State and Future of the European Constitution – Improvement or Radical Reform?

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Introduction

[1] In January 1999 German Foreign Minister J. Fischer called for a debate on the creation of a constitution for the European Union.(1) Since then, many German politicians have exposed their vision of the future of Europe and its constitution.(2) However, even one year later, the matter appeared still to be a 'German concern' only.(3)
[2] Since May 2000, one can observe that the Union's 'constitutional question' has become a matter of a public debate at European level. It has gained such a momentum that no important or ambitious politician (or political party) can permit himself to leave the matter beside.(4) During the last months various contributions have been made to this debate, not only in Germany but also in other EU member and candidate states.(5)
[3] However, the debate on a European constitution is not entirely new. Since the very beginning of European integration, there was a discussion about its *finalité* – either seen as being purely functional or as genuinely 'political' (read: federal) – even if most observers agreed on leaving the question 'still open'. Some academic but rather limited public reaction has been raised by two projects of the European Parliament (in particular the *Spinelli*-Project of 1984, to a far lesser extent the *Hernan*-Project of 1994) on a European constitution. Legal writers have furthermore controversially debated the constitutional quality of the Treaties which the European Court of Justice considers as being, since *Les Verts*(6) , as 'basic constitutional charter'.
[4] Several factors have contributed to the recent 'promotion' of the Union's constitutional debate which has now moved from mainly academic fora towards a greater public sphere, two of them being, in our view, the most important. First, many have become aware that the existing institutional framework of the Union needs to be reformed in order to cope with the deepening (in particular: economic and monetary union, internal and external security) and the widening (enlargement) of European integration which is itself placed in a political and economic context of increased global interdependence. Second, one could note during the last decade an increasing awareness about the limits (or: the delimitation) of the Union's powers. This fundamentally constitutional problem has been in particular felt and expressed by the German *Länder* who have managed to oblige their federal government to insist, during the Intergovernmental Conference (IGC) 2000, on fixing of a binding timetable for a fundamental reform of the Treaties.
[5] Both factors have led to the Declaration No. 23, annexed to the Treaty of Nice, on the future of the Union which endorses formally the public constitutional debate already launched some months before.(7)
[6] It may, thus, be useful to clarify shortly some points on the state (A.), possible improvements in the light of a careful reading of Declaration No. 23 (B.) and a more radical reform (C.) of the European constitution including the possible 'revolutionary' procedures according to which a 'new' constitution could be elaborated and adopted (D.).

A. Does the Union already possess a constitution?

[7] As already indicated, the *Court of Justice of the European Communities* (ECJ) has qualified, already some years ago, the Treaties as the Community's (and the Union's) 'constitutional charter' – as did the German Federal Constitutional Court already in 1967.(8)

1. The ill founding of the 'no constitution thesis'

[8] Not everybody has welcomed this qualification. In particular German scholars have expressed doubts whether the basic charter of a supranational organisation could be understood as 'constitution' since, in their view, there cannot exist a constitution without a State.(9) This theory can be labelled as the 'no constitution thesis'.
[9] However, the 'no constitution thesis' is not really convincing. It is based on a rather narrow perspective which is self limited by the experience of the modern constitutional states in Europe since the French Revolution. However, history tells us that the notion of constitution is older than the modern nation state and, hence, not necessarily exclusively reserved to this form of polity. The proponents of the 'no constitution thesis' apply therefore an a-historical etatistic interpretation of the term 'constitution' which does not appear to suit to a modern world characterised by an increasing 'factual' interdependence and, thus, by 'open states'.(10)
One has therefore to reject the 'no constitution thesis'.

2. The main elements of the present European constitution

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[10] A broad understanding of the notion ‘constitution' can, as a matter of principle, cover a wide range of ‘basic rules', from the founding treaties of an international organisation to the statutes of a private foundation or a soccer club. The Treaties of the European Union, or at least the three founding Treaties – as interpreted by the European Court of Justice – have established a system of public governance, which operates in many respects like national federal type systems.
[11] First, the Treaties have established a sophisticated institutional structure which empowers European institutions to set rules in many policy fields binding both its Member States and, in contrast to most international organisations, also individuals.
[12] Second, this public power is bound by the rule of law. The acts of the European institutions are controlled by the European Court of Justice which ensures that they remain within the limits of their competences and that they respect basic legal principles as, most prominently, the fundamental freedoms.
[13] Third, the Treaties operate a delimitation of powers between the Union and its Member States which is perhaps not easy to understand by everybody, in particular not by all of its critics, but which is nevertheless rather precise.
[14] Finally, the public power established by the Treaties is democratically legitimated. This legitimation is granted through the national parliaments to which the members of the Council are accountable, on the one hand, and through the directly elected European Parliament whose rights have been continuously and considerably extended since 1958, on the other hand.

