

## Heinrich Schneider, The Constitution Debate

**Caption:** In an article published in 2003 in the European Integration online Papers (EIoP), Heinrich Schneider, Emeritus Professor of Political Science at the University of Vienna, analyses the various stages of European constitutional policy.

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## Heinrich Schneider, 'The Constitution Debate'

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### Preliminary Remarks

This paper consists of sections of a more extensive paper, which is to be published in its entirety in German. It deals with certain questions and problems of the constitutionalization of the European Union which did not receive very much attention from the 'Convention on the Future of Europe' and from the observers of that Convention's work, but which, nevertheless, may be relevant whenever the results of the Convention's work are assessed and evaluated.

The paper mainly deals with 'background' problems associated with traditions of political thought in general and with basic understandings of European integration in particular. What the author had in mind and which considerations lead to the intention to focus on the issues of this paper is explained in the first section, entitled 'Objective and Approach of the Paper', which follows immediately on from these preliminary remarks. The problems and questions that are approached in the complete, unabridged paper will be explained in the following lines of this preliminary section.

A section entitled 'Continuities and Innovations in the Constitution Debate', is also included in this paper. Another section, dealing with 'Statics and Dynamics in the Constitutional Conception', represents the final part of the present contribution.

Several additional sections of the unabridged version of the paper are not included here. One of them examines the premises and criteria by which the questions of the need and capacity for a constitution can be approved or rejected. The fact that the Convention on the Future of Europe has, with few reservations, based its work on a positive response to these questions does not make reflections about these questions redundant. It could be that the relatively widespread agreement with the idea and need for a constitution (or rather a 'constitutional treaty') is on weak ground because a relatively unassuming model of 'constitution' seems to have been tacitly agreed to (or generally accepted). If this understanding wins through - possibly in the Intergovernmental Conference as well - and if it actually results in a constitutional treaty being concluded, there is a good chance that the corresponding ideas will also win through, with the result that alternative viewpoints will become marginalized. It is equally possible, however, that the constitution is endowed with breaking points on the basis of conflicting interpretations. It is therefore advisable to contemplate the relevant dangers in order to be able to ascertain the possibilities of dealing with them.

In yet another section, various understandings of a European constitution are examined from the aspect of whether the accent should be more on the specification of guidelines for the political process and of programme perspectives or more on the strict legal force of the constitutional provisions. It would seem that it is possible to identify different views regarding this alternative, which underlie several proposals and drafts of a constitutional treaty. The connection between this dimension of different understandings and the first steps towards an 'ontology of the constitutions' is addressed (continuing the approach undertaken decades ago by Karl Lowenstein).

In the following section of the paper, attention is devoted to certain political and cultural conditions required for a proper functioning of a European constitution. This is done so on the basis of the hypothesis that it is the constitutional loyalty of the political forces which makes a document described or intended as a constitution into a 'real' constitution.

In this regard, various ideas are also examined in relation to the legitimacy requirements and criteria for the authority exercised by the constitutional agencies, along with the ideas on the need for a 'European identity', especially the possible qualities as well as the conditions and strategies for creating and stabilizing a transnational collective identity for all the Union's citizens. The hope here is that this in turn will allow consequences to be derived for the design of a European constitution.

The final section of the unabridged paper consists in an effort to evaluate the rather historical or general analyses and deliberations of the preceding sections through providing a view of the constitutional policy conducted by the Convention, including contributions submitted to the Convention from outside as comments on its work. This was approached by way of a comparative analysis of different drafts and proposals that have been presented with the intention of bringing about a constitutional treaty. Not only does such an analysis present a particular view of certain disputed alternatives, inter alia regarding the 'nature' of the Union, the architecture of the constitution, or the system of governance provided by the drafts looked at. The exercise may also allow a, hopefully, well-founded assessment to be made of the draft that is to be presented by the Presidency of the Convention in the spring of 2003 and of the final draft that is going to be recommended by the Convention - including the question of whether manifest and latent inconsistencies and potential risks of breaks can be identified, and what might be done to overcome them.

