supportive action and contractual solutions by the "bargaining state" to reach the goals of public interest,²⁹ it would be important to develop structures and forms in which such processes could usefully be organised in the European Union using experiences and structures of established national systems with a view of a more efficient implementation of the policies adopted in the common interest of the Union. *Eberhard Schmidt-Aßmann* has quite recently explained to what extent the European administrative law already is based on co-operation among the various actors at the national and European levels so to speak about a non-hierarchical integrated administrative system.³⁰

The Commission's Paper does address networks, but does not explain how the political will regarding Europe is formed - or how its formation shall be organised - in the Member States and for European policies directly. Governance also means influencing networks through a variety of channels and, the other way around, analysing, channelling and - if necessary, limiting the influence of networks on government decisions. The whole issue of communication, networking and citizens self-rule so, should be more clearly addressed in the coming discussion in order to broaden the scope of reflection, research and institutional creativity. This seems particularly important with a view to the ongoing constitutional process we are facing since Laeken.

b. European policies as internal policies of the Member States

In terms of accountability and, consequently, regarding any steps towards enhancing democratic legitimacy and control of the Union, it must become clear that policies at European level are, in fact, internal policies of the Member States and not, any more, part of their foreign policy. It is just another mode for (jointly) making law and politics for and applicable to the citizens of each Member State. The implications of this insight for the national organisation of the formation of the will to be expressed in the Council are evident. It cannot be the foreign affairs offices which co-ordinate European policies.³¹ National governments are not yet ready to accept this, national institutions and, in particular, national parliaments are not yet prepared fully to assume their responsibilities as substantial parts of the European system. There are three steps, at least, to be taken to enhance transparency, accountability and efficiency :

- The legislative function of the Council should be separated from its executive functions in order to make more transparent that the Council is decisive in the legislative procedure.
- The Council acting in its legislative capacity should be open to the public so to make the ministers more accountable and allow their control by the national parliaments.
- The creation of ministers for European affairs responsible for the co-ordination of the European policies at the national level and representing the Member States legislative Council.

If in fact a great part of national legislation relevant for the day to day life of the citizens is determined, in substance, by directives and policies adopted at the European level, if indeed the national ministers have the final say in the European legislative process, and if the only

²⁸ For this see the proposals of the European Consultative Forum on the Environment and Sustainable Development, in: European Commission, *Sustainable Governance. Institutional and procedural aspects of sustainability*, Luxembourg 2000, www.europa.eu.int/comm/environment/forum, p. 13 (C.7).

²⁹ On the legal problems of the new forms of public administration in cooperation with the private see: M. Schmitt-Preuß/U. Di Fabio, *Verwaltung und Verwarlungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, 56, *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, 1997, p. 160/235; more recently:

³⁰ E. Schmidt-Aßmann, *Europäische Verwaltung zwischen Kooperation und Hierarchie*, in: H.-J. Cremer/T. Giegerich/D. Richter/A. Zimmermann (eds.), *Tradition und Weltoffenheit des Rechts*, Festschrift für Helmut Steinberger, 2002, p. 1375 at 1379-84, 1389-99: "Europäische Verwaltung als Informations-, Entscheidungs- und Kontrollverbund".

³¹ For questions of this kind regarding the German and the French cases see: Mayer, *supra* note 20.

efficient control of these ministers can be exercised by the national parliaments, the need for more visibility of their European functions becomes evident.³² National election campaigns would consequently more than traditionally be run on themes which include the European policies of the national governments instead of passing over with silence this dimension of real and decisive power.

c. Participation of local and regional authorities in the legislative process

Regarding a closer integration of the various levels of political action in the legislative process of the Union, regional authorities and national parliaments should be involved at an early stage of European legislation. As Declaration (no. 43) on the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam, confirms, it is their responsibility to implement European policies, and the efficiency of these policies very much depend on their capacity, skill and readiness to act as European agencies. Their inclusion in the legislative process would compensate for the loss of autonomy and authority resulting from the shift of competencies to the European level, make the European dimension of their work more visible and finally provide the European legislation with the necessary experience and knowledge “from the ground”. They can provide information and solutions which ensure the effectiveness of the legislation when it is to be implemented.