3. Conclusion

[15] It follows that one does not have to apply a too broad definition of ‘constitution' in order to qualify the Treaties as such.(11)

B. Possible improvements of the present European Constitution

[16] As most constitutions, the European constitution is not perfect. This has been formally recognised by the IGC 2000 when adopting Declaration No. 23 on the future of the Union. The following points listed in that declaration merit particular attention: a more precise delimitation of powers between the Union and its Member States (1.), the legal status of the Charter of Fundamental Rights (2.) and the role of national parliaments in the European architecture (3.).

1. A more precise delimitation of powers

[17] This issue has been a major preoccupation of the German Länder since more than one decade. In fact, they have closely cooperated during the IGC 2000 in order to put this matter on the European agenda.(12) However, looking more concretely to the postulates of the Länder we must note a disturbing absence of a coherent position.(13)
[18] At a closer look this is not at all surprising. Delimitation of competences is not only a highly political exercise but also a rather technical one which does not easily fit to simple solutions. Much of the problem lies in the fact that the ‘logic of the Single Market' governing some of the Community's competences is not understood by everybody (14) and that the Community's competences are not summarised or precisely described in one single Treaty provision. In spite of – and given – the considerable practical difficulties related to any attempt at simplifying and clarifying these provisions, one will welcome such efforts (15) as those aiming at simplifying the readability of the Treaties in general.(16)
[19] However, one should be aware that there are no ‘magic solutions'. The experience of most federal states should teach us that economic and socio-political developments often do not respect a carefully drafted constitutional delimitation of power. In particular, the more detailed a list of competences, the faster it will be outdated in practice, demanding constant amendments.(17) It is, hence, not surprising that federal states' constitutions contain often ‘flexibility clauses' allowing, within some limits, ‘day-to-day corrections' of sometimes too ‘rigid' divisions of power.(18) In this perspective, calls for repealing Art. 308 EC are not really convincing, notwithstanding the fact that the careful wording of Declaration No. 23 does probably not cover such a radical measure.(19)

2. The legal status of the Charter of Fundamental Rights

[20] The existence and degree of fundamental rights protection at European level has been traditionally subject of debate in German case law and doctrine.(20) Today, even the Federal Constitutional Court has recognised that the EU efficiently protects its citizens' fundamental rights through the case law of the European Court of Justice.(21)
[21] In spite of this fact, many have felt the need to make the fundamental rights at EU level more ‘visible'. After years of discussions on this matter, the Charter of Fundamental Right was elaborated by a ‘convent' and formally proclaimed by the IGC 2000 – but has not yet been integrated into the Treaties. It is therefore not legally binding. However, the Charter expressing the ‘common fundamental right-consensus' of all Member States, the Court of Justice will be able integrate its content to a large extent into its existing case law as ‘general principle common to the laws of the Member States'.

[22] In this light one can conclude that there seems to be no urgent need for the integration of the Charter into the Treaties, even if such an exercise would be desirable, in particular if the Treaties would be re-organised and simplified.

3. The role of national parliaments in the European architecture – or: the wrong problem

[23] National parliaments play an important role within the European Union since they provide for its democratic legitimacy in two respects: firstly, they have to approve in most Member States any Treaty amendment and, second, they are the democratic instance to which the members of the Council are directly accountable.
[24] Calls for an increased role of national parliaments in the EU architecture reflect therefore two concerns which are a deficit of democratic accountability of the Council, on the one hand, and some scepticism with respect to the capacity of the European Parliament (EP) to grant democratic legitimacy, on the other hand.
[25] It is submitted that the latter concern is ill founded (a) while the former preoccupation should preferably not be resolved by increasing the role of national parliaments within the EU architecture (b).