## **1 Objective and Approach of the Paper**

### **1.A The "Elucidation of What is Meant" (Max Weber)**

It is not the intention of this paper - of which original version only certain sections are presented here - to give an historical analysis or even a chronology of the discussion on a constitution for the European Union (formerly the European Community) which has led up to the current work of the, 'Convention on the Future of Europe'. It will not be introducing and commenting upon typical or otherwise interesting constitutional concepts from former or more recent times. Nor is the object of the exercise to suggest interpretations of this or that past or current contribution to the European constitution debate and then to offer value judgements (with the relevant explanations) of the conclusiveness, creativity or political advisability of the contribution.

There will be no marks awarded to this or that position represented in academic debate, say as to whether or not, from a legal perspective, the actually existing European Union already has a constitution deserving of the name, or whether or not it is in need of such a constitution. Similarly, the pertinence (or irrelevance) of this or that thesis, teaching or recommendation drawn from economic or political science will not be the focus of attention.

The aim is more modest: it is an attempt to ensure - by simple hermeneutics - that misunderstandings, inappropriate conceptual constrictions and simplifications in the discourse can be either avoided or recognized - and, perhaps, finally resolved. (1)

Terminological understanding has become something of a special problem in our societies. European policy and constitutional policy discussions also take place under conditions that affect the communication and interaction of modern societies generally and fundamentally. In all differentiated societies there is not only organized social and political pluralism, but also more or less differentiated cooperation, concurrence and conflict of political worldviews and the narrower scientific communities corresponding to them - regardless of the fact that a certain stock of unifying meanings must be common to the members of a society if there is to be any effective coexistence at all. To a certain extent such a constellation has an analogy in our field of discourse, too.

In view of this, one may embark on a task which Max Weber regarded as a legitimate, important and practical one for the social sciences and which he termed the 'elucidation of what is meant' (by discourse participants and political actors).(2) It is to the fulfilment of this task that this paper is dedicated.

Concepts and propositions that play a role in the constitution debate are to be examined (and analysed) for their meaning (and any possible 'deeper meaning' they might have). This could prove fruitful because not only academic explanations but also constitutional-policy related theories and arguments are regularly embedded in a semantic context that is never understood in the same way by all the participants in the debate. Much less is their thought and speech based in the same unreflecting and, as it were, taken-for-granted way as is the case for the particular speaker or author.

The semantic context determining the meaning in each instance can be due to very different determining factors:

- to the specific viewpoint of a scientific discipline, school of thought, analytical approach or research method, for example;
- to the peculiarity of a pre-scientific political way of thinking: in our context especially, to the specific factor of a 'basic European-policy understanding', which in turn is derived from a fundamental political understanding and 'political worldview';(3)
- or the political worldview itself may depend on an ideological tradition or contemporary current of thought,(4) be simultaneously shaped by the processing of experiences and legacies from social and constitutional history, or itself shape the understanding of the problem obtaining in a national or social milieu.

Hence the semantic context that defines the significance (the importance and the 'deeper meaning') of a theoretical or political proposition in the constitution debate for its authors or advocates does not have to be familiar to other participants in the debate. This may cause the various parties to argue at cross purposes or make it difficult to convey one's own concerns intelligibly to one's partners or opponents, thereby making agreement or compromise harder to achieve. In such cases, to offer to assist in the understanding is not perhaps such a futile ambition.(5) This applies both to academic discourse and to political debates and editorial endeavours.

## **1.B Differences of Meanings in the Contexts of Scholarly Understanding**

Scholarly analyses typically involve clarifying and evaluating accuracy or truth claims.

Occasionally, the controversy can lead to a conclusive result, which is recognized and thus accepted by the participants. This may be identical with one of the original, irreconcilable propositions, with the alternatives, on this occasion, being rejected (or, at best, conclusively disproved). However, the discussion may also produce a result that leaves all the other hypotheses originally represented behind. Ultimately, it is possible that a plurality of diverging opinions will remain. In this event, we should try to discover the reason or reasons for the continuing disagreement. If someone believes that an interpretation fails to enlighten them and that is why they must reject it, while the advocates of this view have no problem in regarding it as persuasive, then we should investigate this and ask which premises - either unexpressed or only intimated in the current discourse - cause the interpretation concerned to present itself as acceptable or unacceptable, and what the decisive view here is based on.<sup>(6)</sup> This may lead to the systems of scientific theories and, in particular, the terminological fields that underlie them being compared. Whether or not this comparison and contemplation of premises allows the disagreement to be resolved, or whether or not it promotes a better appreciation of the dissenting constellation (derived perhaps from the view that the basic assumptions or 'conceptual approaches' made by the discourse partners on the basis of 'decisionism' or socialization are not communicable) or, indeed, whether or not it generates any other result, need not be determined once and for all from the very outset.