So far only national experts and, sometimes, experts from business or other organisations are consulted. There are two ways for enhancing the inclusion of the regional and local authorities in the process, based on existing practices and institutions:

- The practice of green- and white books opening a broad discussion with the public at an early stage of the process should be applied more systematically and, in particular, actively include a dialogue with the regional and local authorities.
- The Committee of the Regions should be developed to form a “roundtable” of representatives of the local and regional authorities to be consulted at the stage where the Commissions services elaborate their proposals for legislation.

d. The vertical division of executive powers

Finally, the White Paper gives high emphasis to the executive responsibility of the Commission. As it has already been emphasised, the European system, instead, has so far been based on the competence of Member States to implement and execute European legislation. This functional sharing of powers between the two levels of government has its merits not only in preserving some autonomy to the national authorities, but also in that local, regional or national authorities are closer to the citizens and have the knowledge of the specific circumstances on the spot. This principle should be maintained and underlined. A European executive, consequently, should be given power and responsibilities for the administrative implementation of European law only insofar, as it is indispensable, like in the areas of competition and the control of state aids, and such powers must be expressly provided for in the Treaties. The same applies to common foreign and security policies.

In some cases, like for the application of the competition rules of the treaty, the creation of a specialised agency may even be appropriate, with a view to take these executive areas out of the day to day politics of the Commission.³³ Necessary decentralisation should, however, not be confounded with the principle of subsidiarity which aims at preserving national, regional and local authorities as much autonomy as possible. Generally, the execution and implementation of European legislation should remain in the responsibility of the Member States, and according to the principle of proportionality laid down in Article 5 (3) EC, as much

³² These functions of the national parliaments are explained more in detail by I. Pernice, “The role of National Parliaments in the European Union”, in: D. Melissas/I. Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (2001), p. 73.

³³ An in-depth study of the new possibilities of the creation of agencies for such purposes, leaving behind the „Meroni“ doctrine, has been made by A. Yataganas, “Delegation of Regulatory Authority in the European Union. The Relevance of the American Model of Independent Agencies”, Harvard Jean Monnet Working Papers 03/01 (2001).

room for political action should be reserved to them as possible. This is the condition for the acceptance of European legislation in the Member States and the functioning of the European divided power system as such. The functional separation of powers, between the legislative and the executive, therefore, to some extent is enhanced and should continue to do so in the European divided power system, by a vertical division of competencies between the European and the national levels.

2. *The issues of the post-Nice agenda*

The post-Nice agenda as set down in the Declaration of Nice on the Future of the Union³⁴ has been turned into more than sixty questions by the Declaration of Laeken³⁵, but apart from the consolidation and simplification of the Treaties with a view to achieving some sort of Constitution,³⁶ the main issues of substance still are the status of the European Charter of fundamental rights, the question of a catalogue of competencies and the role of the national parliaments. This is not the place to go into all these issues³⁷, and it will be for the Convention to find an appropriate and consistent reply to the questions posed by the Heads of State and Government. Only two points shall briefly be mentioned here, the first being a procedural solution to the difficult question how to make sure that the Member State's room for political action is respected by the European Union, the second being some thoughts on appropriate organisation of the representation of the Union to the outside world.

a. Respecting the limits of European competencies and the principle of subsidiarity