(a) – On the legitimating capacity of the EP: rejecting the ‘no demos thesis'
[26] In spite of the direct election of its members, some legal writers are questioning the EP's capacity to provide for democratic legitimacy. The main argument of the so-called ‘no demos thesis' is that true democratic legitimacy could not be provided at European level since there is neither a ‘European demos' nor a European public sphere (‘Öffentlichkeit'), as is allegedly proven, according to its proponents, by the lack of truly ‘European' political parties or media. Furthermore it is argued that a European ‘Staatsvolk' (people) would not develop within a foreseeable future, as the multitude of different languages within the Union is considered as causing a kind of structural incapacity hindering the various national ‘Öffentlichkeiten' to enter into a ‘real' supranational public communication process.
[27] This ‘no demos thesis', albeit particularly popular among public law professors in Germany,(22) is based on wrong premises. First, there is neither empirical nor theoretical evidence on the pretended need of a common language within a polity in order to ascertain a democratic communication and deliberation process.(23) Second, the same has to be stated about the pretended need of a unitary structure and organisation of political parties and media.(24) Third, the ‘no demos theory' is based on the ‘romantic' assumption that a given ‘Kulturnation' historically precedes the modern state – in spite of the fact that most states in this world, including the celebrated model of a modern nation-state (France) are ‘Willensnationen' (nations founded on consent and will) and, hence, ‘artificial'. Finally, one should also bear in mind that the very idea of ‘demos' is based on the assumption that there exists a well determined, personally and geographically limited and ‘exclusive' frame of reference – first the Greek marketplace, then the nation-state. This ‘exclusivity' is increasingly questioned as not only states but also regions (25) and citizens are gradually discovering, individually or through their agents, the limits of ‘national action', on the one hand, and the possibilities offered by supra- or international fora, on the other hand – the phenomenon of transnationally ‘shared identities' expands.(26)
[28] In this light one can agree with J. Habermas who recently argued that a European-wide public discourse does not require a kind of mono-cultural and mono-lingual ‘substratum'. Habermas rightly observed (27) :
‘Die nationalen Medien des einen Landes müssen nur die Substanz der in den anderen Mitgliedsländern geführten Kontroversen aufnehmen und kommentieren. Dann könnten sich in allen Ländern parallele Meinungen und Gegenmeinungen an derselben Sorte von Gegenständen, Informationen und Gründen herausbilden, gleichviel woher sie stammen. Dass dabei die horizontal hin und her fließenden Kommunikationen den Filter von wechselseitigen Überzeugungen passieren müssen, beeinträchtigt die wesentliche Funktion der grenzüberschreitenden, aber gemeinsamen politischen Meinungs- und Willensbildung nicht.'

[29] From this follows, first, that one has to reject the ‘no demos theory', and second, that there is no structural obstacle which would reduce the EP's capacity to provide for democratic legitimacy at Union level.
[30] This is not to say that the quality of democratic representation within the EU could not be enhanced. One could in particular adopt a uniform election procedure, as suggests Art. 190 (4) EC since now more than 20 years, which should ideally provide for as many constituencies as MPs.

(b) – Enhancing the democratic accountability of the Council
[31] An increased participation of national parliaments within the European architecture is also often proposed in order to ‘police' the members of the Council more closely since the latter often tend to circumvent political obstacles ‘at home' by taking the ‘European track'. This kind of ‘forum shopping' often leads also to European legislation which may be questionable under subsidiarity considerations.(28)
[32] When considering an increased participation of national parliaments at EU level one should, first of all, remember that one of the reasons for introducing the direct election of the EP was, back in the 1970s, the idea of freeing national MPs from the supplementary ‘European workload', in which many of them often were not too interested. Moreover, one has to bear in mind that ‘policing' members of the government is a task which primarily has to be organised by each national parliament and which some of them have organised in a rather satisfactory way.(29) In this respect it is particularly interesting to note that those Member States that have set up a efficient internal

parliamentary control of its members of the Council are those which most promptly and most correctly transpose EC directives into national law. Finally it should not be forgotten that the present decision-making processes in the Union are not a model of efficiency. Therefore, any institutionalised participation would be an additional burden for this machinery.
[33] These considerations suggest that reinforcing the role of national parliaments within the Union's architecture would not offer a remedy to the problem of 'forum shopping' and the connected problem of non-respect of the subsidiarity principle. Both problems are not really caused by the Union's present institutional design but much more by a lack of 'political culture' within most Member States, as recently pointed out by J.C. Juncker:
'"Deine Rede sei ja ja, nein nein": dieser Grundsatz muß auch für die europäische Politik vor allem aber für ihre Darstellung gelten … EU-Politik ist keine fremde Ware, sondern regierungsamtliche Eigenproduktion. Die Urheberrechte – und Urheberpflichten – an dieser Politik würden klarer erkennbar, wenn die Mitgliedsregierungen einen hochrangigen Minister als ständigen Vertreter nach Brüssel entsenden würden.'(30)

