

# ELEMENTS AND STRUCTURES OF THE EUROPEAN CONSTITUTION

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## A. Introduction

The European Constitution is in the making<sup>1</sup>. If we have chosen this heading for our Seminar this was not to say that the European Union had no Constitution so far and that the process was just started with the work of the Convention. Seen in the light of what I have proposed to call "multilevel constitutionalism"<sup>2</sup>, it is from the date when the Treaties of Paris and Rome have entered into effect that the European Communities of the six which developed to the European Union of fifteen and will be a Union of around thirty Member States in the near future has a Constitution. Let me be clear from the beginning: I am not talking of a Constitution in the traditional, rather static sense of "constitution" being the legal foundation of a State. Given the obvious developments of the political and social systems, as described by the *Habermas* formula of "post national constellation",<sup>3</sup> it seems to be appropriate to also develop further the concept of constitution. My view is that a "post national" concept of constitution should allow to apply the term to the legal foundation of government in general, including treaties establishing and organising supra-national public authority which may be based upon and complementary to the constitutions of its Member States.<sup>4</sup> On this basis, the European Constitution is in the making since the fifties of last century, and we must understand "Constitution" as a process rather than an isolated act, involving both the national Constitutions of the Member States and the progressive formation and evolution of the primary law at the European level which is the constitutional foundation of the Union.

Talking about the elements and structure of the European Constitution, thus, includes the national and European level of what I see as one composed constitutional system serv-

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<sup>1</sup> For the state of discussion in the Convention (fall 2002) see P. Oliver, "European Union Law and National Constitutions: Community Report", FIDE XX. Congress London 2002 (published on <[www.fide2002.org](http://www.fide2002.org)>), at p. 6 et seq.

<sup>2</sup> I. Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?", (1999) 36 *CML Rev.* 703; I. Pernice, "Multilevel constitutionalism in the European Union", (2002) 27 *EL Rev.* 509.

<sup>3</sup> J. Habermas, "Die postnationale Konstellation und die Zukunft der Demokratie", in: *ibid.*, *Die postnationale Konstellation: Politische Essays* (1998), p. 91 et seq.

<sup>4</sup> See for details I. Pernice, "Europäisches und nationales Verfassungsrecht", (2001) 60 *VVDStRL* 148.

ing the interests of the citizens of the Member States<sup>5</sup>. By establishing progressively the European Union through their respective national institutions these citizens have defined themselves as citizens of the Union and added a new, European, identity to their national, regional and local identities<sup>6</sup>. The European, not less than the national constitutions have their origin, and base their legitimacy, on the will - or consensus - of the citizens concerned, and any further development of the European Union's legal foundations is basically and primarily a matter of the citizens<sup>7</sup>. They will and must be the ones who may or may not agree on the re-arrangement of the division of powers between the Member States and the Union, on the revision of the institutional structure of the Union as well as on the common values and fundamental rights to be made a binding foundation of the Union and its Constitution. The modalities and procedures to do this are, according to Article 48 EU, provided for in the respective national constitutions, while the introduction of a European referendum could enhance the need for a closer dialogue of the relevant actors with the citizens and better explanation to the public of the existing and the new Constitution. It follows that, what ever the name of the new treaty may finally be - just Treaty (of Rome II), constitutional treaty or Constitution - it will be the expression of a new and, with the new Member States included, an enlarged "European social contract" which is consented by the peoples of the Member States acting as the citizens of the Union.<sup>8</sup>

This seminar is meant to contribute to the necessary dialogue among the political actors and the citizens of the Union, and it is my task at this stage, to explain what are the relevant elements and structures of the European Constitution in the making. It is part of a process of reflection to which the Commission has recently made an important contribution saying that a Constitutional Treaty is needed which simplifies the existing law, gives the Union legal personality and reorganises the system of attributed competencies, the forms and procedures of action as well as the institutional framework.<sup>9</sup> In the same direction, talking about elements I will address the question what, from a functional perspective of the "post national" concept of constitution, could and should be the chapters of the new "constitutional treaty" on the European Union as it may or shall be proposed by the Convention

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<sup>5</sup> I. Pernice, "Multilevel constitutionalism in the European Union", (2002) 27 *E.L.Rev.* 511 – 529 esp. at 514 – 516.

<sup>6</sup> See also H. Hofmann, "Von der Staatssoziologie zu einer Soziologie der Verfassung", 1999 *Juristenzeitung* 1065 at 1069 et seq.