Texts and definitions alone do not provide any reliable safeguard against the erosion of national competencies as a consequence of the extensive use of European competencies. They are exposed to interpretation of those who have to apply them, and the ex post control of the Court of Justice is part of this system. No clear solution exists for the cases where the European legislator or the Court act *ultra vires*, though this case seems to be rather academic³⁸. It has been proposed to create an upper constitutional court or Constitutional Council³⁹, composed by judges from the highest courts of the Member States and the European Court of Justice. But practice shows that almost all cases before the Court have, to a certain extent, aspects of competence, and it would be difficult to select those cases which have to be submitted to the upper Court. In addition, such solutions still would not exclude national Constitutional Courts from refusing the application, at national level, of European legislation which they find *ultra vires*.⁴⁰

The problem is basically a political one, and as the recent Commissions communication on a project for the European Union acknowledges, there is a need for a procedural, external, safeguard to ensure that the limits of the European competencies and the principle of

³⁴ Declaration no. 38 to the Treaty of Nice (2000); for comments see: D. Tsatsos, *The Treaty of Nice. A failure which can only be remedied by means of an effective and properly implemented post-Nice process*, in: D. Melissas/I. Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (2001), p. 10.

³⁵ Laeken Declaration – The Future of the European Union, 15 December 2001.

³⁶ For good reasons why simplification is indeed a "constitutional process" in itself: L. Tosato, *Simplification of the Treaties as a constitutional process*, in: EuropEos (ed.), *Institutional reforms in the European Union. Memorandum for the Convention* (2002), p. 183.

³⁷ On the Charter of fundamental rights see: I. Pernice, "Eine Grundrechte-Charta für die Europäische Union", 2000 *Deutsches Verwaltungsblatt*, 847; on the issue of competencies: I. Pernice, "Rethinking the methods of Dividing and Controlling the Competencies of the Union", in: European Commission (ed.), *Europe 2004 Le Grand Debat. Setting the Agenda and Outlining the Options* (2002), p. 96; see also: I. Pernice, "The role of National Parliaments in the European Union", in: Melissas/Pernice (eds.), *supra* note 34, p. 73; I. Pernice, "The European Constitution, Discussion-paper", in: Herbert Quandt Foundation (ed.), *Europe's constitution – a framework for the future of the Union, Sinclair House Debates 16* (2001), p. 18.

³⁸ For a detailed analysis see Mayer, *supra* note 20.

³⁹ J. H. H. Weiler, "The European Union Belongs to its Citizens: Three Immodest Proposals", (1997) 22 *ELRev.* 150 at 155.

⁴⁰ See also F.C. Mayer, "Die drei Dimensionen der europäischen Kompetenzdebatte", (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 577 at 609.

subsidiarity are not violated.⁴¹ My proposal is to install the “interest of subsidiarity” and of the safeguard of the limits of European competencies in the political process itself.⁴² “Losers” in a case of *ultra vires* action or violation of the principle of subsidiarity are not the national governments. Governments may even feel comfortable to use the “European channel” to implement policies which at national level they would politically be unable to get acceptance for. At the end, it is the national Parliament who suffers and will be subject to European rules where it may have had the competence and power to legislate autonomously. Yet, to give the national parliaments a say in the legislative process of the Union in general, would conflict with the role of the European Parliament and exceed by and large their working capacities. It is therefore proposed to create a Parliamentary Subsidiarity Committee (PSC), composed by two parliamentarians of each Member State, which is consulted in each case of doubt and gives its reasoned opinion on the matter. The Parliament and the Council will, then, be bound to argue in detail why they consider that the limits of European competencies and the principle of subsidiarity are respected and why they have the power to adopt the act in question. The Court of Justice will have the final word, in case the question is put to it, and it can base its judgement on all the arguments exchanged before. The advantage of this solution, however, is that the questions are dealt with, basically, at the right scene: the political, and judicial control rests what it should be: the *ultima ratio*.