4. Conclusion

[34] Most points of the Declaration No 23 on the future of the Union can be read as a kind manual for the 'toilettage' of the present European constitution.
[35] In this light, the simplification of the Treaties in general and the redrafting of the provisions describing the powers of the Union in particular appear as mainly 'technical' tasks, as important they may be. In a similar vein, the integration of the new Charter of Fundamental Rights into the Treaties could be seen as useful but not indispensable.
[36] However, the further integration of national parliaments into the architecture of the Union, in our view, is not a measure which will contribute to a proper 'facelifting' of the EU constitution. As this is proposed as 'booster' complementing a – non existing – structural democratic deficit of the EP it will only serve as pretext in order to delay even further the reform of the latter, and in particular the adoption of a uniform election procedure. As remedy to underdeveloped democratic control of the Council it is simply unsuitable: the Member States' lack of political culture have to be resolved by and within the Member States themselves and not at the expense of the already often cumbersome EU decisionmaking process.

C. Towards a more radical reform of the European Constitution

[37] The recently launched debate on the future of the Union is, however, not limited to the issues expressively mentioned in Declaration No. 23 annexed to the Treaty of Nice. In fact, many proposals have been made which go beyond a 'simple' improvement of the existing Treaties.
[38] Many proposals concern only the institutional structure of the Union. However, some observers have rightly noted that 'form follows function' and that one should, hence, firstly determine the Union's tasks (1.) and then ask what should be its institutional structure, its means in order to fulfil these tasks (2.).(31)

1. What should the Union do?

[39] The present debate on the distribution of powers between the Union and its Member States has been launched by those who aim at restricting the Union's existing competences. However, if one reflects not only upon a more concise delimitation but about a real reallocation of powers, more reasons may be found for an *extension* than for a *restriction* of the Union's competences.
[40] It is common ground to assume that the Union should act in those fields in which the single Member States are not any more able to grant services and/or benefits to their citizens. In this perspective, the Union should therefore have competences to act in the following policy fields: general economic policies (a), immigration and internal security (b) and external relations (c).

(a) General economic policies complementing the Single Market and Monetary Union
[41] Establishment and extension of the Single Market (but also liberalisation at WTO level) has caused important losses of national 'policymaking power' and the individual Member States' action has been limited in various fields as *e.g.* consumer protection, social and environmental policy (32) . These losses have not been entirely compensated by conferring respective competences to the Union.(33) Losses in the field of monetary policy have not been compensated at all.(34) The Monetary Union (EMU) considerably reinforces the already existing desequilibrium between strong liberalisation competences and weak re-regulation powers. However, as the Member States have already lost and continue to loose regulation powers to a large extent, a proper balance between liberalisation and re-regulation, between harmonisation and competition, between market forces and public intervention can be established today only at Union level.
[42] This is not to plead in favour of a particular 'European model' as was recently the message by French Prime Minister Lionel Jospin.(35) New or more effective competences in general economic policies including tax policy and social security policy would not necessarily prejudice an 'interventionist European Welfare State' – since this is a

matter of the concrete use of such competences. However, they are necessary in order to allow us not only to discuss the arguments in favour or against public intervention in a given policy field but – in case of such a need – also to reach a decision in these issues.
[43] These arguments in favour of a considerable extension of Union competences are surely rather functionalistic. However such an extension would be the decisive step towards a real political union.

(b) Immigration and internal security
[44] The need for common action in the field of immigration and internal security has been recognised for many years now and is today, as matter of principle, not seriously questioned.
[45] However, it has been in this field in particular that national administrators have opposed further integration, arguing that the policy fields concerned were to be considered as constituting the very heart of national sovereignity. At best, they accepted various forms of cooperation and it took many years until politicians discovered (and, to lesser extent, accepted) that the Union should be vested with powers allowing it to effectively act in this field.

(c) External relations
[46] In an ‘internationalised' and ‘globalised' world the effective use of internal competences in given policy fields requires also the capacity to use them externally at international level. This ‘functional link' has been recognised by the European Court of Justice quite early. However, Member States often sought to reserve to themselves the external powers in fields which have been internally attributed to the Union. By separating the Union's internal and external capacities the Member States have gained a position from which they can indirectly conserve those powers which, in principle, already belong to the Union.
[47] This situation is, however, not acceptable. The ‘minimum solution' required for this issue is that the Union's internal problems on power distribution are exclusively dealt with ‘inside' but not at the ‘external' level. This could be reached by a mechansim which makes sure that one single representative is vested with a clear mandate to act externally.(36) The best solution would be to formally accept a parallelism of the Union's internal and external competences.