<sup>7</sup> Critical, however, M. Nettesheim, Country report "Germany" in: Lord Slynn of Hadley/M. Andenas (eds.), FIDE XX. Congress London 2002, Volume 1, National Reports (2002) 84 – 173 at 119. Nonetheless, he concedes that "the people" exercise the constitution-making power. See also the General Report to FIDE XX Congress 2002 by J. Dutheil de la Rochère/I. Pernice, [www.fide2002.org/pdfs/euroreportgeneral.pdf](http://www.fide2002.org/pdfs/euroreportgeneral.pdf) at 3 for a summary of different national positions. For some general thoughts upon the choices that have to be made within the context of the new Constitution see J. H. H. Weiler, "A Constitution for Europe? Some Hard Choices", (2002) 40 *JCMS* 4.

<sup>8</sup> 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.

<sup>9</sup> Communication of the Commission, A project for the European Union, COM (2002) 247 final. See also the Proposals of the SPD and Bündnis 90/Die Grünen - group in the German Bundestag of 14. Mai 2002.

and adopted by the IGC 2004 (see B. below). The Preliminary Draft Constitutional Treaty, presented to the Convention by its Presidium<sup>10</sup> only outlines a possible general structure, without going into any detail. Talking about structures means the multilevel architecture of the European Constitution as such and its implications on the one hand (see C. below), and the relationship of the new constitutional treaty of the Union to the existing Treaties on the other (see D. below).

## B. Elements of the Constitutional Treaty of the European Union

What are the essential elements of the constitution of the European Union? Let me start with a general summary of the central functions of a constitution<sup>11</sup>; they are to establish, legitimise, organise and limit public authority by and for those who are its subjects: A constitution, with regard to a defined territory and group of people settled on that territory

- sets up institutions, their decision-making procedures and the conditions and rules according to which the persons responsible are elected and nominated;
- provides these institutions each with specific and limited competences and fixes the objectives to be pursued in the exercise of the functions so defined;
- defines the status of the people concerned with regard to the "community" so created in determining their fundamental rights and their active role in the political process.

The European Treaties, together with the national constitutions of the Member States already fulfil all these functions<sup>12</sup>, and the task of the Convention, thus, is not to make a new Constitution but to make the Constitution of the Union better, i.e. to revise the structure and the provisions of the existing treaties. The objective must be to obtain a text which - as it has been emphasised by Jacques Chirac<sup>13</sup> - can be called a constitution, while it would not be the legal foundation of a "super-State", as Tony Blair has underlined,<sup>14</sup> or of a "federation of nation-States", a description originally proposed by Jacques Delors,<sup>15</sup> and taken up

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<sup>10</sup> CONV 369/02, <http://register.consilium.eu.int/pdf/en/02/cv00/00369en2.pdf>. For many other proposals see the collections at [www.whi-berlin.de](http://www.whi-berlin.de) and [www.cap.uni-muenchen.de/konvent/entwuerfe.htm](http://www.cap.uni-muenchen.de/konvent/entwuerfe.htm).

<sup>11</sup> On the functions of a Constitution see also the national reports to the FIDE 2002 Conference in London (on point I.1.a. of the questionnaire) and the summary in Dutheil de la Rochère/Pernice, *European Law and National Constitutions*, General report (note 7 *supra*), at 3-8. See also D. Thym, 'European Constitutional Theory and the Post-Nice Process' in M. Andenas, /J. Usher (eds), *The Treaty Of Nice, Enlargement and Constitutional Reform*, 2003, 179 in section C.

<sup>12</sup> For a comprehensive and thorough analysis of this assertion see I. Pernice, *Europäisches und nationales Verfassungsrecht*, Bericht, (2002) 60 *VVDStRL* 148 – 193 esp. at 165 - 176; R. Steinberg, 'Grundgesetz und Europäische Verfassung' (1999) *Zeitschrift für Rechtspolitik* 356 – 374. Cf. Biaggini, *Die Idee der Verfassung - Neuausrichtung im Zeitalter der Globalisierung*, (2000) 119 *ZSR* 463. The Laeken declaration – The Future of the European Union, 15 December 2001, <[http://europa.eu.int/futurum/documents/offtext/doc151201\\_en](http://europa.eu.int/futurum/documents/offtext/doc151201_en)> sees the Union "heading towards a constitution for the European citizen".

<sup>13</sup> J. Chirac, *Notre Europe*, Speech to the German *Bundestag*, 26 June 2000, online [www.elysee.fr](http://www.elysee.fr).