National Parliaments already play an important democratic role in the European context: They participate in the Constitutional Convention and have the final say in the revision procedure for the European Treaties, they control their governments in their European policies at the Council, they are responsible to transpose and ensure the implementation of European legislation at the national level. Giving them through the PSC a floor for direct involvement and a specific, active role in the European legislative process, would meet to some extent the requests included in the Nice-declaration. This new role for the national parliaments, as watchdogs at European level for their own, legitimate interest, would so be limited to a specific function which does not overlap with the functions of the European Parliament. It would, however, not exceed the capacities of national parliamentarians, as it is sometimes argued, as the PSC is involved only in cases of doubt referred to it by either a national government or a national parliament. Though its composition may reflect the political spectrum in the Member States, the specific function and identity of the PSC as a body of control would induce its members not just to support what the national governments may decide at the Council but exercise a strong scrutiny in the cases submitted to them for subsidiarity and the limits of the competencies of the Union.

The specific role of the PSC would even be enhanced if it would be given the capacity to impose the Council a “cooling down” period for further reflection on the questions of competence and subsidiarity in a given case, or to refer a case immediately to the Court of Justice. It could further be strengthened by a right of co-decision in the field of application of general competencies like Article 308 EC or Article 95 EC regarding the harmonisation of legislation for the functioning of the internal market.

Proposals to create a second Chamber at the European Parliament, which is composed by national parliamentarians and having an advisory or observer function⁴³ so would find specific and adequate concretisation with the PSC. There is also the proposal to create a Joint Subsidiarity Committee consisting of national parliamentarians and representatives from the Council or the European Parliament, but having a real right of veto in the European legislative process.⁴⁴ Though this solution would have the merit of providing a forum to discuss and find compromises between the interested actors, it would not give the national parliaments a sufficient independent platform to articulate and express in public their views on the questions at stake.

⁴¹ European Commission, Communication of 22 May 2002 on “A project for the European Union”, COM (2002) 247 final, p. 24-25.

⁴² I. Pernice, “Kompetenzabgrenzung im Europäischen Verfassungsverbund”, 2000 *Juristenzeitung* 866, at 874, 876.

⁴³ See the speeches of T. Blair, *A Larger, Stronger, more Democratic Europe*, Speech to the Polish Stock Exchange, Warsaw, 6 October 2000, online www.number-10.gov.uk and L. Jospin, *L'avenir de l'Europe élargie*, Speech from 28 May 2001, online www.premier-ministre.gouv.fr.

⁴⁴ J. Meyer, the representative of the German Parliament at the Brussels Convention.

b. Reorganizing the representation of the Union

The enlargement of the Union will be a threat to the efficiency of its decision-making procedures, to the cohesion of the Union vis-à-vis the variety of the (political) cultures, social systems and specific interests of its Member States, as well as to the principle of democracy insofar as increasing powers at the European level will be exercised with regard to up to five hundred million people in thirty Member States and the respective influence of every citizen in, or control of the political decisions taken at European level is approximating zero. Giving the Union a face, by a person who represents it internally and to the outside world and who is ultimately accountable for its policies, could add to remedy not only these deficits of efficiency and democratic accountability, but also the lack of European identity of the citizens of the Union. Since the Union is not, any more, a technocratic agency for the integration of national markets and the management of agriculture policies of a small group of countries, but an important instrument for the joint interests and policies, in general, of the citizens of up to thirty States, there is a need to adapt its institutions so to reflect this political character.

This is why the function and role of a President of the Union should be considered. Europe should not only speak with one voice, but also, as Commissioner Lamy recently pointed out in his speech at the Humboldt-University of Berlin, "through a single mouth".⁴⁵ It would not be sufficient, as the Commission now proposes, to merge the functions of the High Representative and that of the Commissioner for foreign relations.⁴⁶ Such a person would certainly ensure a more efficient and coherent foreign policy of the Union, but would he/she give the Union the necessary face and representation? The following elements may enlighten some specific advantages of reforming the status and role of the Commission's president on the basis of the existing structures and institutions of the European Union:

- The President should be the representative of the Union towards the citizens and the outside world, as a symbol of its unity and the guardian of the cultural and social diversity of its Member States.
- The President should have the function of the President of the Commission, which is the executive body of the Union. He/she should be elected by the European Parliament and nominated by the European Council.
- The President should take the functions of the High Representative of EFSP and of the Presidency of the Council, to represent the European external policies according to the common strategies, positions and actions decided by the Council.
- The President should organise and ensure the coherence of the work done by each of the Commissioners responsible for external policies in trade, environment, development, security etc., as well as, through the executive branch of the Council, the national external policies.
- The President should, in this specific role, be responsible to the European Parliament, while its policies are bound to the general political guidelines of the Union as they are set up by the European Council meeting under his chairmanship.

It is crucial for the functioning of the European democratic system, that the European elections are given a real political meaning: European (groups of) Parties should be able to present their candidates for the Presidency and their political programs and give the citizens a real political choice when they go to vote. A European Parliament elected this way, would consequently have to guide and watch closely the policies of the Commission and the President, while his freedom of choice is limited by the need to find a general agreement for his policies at the European Council. Different majorities at the national and European levels would result in a strong scrutiny of his proposals and limitation of his freedom to act, while similar majorities would allow more innovative policies. But this is exactly what the multilevel system needs: political coherence and broad, negotiated, consensus for any major political change. The President stands for his policies and his strategy towards the Council, and the Member States will be decisive for his success. If he/she fails, the European Parliament may

⁴⁵ P. Lamy, Europe's Role in Global Governance - The Way Ahead, *FCE 3/02*, www.whi-berlin.de/lamy.htm (proposed action).

⁴⁶ Communication of the European Commission, *supra*, note 41, p. 13-17.

censure and elect another President, the citizens may sanction bad or unsuccessful policies by a new choice at the next elections.

A President having the role of representing the Union to the outside world only seemingly would run against the interests of the Member States to maintain this important role to their Heads of State or foreign ministers. Hence, in a Union of thirty Member States each of them would have this privilege only once in fifteen years. To give this function to a European President, indeed, would provide more authority, continuity, neutrality, experience and effectiveness to this function, and it would offer a real chance for each of the persons in question to run for election and implement this role in the common interest of the Union. It would, in particular, provide the Union with a person to whom foreign countries could address and who symbolises the necessary unity of the Union as a political actor in the mind of the people. It will remain the function of the national Heads of State and Government to represent their country within the Union and to the outside world, a country however, which is part of the Union and regains, this way, sovereignty and influence on the global scene, which it would not be able to exercise on its own.

Conclusions

Multilevel constitutionalism means taking seriously the political and constitutional weight of the European construction as a part of how society is organising itself today. While it is accepted that the European Union already has a constitution and that the European Constitution is the composed system of the national and the European constitution in one coherent legal system, the necessity to simplify the Treaties, to adapt the institutional framework to the needs and challenges of the enlarged Union is striking and sufficient reason for the Brussels Constitutional Convention to make meaningful steps for reform. For the first time, parliamentarians are strongly involved into the preparation of the revision of the Treaties, and this gives hope that the exercise will be a success. It may lead to a Treaty, which is developed from the existing law of the Union and may be proclaimed, as Jacques Chirac has envisaged it in his Berlin-speech in summer 2000, to be the Constitution of the European Union.⁴⁷ It would be appropriate to provide, at the end of the procedure, for a final referendum at the European level. With this in view, the future consolidated Treaty would be considered, from the beginning of the preparatory works, as a matter of the citizens, would be negotiated in public with the active participation of the citizens and the civil society and would, therefore, have the chance to be finally accepted by the citizens of the Union, including the new Member States, as the expression of a new and enlarged European social contract⁴⁸.

⁴⁷ J Chirac, *Notre Europe*, Speech to the German *Bundestag* 26 June 2000, online www.elysee.fr.

⁴⁸ For more details see: I. Pernice/F. Mayer/S. Wernicke, "Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism", (2001) 12 KCLJ 61.