2. How should the Union act? – Or: extending and improving the ‘Community method'

[48] History of European integration has demonstrated that the use of the so-called ‘Community method' – characterised by the triangle of Commission, Council and EP policed by the Court of Justice to which also individuals have access – is be preferential in comparison to the *intergovernmental* method. In fact, the latter ascertains a lower level of effectiveness, democratic and judicial control. In spite of many shortcomings and re-emerging scepticism towards the ‘Community method' it appears that there does not exist a better one which would allow a proper organisation of a supranational polity. One has therefore to acknowledge that the ‘Community method' should be extended to the largest extent possible.
[49] This is not to say that the ‘Community method' could not be improved in order to grant an enhanced democratic and judicial control and more effectiveness of the decisionmaking process. Only three points will be made here:
[50] As to improve a better democratic control, two already ongoing developments should be re-enforced: first, the extension of the EP's powers in the legislative process (co-decision) and, second, the accountability of (a better organised) Commission towards the EP.
[51] Enhancing the rule of law requires that Member States abandon their scepticism towards the Court of Justice which they manifested when they seriously limited the Court's competences in the field of asylum and immigration policy (Title IV EC Treaty inserted by the Treaty of Amsterdam) at the expense of the individuals which are concerned by Community acts adopted in this matters.
[52] Improving the effectiveness of the decisionmaking process is primarily concerned with the question as to which extent the unanimity rule within the Council should be preserved. This rule confers a veto power to each individual Member State. The main effect of this veto power is to block Community action in important policy fields or, at best, to make the decisionmaking process rather burdensome as the ‘blocking power' greatly contributes to the phenomenon of the so-called ‘package deals'. Many if not all insiders to the EU voting system consider this situation as already being inacceptable in light of the Union's present structure. Most observers, however, agree that an enlarged Union would encounter serious difficulties if unanimity voting was not at least ‘softened'. The still rather new and recently reformed mechanism of *‘closer cooperation'* offers a kind of ‘emergency valve'. While it may be rather helpful in some cases (37) its use should be facilitated even further.(38) However, this will not be sufficient in an enlarged Union and it would be therefore preferable to abandon the unanimity rule and to generalise the qualified majority rule which (in particular in its post-Nice version) protects sufficiently the ‘minorities' within the Council.

3. Conclusion

[53] Elaborating a more radical reform of the present European constitution should take into account the tasks which the Union should fulfill in the future which concern most prominently the field of general economic policies complementing the Internal Market and Monetary Union and the field of immigration and internal security. All internal

Union competences should be coupled with (at least representative) external powers. With regard to the necessary instruments herefore, one has to prescibe the traditional ‘medicine' which is called ‘Community method' as it appears that there does not exist a valuable alternative. This method must, however, be improved substantially. In particular, it would be necessary to improve the Commission's independence from the Council, to extend the EP's legislative powers and the material scope of the Court's competences and, last not least, to eliminate unanimity voting within the Council.

D. Making a new Constitution for Europe – or: organising a ‘legal revolution'

[54] Finally we would like to add some remarks with regard to the different ways which could be followed in order to reform the present or even to elaborate a new European constitution. In substance, this questions concerns the procedures which are already available for the elaboration and the adoption of a future European constitution.

1. The limits of the present Treaty amending procedure

[55] The present Treaty changing rules are characterised by the classical intergovernmental method since any amendment requires both an unanimous decision of the representatives of all Member States within an Intergovernmental Conference and ratification of this decision by all Member States (Article 48 EU Treaty). (39)
[56] The consequences of these procedural requirements – which are in fact more rigid than the ‘rules of change' of both federal constitutions and those known in international law – have been felt during the three IGCs which took place in the last decade. Any attempt at fueling progress towards enhanced integration at EU level was thus dependent upon the political will of the ‘less integrationist' Member States. This explains why many projects – *e.g.* the extension of qualified majority voting within the Council or the extension of the EC's external competence in the field of commercial policy – have not been entirely realised or were not subscribed by all Member States (e.g. EMU or the partial ‘communitarisation' of immigration and asylum policies). This intergovernmental constitution-making has greatly contributed to a rather user-un-friendly style of the present European constitution and to widespread confusion about scope and extent of the Union's powers. Dissatisfaction with the Treaty amendment procedures reached a new degree after the Nice Summit in December 2001 where national governments and administrations made such an extensive use of their individual veto power ‘empoisoning', hence the negotiation climate.
[57] It appears, hence, to be rather unlikely that even a modest reform of the EU Treaties would be realised by means of this traditional Treaty amending procedure.