<sup>14</sup> T. Blair, *A Larger, Stronger, more Democratic Europe*, Speech to the Polish Stock Exchange, Warsaw, 6 October 2000, online [www.number-10.gov.uk](http://www.number-10.gov.uk).

<sup>15</sup> Jacques Delors, *Eine Föderation der Nationalstaaten*. Gastkommentar in: *Die Welt*, 17 February 1999.

by many others including the presidents Carlo Azeglio Ciampi,<sup>16</sup> Johannes Rau<sup>17</sup> and, in a slightly different way, Joschka Fischer<sup>18</sup>. To put more emphasis on the new, *sui generis*-character of the Union and the citizens being the origin of its supranational powers I would prefer to talk about a "constitutional federation" - as my assistant *Daniel Thym* has recently proposed,<sup>19</sup> or just use the established term "supranational organisation". To adapt its constitutional foundations to the needs of simplicity, transparency, democracy and efficiency of the enlarged Union, it is essential that,

- first, the existing treaties are merged to one unique treaty<sup>20</sup>, consolidated and simplified so that they can be understood by the citizens as their constitution;
- second, the three pillars which have been established by the Treaty of Amsterdam, are merged into one unit called European Union and having legal personality,
- third, the provisions of the treaties on competencies, institutions and procedures are adapted to the needs of an enlarged Union and, in particular
- fourth, that this revision leads to more transparency, democratic accountability of the actors and more efficiency of the decision-making procedures.

On this basis, how could or should the revised treaty look like, what are the elements it should include? Of course, it should be introduced by a revised preamble which contains the essential elements of the preamble of the European Charter of Fundamental Rights, of the Treaty on the European Union as well as of the EC-Treaty. Following this, the Treaty should be composed essentially of seven parts which contain the "constitutional" provisions of the existing primary law including the accession treaties and protocols. The approach I suggest to be used for drafting this new treaty - let us call it provisionally the "Constitutional Treaty of the European Union (CTEU) - is the "pick and choose" - procedure for the existing law as revised and completed for the purposes indicated above.

### **Part One: Principles, Objectives and Fundamental Rights**

The first part of the Treaty should set out the common objectives of the Union and the common values on which it is based<sup>21</sup>. It is the foundation of the social contract men-

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<sup>16</sup> President C. Ciampi, Speech at Leipzig University, 6 July 2000, and Speech at the ISPI, 3 July 2001, both reported in: A. Battaglia/G.B. Grimaldi, An overview of leaders' statements, in: *EuropEos* (ed.), *Institutional Reform in the European Union: Memorandum for the Convention*, 2002, p. 225 et seq. at 229 and 241.

<sup>17</sup> President J. Rau, Speech to the European Parliament, 4 April 2001, reported in: A. Battaglia/G.B. Grimaldi, *supra* note 16, p. 233.

<sup>18</sup> *J. Fischer*, Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration, *FCE-Spezial* 2/2000, [www.whi-berlin.de/fischer.htm](http://www.whi-berlin.de/fischer.htm) = Walter Hallstein-Institut (ed.), *Verfassungsrechtliche Reformen zur Erweiterung der Europäischen Union*, 2000, 171 = (2000) 23 *Integration* 149.

<sup>19</sup> D. Thym, 'European Constitutional Theory and the Post-Nice Process' in M. Andenas, /J. Usher (eds), *The Treaty Of Nice, Enlargement and Constitutional Reform*, 2003, 179 in section C.

<sup>20</sup> In its final report, the working group "Legal Personality" proposed to have one single treaty, composed of two parts, cf. Final report CONV 305/02 p. 2.

<sup>21</sup> This is nearly common ground, since all the proposed constitutional treaties, including the draft constitutional treaty of the praesidium, proceed like this.

tioned, it gives the policies of the Union orientation and legitimacy, it gives guidance to the interpretation of the following provisions of the Treaty, and, above all, it provides the citizens assurance on what are their legal and political status, their individual rights and freedoms, their participation in the processes which design the policies and actions of the Union.

## 1. Principles and Objectives of the Union

Many of the provisions existing in the chapters on principles of the EU-Treaty and the EC-Treaty do not qualify for incorporation in this first chapter of the new Treaty. This is because some are part of the institutional setting, some others are taken up in the Charter of fundamental rights. What seems to be essential are Article 2 EC, some of the objectives of Article 2 EU, the principles of Article 6 I and 3 EU as well as those of Articles 5, 10 and 15 EC. It should be emphasised that the Union is a "community of law",<sup>22</sup> based on the constitutions of the Member States, and a special provision should be added, if felt necessary as a matter of clarity, to confirm the primacy of European law as a guaranty for its equal application and validity throughout the Union.<sup>23</sup> The first chapter on objectives and principles should be short and avoid any overlapping with the following provisions of the Treaty.

## 2. The Status of the European Citizen, Fundamental Rights and Freedoms

The Charter of Fundamental Rights has been elaborated by a special Convention and should be incorporated into the Treaty as such. It is clear, however, that the preamble has to be dropped and that a revision of its drafting is necessary in order to adapt it to the fact that it is part of the Constitutional Treaty: References to "this Charter", for instance, should be - at least - changed in references to "this Chapter" or to "this Treaty". The final provisions would have to be adapted to the new legal context, and it must be made clear that Article 53 of the Charter is not questioning the principle of primacy of European law. Incorporating the Charter as such into the CTEU, finally, would mean that similar or parallel provisions of the existing treaties would not be repeated in other chapters of the CTEU.

Regarding the citizenship of the Union, it seems to be important, that the chapter on fundamental rights is introduced by Article 17 EC. It describes the status of equal rights of all the citizens of the Union, including their political rights throughout the Union. This provision should, however, be revised so as to make clear that the citizens of the Union are the origin of democratic legitimacy of the Union and all its policies. It should be completed by a provision on equal rights for nationals of thirds countries except for cases of express derogation.

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<sup>22</sup> For the origin and significance of this important principle see I. Pernice, "Der Beitrag Walter Hallsteins zur Zukunft Europas - Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft" - WHI Paper 9/01, [www.whi-berlin.de/pernice-rechtsgemeinschaft.htm](http://www.whi-berlin.de/pernice-rechtsgemeinschaft.htm).

<sup>23</sup> For an explication of the necessity of this rule in a non-hierarchical multilevel system see I. Pernice, "Multilevel Constitutionalism in the European Union", (2002) 27 *EL Rev.* 511 - [www.whi-berlin.de/pernice-constitutionalism](http://www.whi-berlin.de/pernice-constitutionalism).

## **Part Two: Institutions of the European Union**

The provisions of the EC-Treaty on the institutions, their composition, the election and/or appointment of their members or personal, the modalities of their decision-making procedures and their basic functions are to be included in part two of the CTEU so as to respond to the needs of separation of powers and democratic accountability. There should be at least five chapters, laying down the basic features of the institutions, while details may be left to protocols attached to the CTEU.

### 1. The European Parliament

Regarding the European Parliament there should be provisions on general direct, free and equal European elections. Account should be taken, nevertheless, of the fact that in a system where citizens of the Union and the peoples of the Member States are represented in the European Parliament the weight of votes may differ from one Member State to the other depending on their respective population. All the members of the European Parliament should have an equal status. It should be made clear that co-decision of the European Parliament is the general rule, including questions of the budget, and that it is the European Parliament that elects and may dismiss, by a motion of censure, the President of the Commission<sup>24</sup>. In turn, the European Council shall have the right to dissolve the European Parliament in case European politics are blocked.

The European Parliament shall hear and put questions both to the Commission and to the European Council and their members. Also the president of the European Central Bank and the presidents of other bodies or agencies of the Union should be heard and have the duty to reply to questions of the Parliament. Its right of initiative, as provided for in Article 192 § 2 EC continues to be appropriate; it is based on the services to be provided by the Commission in the legislative process as a catalyst of integration, subject to the "federative control" exercised by the Council and the "democratic control" of the European Parliament. There is no need to change this.

### 2. The European Commission

It is important, in the CT, to enhance and to make more transparent the political function of the Commission. Its president shall be elected by the European Parliament and nominated by the European Council, of which - in its executive function - he/she will equally act as the President. This is not only to give the Union a "face" - and an address - , representing its unity as well as the diversity of the Member States, but also to institutionalise the coherence of the internal and external policies of the Union as determined by the respective Members of the Commission or, as the case may be, by the co-operation of the Heads of State or ministers in the Council.

The Commission should be the executive of the Union, provided that it is given express powers for the administrative application of European law, such as in the areas of competi-

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<sup>24</sup> By now, this seems to be more or less generally accepted. Most of the proposed drafts (note 10 *supra*) contain such provisions.

tion, state aids or structural funds. As a matter of principle and subsidiarity, the implementation of European legislation, however, should be a matter for the Member States. As to auxiliary or implementing legislation to be entrusted to the Commission by the Council, comitology should be replaced by the clear responsibility of the Commission which is accountable to the European Parliament and its special committees<sup>25</sup>.