2. Alternatives

[58] It is therefore not at all surprising that many today are under the impression that ‘intergovernmental constitution-making' belongs to a yesterday, especially as the formula of a ‘Verfassungskonvent' has recently been used at EU level in order to elaborate the Charter of Fundamental Rights. Moreover, it has been proposed – most recently by the President of the German Federal Constitutional Court (sic!)(40) – to submit the project of a new constitution to referenda to be held in all Member States.
[59] Such proposals have three fundamental merits. First, they would allow to stimulate a wide public debate on the shape of the future European constitution. Second, they would allow to elaborate a more coherent (and technically ‘better') framework as the existing one which is the result of subsequent diplomatic bargains dominated by the different national executives. Third, they would provide the Union with a great additional input of democratic legitmacy. In our view, one should therefore try to realise these proposals.
[60] However, one should also be aware that these proposals go beyond the present state of law, even if Declaration No. 23 on the future of the Union appears to some as being a first step towards a new Treaty revision procedure. Realising the new procedures would therefore require a previous ‘classical' Treaty amendment. An alternative – and, in our view, better – solution would be a kind of ‘pop-up-procedure' which could work in the following manner: first, a ‘convent' would elaborate a reform of the Treaties which would then be formally adopted by a traditional IGC in 2004, while Member States would proceed to the necessary constitutional changes in order to submit the reform project – which should also contain a revision and further flexibilisation of the present amendment procedures – to a referendum for ratification.
[61] Given the fact that enlargement negotiations are expected to be concluded in the next years and that at least some candidate countries will have to adhere to the future Union, it would also be necessary to invite representatives from the candidate countries to participate as observators in the ‘convent'.

3. The consequence: ‘kicking out' the ‘outs'

[62] It is, however, possible that the revision process will be blocked at two levels since the amendments proposed by a ‘convent' may be refused by one or more of the Member States' representatives within the IGC or of the populations in the subsequent referendum.

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[63] From a strictly legal point of view, the amendment procedure would then have failed and the changes would not enter into force at all.
[64] This consequence has, however, so far never been accepted, as demonstrated by the ‘Danish case' of 1992 and the present ‘Irish case', where the populations were/are given a ‘second chance'. We would argue that such a consequence would be even more unacceptable in case of a project elaborated by a ‘convent' composed by members of national and the European Parliaments, even if it would have - in some particular sensitive points – come about not by unanimity but by a qualified or re-enforced majority. This would be the moment to apply the ‘revolutionary option' which is inherent in all ‘constitution-building' as it reverses normally existing legal orders.
[65] This would amount to consider that a new Union has been created which replaces the existing one. The rights of the ‘outs' would then to be preserved as far as possible by one or several ‘association agreements' for which the EEA agreement may serve as blueprint. Such agreements should also contain the option to subsequently join the new Union, provided that the interested State fulfils the necessary requirements by accepting the new European ‘contrat social'.

4. Conclusion

[66] It appears that the present Treaty's revision procedure is too rigid in order to allow the adoption of a more substanive reform or even of a ‘new' European constitution. Even if it appears to be utopical at the present state of affairs it may be useful to indicate that one can imagine a legally admissible procedure which could be followed in order to allow an elaboration of a future European constitution by an essentially parlamentarian ‘convent' and its adoption by the peoples of the Member States. This way it would be possible to enter into a true constitution-making process which would provoke and venture public debate on the legitimity of the future Union. Such a process would then also provide for the sufficient legitimacy to leave ‘non-integrationist' Member States before the door until they decide to join the new and more integrated Union.

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(1) Speech of Foreign Minister J. Fischer at the European Parliament on 12 January 1999, see Bulletin der Bundesregierung 2/1999, 9.
(2) *See, e.g.* W. Hoyer, ‘Europa braucht eine Verfassung', Die Welt (11 February 1999); E. Teufel, ‘Regierungserklärung zu aktuellen Perspektiven der Europapolitik', Plenarprotokoll 12/65, 5109 at 5111 (28 April 1999); W. Schäuble/K. Lamers, Europa braucht einen Verfassungsvertrag, FAZ of 4 May 1999; J. Rau, Die Quelle der Legitimation deutlich machen. Eine föderale Verfassung für Europa, FAZ of 4 November 1999; K. Kinkel, ‘Eine Verfassung tut not', Rheinischer Merkur of 24 December 1999 – Rejecting the idea of a constitution for Europe: E. Stoiber, ‘Braucht Europa eine Verfassung?', Die Welt of 26 January 1999 and R. Scholz, ‘Zu früh für eine Verfassung', Die Welt of 19 February 1999.
(3) *See* C. Dorau/P. Jacobi, ‘The Debate over a "European Constitution": Is it Solely a German Concern?', 6 (2000) European Public Law 413-428.
(4) This became particulary clear in the case of the French Prime Minister when he tried, during several months, to ignore the matter.
(5) *See e.g.* the Internet site ‘Futurum' at <http://www.eiz-niedersachsen.de/>. This site contained in August 2001 not only 27 contributions from Germany but also contributions from Belgium (7), France (5), Italy, The Netherlands, Austria and Portugal (each 3), from Sweden, the UK, Greece (each 2), Spain, Ireland (each 1). One can find there also statements from some candidate countries (as from the Czech Republic, Poland, Cyprus, Hungary, Slovenia, Slovakia, Lituania and Lettland).
(6) Case 294/83 Les Verts/Parliament [1986] ECR 1339 at 23. This formula has become well-established case law, see Case C-2/88 Zwartveld [1990] ECR I-3365 at 16; Opinion 1/91 EEA I [1991] ECR I-6079 at 21 (‘the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law').
(7) *See* point 3 of the Declaration: ‘… the Conference calls for a deeper and wider debate about the future of the Union. IN 2001, the Swedish and the Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political economic and university circles, representatives of civil society, etc. The candidate states will be associated with this process in ways to be defined.'
(8) 22 BVerfGE 293 at 296.
(9) Most prominently two ex-judges of the German Federal Constitutional Court, P. Kirchhof (most recently in an article published in the Handelsblatt of 8 August 2001) and D. Grimm (see, e.g. ‘Does Europe need a constitution?'