### 3. The European Council and the Council of the European Union

The European Council, the president of which should be the President of the Commission and elected by the European Parliament, should be the leading political institution of the Union giving it the necessary impetus and political guidelines. The European Council should act on initiatives of the Commission, the Member States or the European Parliament, and its president, who is the "President of the Union" should have the function as a mediator among the diverse national interests.

The Council of the Union, in turn, should be split into an executive branch and the "legislative Council", so to provide for more efficiency and transparency<sup>26</sup>. The legislative Council should meet and take its decisions in public, while the executive branch of the Council should be the body for co-ordination of national policies (economic, employment, external, security, home affairs, criminal justice etc.) as far as they are not subject to the Community-method. It may also be responsible for the necessary co-ordination of national implementation measures regarding European legislation<sup>27</sup>.

Taking account both of the need for a more visible role of the national Parliaments at the European level and of a procedural devise for the control of the respect of subsidiarity and the limits of the competencies attributed to the European Union, the Council should be extended by a "parliamentary branch" which is the Parliamentary Subsidiarity Committee<sup>28</sup>. It would consist of representatives of the national Parliaments and be consulted by the Council, the European Parliament, Member States or a group of Parliamentarians, in cases of doubt on the question if the principle of subsidiarity and the provisions on EU competence are sufficiently respected. The advice of the PSC would not be binding, but initiate and feed, as the case may be public, a political debate on the need and legitimacy of European legislation.

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<sup>25</sup> The Commission itself proposes to abolish most comitology committees, leaving in place only the advisory committee, cf. "European Governance: A White Paper", Com(2001) 428 p. 40.

<sup>26</sup> Steps in this directions were already undertaken at the Seville European Council, see Annex II of the Conclusions of the presidency, SN 200/02.

<sup>27</sup> See my proposals on "reorganising the representation of the Union, I. Pernice, *Multilevel Constitutionalism in the European Union*, (2002) 27 *ELRev.* 509 at 527-528.

<sup>28</sup> See for the general idea: Tony Blair, Speech to the Polish Stock Exchange (supra, note 14) and my proposals in "Kompetenzabgrenzung im Europäischen Verfassungsverbund", (2000) *JZ*, 866, published also in - *FCE Spezial* 4/00 [www.whi-berlin.de/pernice-kompetenzabgrenzung.htm](http://www.whi-berlin.de/pernice-kompetenzabgrenzung.htm). More specifically now I. Pernice, "Der Parlamentarische Subsidiaritätsausschuss", [www.whi-berlin.de/subsidiaritaetsausschuss.htm](http://www.whi-berlin.de/subsidiaritaetsausschuss.htm). Cf. N. Colneric, "Der Gerichtshof der Europäischen Gemeinschaften als Kompetenzgericht", (2002) 13 *EuZW* 709 who argues that the ECJ itself already is acting as a competence court.

#### 4. The European Central Bank

There is no room for a revision of the provisions on the European System of Central Banks and the ECB. Articles 8, 107 to 110, 113 and some other provisions of the EC-Treaty should be incorporated in the CT, while the bulk of the provisions should become part of the Protocol on the Statute of the ECSB. Careful consideration should be given, however, to the question of how the Union should be appropriately represented at the international financial institutions. It should talk with one voice and one mouth, to be efficient, and my suggestion would be to give this role either to the member of the Commission responsible for financial policies, and, as the case may require, to the President of the ECB.

#### 5. European Court of Justice and Court of First Instance

Most of the provisions of the existing treaties regarding the European Court of Justice, as amended by the Treaty of Nice, can be taken over in the CTEU as such. Special consideration, however, should be given to the efficient judicial safeguard of the respect of fundamental rights. It is proposed to introduce a special "complaint on fundamental rights" to the Court of Justice for the individuals in cases of alleged violation of their rights.<sup>29</sup> The German experience with this is ambivalent, given the great number of complaints per year. A more decentralised system would be the way through Article 234 EC, provided that individuals dispose of a remedy to enforce a preliminary question to the Court where a national judge would refuse to submit the case of an alleged violation of European fundamental rights by a European measure to the Court. In a decision of 9 January 2001 the German Constitutional Court has accepted that such a refusal is a violation of the "right of access to court" (Article 101 § 3 Grundgesetz).<sup>30</sup> Yet another possible and necessary option is to modify the conditions for the access of individuals to the Court. Here, a modification of the relevant provision (Art. 230 § 4), as interpreted by the Court<sup>31</sup>, needs to be envisaged. This was suggested by the Working group "Charta of Fundamental Rights", too<sup>32</sup>.

#### 6. Other Institutions

Provisions on other institutions like the European Investment Bank, the Court of Auditors, the Committee of the Regions should be taken over in the CT in a simplified and shorter form. A question is whether the Economic and Social Committee should continue to exist or whether it should be reorganised to - or replaced by - a "Sustainable Development Council". Such a SDC has been proposed by the European Consultative Forum for Envi-

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<sup>29</sup> See the proposals of the Social democrat and Green fraction of the German Bundestag. The final report of Working group II "Incorporation of the Charter/accession to the ECHR", CONV 354/02, p. 15 however, does not recommend the introduction of a new mechanism.

<sup>30</sup> Reported in BVerfG EuZW 2001, 255, 256 – *Teilzeitarbeit*.

<sup>31</sup> See final report of Working group II, note 29 *supra* at 16.

<sup>32</sup> Case C-50/00, *Unión de Pequeños Agricultores*, reported in (2002) 13 *Europäische Zeitschrift für Wirtschaftsrecht* 529 comment Feddersen.

ronment and Sustainable Development in 2000,<sup>33</sup> and it could play an important role in the enforcement and monitoring of the implementation of what is actually provided for in Article 6 EC: The effective integration of environmental concerns into all European policies.

### **Part Three: Instruments of Action and Decision-Making Procedures**

Provisions on the decision-making procedures in the European Union should include the provisions of Articles 249 to 254 EC, as well as provisions on other instruments of action such as on common strategies and positions, joint actions, framework decisions, international treaties etc. It is crucial to lay down the principle that legislation is decided by qualified majority of the Council, while certain acts in the area of external and security policies or defence may continue to be subject to consensus.

A special category of legislation should be introduced for the amendment of what remains, after the entry into force of the CTEU, as primary law: It is proposed to call this category, which is in the hierarchy of norms, below the Constitution but above the secondary legislation, "organic laws", and to make sure that such organic laws are made with the consent of the European Parliament and a (super-)qualified majority of the Council. Even the consent of the Parliamentary Subsidiarity Committee could be required in these cases, so to give it and the national Parliaments which it represents, a more substantial role in the process.

### **Part Four: Competencies of the European Union**

The most complicated task for the Convention will be to put the attribution of competencies of the Union in an appropriate order. The provisions on competencies are mixed up, today, with the provisions on the European policies, and they are spread out over the treaty, highly complex and differentiated, and subject to diverse provisions on objectives, parameters and other modalities of procedural or substantial character. To make clear who is doing what and responsible for what in the EC, the provisions on the vertical distribution of powers have to be brought into a systematic order. Furthermore, they must be simplified to a great extent. They may include negative clauses excluding European action in specific areas<sup>34</sup>, but all kind of detailed provision on how, why, for what purpose and to what extent the Union or some of its institutions shall act, should be deleted<sup>35</sup>. It is so proposed to divide the title on competencies into three chapters:

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<sup>33</sup> European Consultative Forum on the Environment and Sustainable Development, in: European Commission, Sustainable governance - Institutions and procedural aspects of sustainability, 2000, point D.3, the alternative being the creation of national sustainability ombudsman which meet, at the European level as the European Sustainability Council (ibid., D.4). This topic is not mentioned in the final report of Working Group VI on Economic Governance, CONV 357/02.

<sup>34</sup> For an analysis of different categories of competence provisions see F. Mayer, "Die drei Dimensionen der europäischen Kompetenzdebatte", (2001) 61 *ZaöRV* 577.

<sup>35</sup> For more detailed proposals see: V. Constantinesco/I.Pernice, *La question des compétences communautaires: Vues d'Allemagne et de France*, [www.whi-berlin.de/constantinesco-pernice.htm](http://www.whi-berlin.de/constantinesco-pernice.htm), section II. Cf. J. Dutheil de la Rochère/I. Pernice (note 7 *supra*) 17 – 18.

### 1. Definition of Categories of Action and the Means for Implementation

There should be four categories of European legislative competencies: exclusive, parallel or concurrent, complementary action and encouragement of co-operation<sup>36</sup>. Each of these categories shall be defined regarding the modalities and, in particular, the possible instruments of action: directives, regulation etc. To describe these categories in general renders unnecessary the separate outlay of specific provisions in each of the articles regarding the attribution of powers which belong to the respective category.