(1995) European Law Journal 282 et seq.); see also C. Koenig, 'Ist die Europäische Union verfassungsfähig?', (1998) Die Öffentliche Verwaltung 268 et seq.
(10) *See* on this point *e.g.* C. Dorau/P. Jacobi, 'The Debate over a "European Constitution": Is it Solely a German Concern?', 6 (2000) European Public Law, l.c.
(11) *See* hereto also M. Zuleeg's contribution in 2 Germ. L. J. (2001), number 14, 1 September 2001.
(12) They have successfully made 'prophylactic use' of the veto power, which Article 23 BL confers to the *Bundesrat* at national level in the ratification process, which all Treaty amendments have to stand pursuant to Art. 48 EU. On the influence the Länder had on the previous IGC 1996/97 *see* K. H. Goetz, 'Integration Policy in a Europeanised State: Germany and the Intergovernmental Conference', 3 (1996) *Journal of European Public Policy* 40 et seq. and, most recently C. Mazzucelli, 'Much Ado about Amsterdam: CDU/CSU Politics, Länder Influence and EU Treaty Reform', 2 Germ. L. J. (2001), number 14, 1 September 2001 (http://www.germanlawjournal.com).
(13) In fact, it appears that the *Länder's* aim was essentially about avoiding the application of the Community's competition and state aid rules in fields covered by their 'public economy' (Daseinsvorsorge) and to get back the competence in the field of regional policy. See the debate in the *Bundesrat* of 4 February 2000 (Stenographischer Bericht der 747. Bundesratssitzung at 1 et seq.) and Resolutions of 4 February 2000 (Bundesrats-Drucksache 61/00, I.2.) and 10 November 2000 (Bundesrats-Drucksache 680/00). See also the Resolution of the *Länder's* Prime Ministers of 24/25 March 2000 (Europa-Archiv Nr. 165, Mai 2000, II.2.).
(14) Some require, *e.g.*, the repealment of Articles 95 and 308 EC (see for such a proposal W. Clement, Prime Minister of Nordrhein-Westfalen, in a speech delivered on 12 February 2001 at the 'Forum Constitutionis Europae' of the Walter Hallstein Institute [Humboldt University Berlin], availaible under <http://www.nrw.de/aktuell/reden/mskr20010212_f.htm>). However, no valuable proposals have been made in order to cope with the negative consequences such a repealment would imply with respect to the functioning of the internal market and which, we submit, even Mr Clement would not accept.
(15) *See e.g.* the proposals made by I. Pernice, 'The European Constitution' (Paper presented at the 16th Sinclair House Talks in Bad-Homburg, May 2001).
(16) See on this the Report from the European University Institute on the reorganisation of the European Treaties< http://www.iue.it/RSC/Treaties.html >
(17) *See* for a comparative analysis D. Hanf, Bundesstaat ohne Bundesrat? (Nomos, Baden-Baden 1999).
(18) Examples are *e.g.* Arts. 72 (2) and 106 (4) BL in their original version ('Einheitlichkeit der Lebensverhältnisse') or the 'interstate-commerce-clause' of the US-Constitution.
(19) '[E]stablish[ing] … a more precise delimitation' appears to exclude a renationalisation of EC competences.
(20) For an account of this 'dialogue' *see e.g.* D. Hanf, 'Le jugement de la Cour constitutionnelle fédérale allemande sur la constitutionnalité du Traité de Maastricht. Un nouveau chapitre des relations entre le droit communautaire et le droit national', (1994) *Revue trimestrielle de droit européen* 391 et seq. (with references).
(21) BVerfG, 2 BvR 1210/98, EuGRZ 2000, 175 et seq. (Alcan) and BVerfG 2 BvL 1/97, EuGRZ 2000, 328 et seq. (Banana).
(22) *See e.g.* another former judge at the Federal Constitutional Court, E.W: Böckenförde, 'Welchen Weg geht Europa?' (Siemens Stiftung, Munich 1997).
(23) On this *see* the convincing study of A. Beierwaltes, Sprachenvielfalt in der EU – Grenze einer Demokratisierung? (Discussion Paper C 5/1998 of the Centre for European Integration Studies Bonn).
(24) A classical example proving the contrary is Belgium.
(25) A particularly striking example being the German *Länder* who have converted themselves, during the last decade into real 'European players', which also start to cooperate together with 'constitutional regions' of other Member States (*see*: 'Politische Erklärung der konstitutionellen Regionen Bayern, Katalonien, Nordrhein-Westfalen, Salzburg, Schottland, Wallonien und Flandern' of 28 Mai 2001 at <http://www.eiz-niedersachsen.de/cgi-bin/frameset.pl?page=futurum/index.htm&title=EIZ Niedersachsen>).
(26)*E.g.* the various consumer protection associations, NGOs, (as negative but striking example) the recent 'anti-globalisation' manifestations or - why not? - the European Parliament.
(27) J. Habermas, 'Warum braucht Europa eine Verfassung? Nur als politisches Gemeinwesen kann der Kontinent seine in Gefahr geratene Kultur und Lebensform verteidigen', DIE ZEIT of 29 June 2001; *see* the commentary by Felix Arndt, Habermas and the Preservation of European Modernity: Defining the Challenge. For a European Constitution, in: 2 Germ. L. J. (2001), Number 14, 1 September 2001 (http://www.germanlawjournal.com).
(28) Which explains the proposal made recently by I. Pernice (l.c.9 to establish a 'Parliamentary Subsidiarity Committee' composed by members of the national parliaments and the EP.
(29) This is notably the case in the UK and Denmark.
(30) "Für Gefühlsstarke", FAZ of 1 August 2001 (<http://www.gouvernement.lu/gouv/fr/doss/discour/juncker.html>).
(31) *See e.g.* A. von Bogdandy, The Euro is Forcing the Realization of Political Union - and Perhaps a New Community, in: 2 Germ. L. J. (2001), number 14, 1 September 2001 (http://www.germanlawjournal.com), and J. Habermas, l.c. This approach has also been chosen by the French Prime Minister L. Jospin in its Speech of 28 May 2001 (Maison de la Radio, Paris).
(32) This becomes again apparent in the recent ECJ's case law related to the law of social security.
(33) *See*on this J.C. Juncker's speech, l.c.

(34) *See* on this A. von Bogdandy's contribution, *supra* note 31.
(35) Speech of 28 May 2001, l.c.
(36) This applies also to foreign affairs and defense policy. The reader may wonder that no particular reference is made here to this policy field. This is due to our conviction that foreign affairs and defense policy are not necessarily an element of a future political union or a European constitution. On this point *see* the arguments put forward by A. von Bogdandy, *supra* note 31.
(37) On this subject *see* the recent book of B. De Witte/D. Hanf/E. Vos (eds.), The Many Faces of Differentiation in EU Law (Intersentia, Antwerp 2001).
(38) In particular by 'differentiating' not only the Council in case of closer cooperation but also the EP.
(39) *See* the recent study carried out by the European University Institute on the possible reforms of the Treaties' Amendment Procedures at: http://www.iue/RSC/Treaties.html .
(40) *See* Frankfurter Allgemeine Zeitung Nr. 200 (29 August 2001).