### 2. Specific Attribution of Competencies and Areas of European Legislation and Action

For each of the categories defined, the respective powers of legislation and/or administrative implementation can be laid down in a series of specific provisions: commercial and monetary policy, as well as fisheries will be part of the chapter on exclusive competencies, the great bulk of provisions of the EC-treaty on agriculture, transport, consumers, research, environment etc. will be found in the chapter on parallel competencies, matters like culture, education, health etc. may be included in the chapter on complementary measures, while the chapter on the encouragement of co-operation between the Member States would take up external and security policies including defence, economic and employment policies, police and criminal justice etc.

### 3. The Internal Market: Abolished Competencies, Prohibitions and Implementing Policies

The EC-Treaty contains a number of provisions which exclude certain action both on the national and on the European level: Restrictions to trade, to the free establishment, to the freedom to provide services, to the free flow of capital, but also restrictions to, and distortions of competition. State aids are a special question, since there is a clear need of supranational control to avoid any competition among the Member States to the detriment of the national budgets and of a system of undistorted competition. The chapter on the internal market, thus, is a special area of concern, and it is important to clearly lay down the prohibitions which are applicable to all actors of public authority or to private operators respectively.

This chapter would also include provisions on special legislative powers for the harmonisation of national legislation as well as for the introduction of institutions of private law at the European level: These powers regard technical harmonisation, public procurement, fiscal harmonisation, corporate law, the European patent, trade-marks and other forms of intellectual property etc. There is clearly a need for restricting the existing European powers in the area of harmonisation, but there is also a need for clarification and extension of these powers for specific purposes, such as the statute for a European joint-stock company or for other kinds of corporations.

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<sup>36</sup> The "Preliminary draft Constitutional treaty" (note 10 *supra*) only provides for three different categories of competences in Art. 10 – 12.

### **Part Five: Financial Provisions**

One of the most controversial issues of the CT will be the chapter on finances. It should, first, contain all provisions regarding the re-distribution of money and, in particular on the social and economic cohesion, on the structural funds etc. But it should also contain the provisions regarding the financing of the Union and, above all, on its own resources. Questions like the replacement of the structural funds by a system of horizontal financial transfer will have to be given an answer as well as the question on whether and how to introduce a European competence on taxation as now proposed by the European Commission<sup>37</sup>. Is it a means for enhancing democratic legitimacy and accountability of the Union? Or would it be an undesirable increase of European powers without any real need and justification?

### **Part Six: Enhanced Co-operation**

The provisions of the EU and the EC on flexibility, as amended by the Treaty of Nice, should be simplified and included into the CT. It is important to ensure the dynamism which results of allowing a group of Member States to step forward while others may wait and see how this works out before they join. While it puts the principle of equal application of European law and the cohesion of the Union at risk, it seems to be necessary as experience shows, to avoid the process of integration being slowed down by Member States which feel unable, for the time being, to participate in all fields.

### **Part Seven: Final Provisions**

The final provisions of the CT should, in particular, deal with the procedure of the revision of the Treaty. Following the experience with the Convention this way of preparing the IGC and the conclusion of each revising treaty should be retained in the text of the Constitution. It is not replacing the authority of the governments, but like the Commission's proposal at the Council, the proposal of the Convention would be a tentative compromise with some parliamentary authority. It should be open to modification by the governments at the IGC, while the president and other representatives of the Convention should participate at the IGC and mediate between the governments in view of achieving reasonable results. In any event, the governments will have to bear in mind that too much of a modification may put at risk the ratification of the modified Treaty by the national parliaments.

Serious consideration should be given, in addition, to completing the procedure of Article 48 EU by a European referendum. Any fears that such a referendum could nourish the idea that a European people exists or is created are in vain: The equivalent of what a European people may be at the present stage of integration, already exists in terms of the citi-

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<sup>37</sup> Communication of the Commission. "A project for the European Union" COM(247) final at 5. The final report of the Working Group VI on Economic Governance (note 33 *supra*) proposes "corridors" and qualified majority voting in order to harmonise taxation.

zens of the Union<sup>38</sup>. More important is the "educational" effect of a referendum, both for the leaders who have to explain carefully to the public what exactly they are doing and aiming at, and for the people who will better understand and assume - or reject - what the Union and any further step of integration is for.

### **C. The Multilevel Architecture of the European Union**

The relationship between the European primary law and the national constitutions has usually been qualified as hierarchical and competitive. In the light of multilevel constitutionalism<sup>39</sup> there is no hierarchy and no competition, but a functional distribution of powers and a need for co-operation of all those vested with public authority. European and national authorities are interdependent, their institutions are closely interwoven, democracy and the rule of law at the European level depend on the respect of these same principles also at the national level, national authorities have national and European functions, a "double loyalty" as well as the citizens have a double identity. The Constitutional Treaty for the European Union has to be designed as the supranational component of the European Constitution, complementing the national constitutions by a layer of common principles and rules. It is the legal foundation of just another tool for the citizens to meet the challenges of common interest at the European level. And it is based, and should continue to be based on functioning national constitutions, procedures and cultures from which it depends.

It follows that any modification of the powers conferred upon the Union, any change in the composition, procedure of nomination or powers of the European institutions, any strengthening of the efficiency of decision-making procedures etc. has a strong bearing on the national constitutions and their normative reach. Deputies of the national parliaments, ministers and heads of government have new functions in the institutional framework of the Union, new functions which are not necessarily reflected in the texts of the national constitutions. Administrations and judges have not only the new task to apply European legislation - and to disregard conflicting provisions of national law - but also to watch if it is in conformity with the fundamental rights and the principles of law of the Union and where necessary, to refer the case to the European Court of Justice. This is why national constitutions generally require for the ratification of any revision of the European treaties under Article 48 EU the same conditions as for a constitutional revision.

When powers and responsibilities are defined and institutions are set up at each level, it seems to be wise, therefore, to take account of their bearing on the functions of the institutions at the other. Not only the national system of powers may be changed, but also constitutional traditions, legal concepts, the vision of what are tasks and functions of the public authority - public services - and what is left to private business, competition and the rules of the market. This is why the debate on the European constitution with its two components, the European and the respective national levels, is so important: European policies

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<sup>38</sup> The German Constitutional Court finds in this citizenship already the core of what, like the nationality, expresses some kind of common belongingness and link which not as narrow as nationality, but a legally binding expression of community, BVerfGE 89, 155, at 184 - Maastricht.

<sup>39</sup> For a more detailed description of the concept see I. Pernice, (note 2 *supra*).

touch the life of the citizens as much as, and sometimes even more heavily as national policies. They are part of them and vice versa. It is time that people become aware of the fact that not the Member States but the peoples of the Member States themselves are the masters of the treaties.

#### **D. EU-Constitutional Treaty and Existing Provisions of Primary Law**

If the Constitutional Treaty of the Union is drafted as indicated above, having in mind that it is only one component of one composed constitutional system, the question of how to proceed with the provisions of the existing treaties will be of less importance. The final provisions of the CTEU should make clear that they are replaced by the CTEU unless expressly provided for. Some of the existing provisions will have to be maintained as protocols to the CTEU on specific institutional or procedural matters, some will take the form of "organic laws" explaining details of what is provided for in the CTEU. While protocols may be subject to the normal provisions on the revision of the CTEU, "organic laws" should benefit from a simplified procedure which does not require unanimity of the Member States nor the ratification by the national parliaments.

This solution appears to be more realistic than the division of the Treaties as proposed by the three wise man, since there is no clear criterion as to which provisions on policies may be less important than others. The studies submitted by the Florence group<sup>40</sup> as well as that of the Bertelsmann-Foundation (CAP)<sup>41</sup> show that the primary law of the Union would become more complex instead of being simplified if this approach is followed. The aim of the works of the Convention and the IGC 2004 should be to have one Constitutional Treaty containing all what is necessary to define and orient European policies and, thus, to what can be understood by the citizens as the instrument of Government complementing and binding together the national constitutions to one - multilevel - constitutional system<sup>42</sup>.

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<sup>40</sup> European University Institute, *A basic Treaty for the European Union*, 2000.

<sup>41</sup> Bertelsmann Forschungsgruppe Politik am Centrum für angewandte Politikforschung (C.A.P), *Ein Grundvertrag für die Europäische Union - Entwurf zur "Zweiteilung" der Verträge*, 2<sup>nd</sup> ed. 2000.

<sup>42</sup> Both the "Preliminary draft Constitutional treaty", (note 8 supra) and the final report of working group II, (note 20 supra) p. 2 are somewhat ambivalent whether the constitution should be composed of one or of two parts. The latter formulated: "The Union should have a single constitutional text (composed of two parts, the first of which would contain constitutional provisions)".