At the same time it is also important that, in various scholarly disciplines, different methods of representation and styles of argumentation are characteristically decisive.

## **1.C Differences in Understanding in the Political Debate**

In the constitution-related discussions of political actors, there may be different features. Such discussions may entail, for instance:

1. agreement on supportable system concepts that are predicated on an elite consensus which cuts across nations and camps and for the sake of which the actors are prepared not only to represent but also to question certain standpoints;
2. the presumably frequent assertion of specific interests and, possibly for that reason, the implementation of 'theories' or configurations of ideas that correspond to these interests;
3. the gaining of acceptance for ideas and concepts that are considered indispensable because of their congruence or affinity with particular interpretations or models (corresponding, for instance, to a national tradition of thought or to one of the doctrines of a likeminded political community) - because it is believed that only in this way can the express approval or positive orientation of the citizens or likeminded persons be secured and constitutional loyalty thereby achieved.

Under such circumstances, constellations of consensus and dissent are more complicated. It may be that a constitutional consensus is regarded in principle as a desirable thing, while perhaps being aspired to only on a superficial level, as it were. Dissenting configurations are in this case possibly concealed by fine-sounding formulae. This may be the consciously adopted strategy of a constitutional-policy committed group vis-a-vis its opponents, but maybe also the object of an 'agreement on the nod' between constitutionally conflicting elites. The aim might be to postpone any renewed commitment to one's temporarily deferred 'actual' intentions until a future date, or the differences in interpretation might be expected to wear away in time (reconciled, as it were, by the new formula) and pass into oblivion as the initially superficial formula agreed

to steadily gains in conclusiveness and attractiveness (possibly even persuasiveness). It is also possible that actors are not really conscious of the superficiality or lack of depth of a jointly elaborated formula, with the result that an agreement is implied which, in reality, is equally shallow. What subsequent constitutional policy and the political life of the thus constituted community will be like if something like this has taken place in the process of drawing up the constitution is another matter.

Every now and then, the concealing in a political discussion of problems with understanding or of differences in interpretation may be quite deliberate for tactical or strategic reasons, while in other cases (or in the same interaction context for other actors) the very opposite approach might be employed, whereby such differences and problems are highlighted. Yet this too should be capable of being exposed or understood, at least by observers and analysts. Not simply, say, to enable a judgement to be made as to the reasonableness of constitutional-policy consensus elements or compromise configurations, but also to allow estimates to be made of the desirability and the potential for success of learning processes that will improve the prospect for constitutional loyalty on the part of the forces involved and thus the outlook for the normative strength of the constitution.

Obviously, constitutional discussions must by no means lead to a substantial or extensive agreement in order to arrive at a temporarily satisfactory conclusion. Such a thing is not normally possible anyway under the conditions created by the involvement of pluralistic interests and convictions. Even 'dilatatory formulaic compromises' can be productive, and in a community that is based on the principle of freedom, controversies are a necessary part of the political process. In actual fact, mutual understanding and intersubjective agreement is precarious and rare, and mere fictions of agreement play a role that should not be overestimated in social existence.<sup>(7)</sup> The 'ideal speech community' is a Utopia, and it is doubtful whether its earthly realization can prove the salvation of humanity and society. Differences of interpretation and misunderstandings can stimulate creative thinking and the productive handling of problems. It is not without reason that occasionally constitutional texts in particular are required to read well, while remaining ambiguous in substance.

All this should be borne in mind with regard to the European constitution debate, and where problems of the type suggested either manifest or suggest themselves, we would do well to advertise and comprehend them. At the same time, we should not attach too much importance to the distinction between 'scientific' and 'political' disputes - nor the distinction between 'primary political language' and scientific language.<sup>(8)</sup> Scholars frequently take the trouble to critically illuminate primary political discourses, or they endeavour to assist political actors in reaching an opinion or judgement. Politics meanwhile avails itself of the scientific advice. This is then included or even closely integrated in the political communication and interaction process. European constitutional policy in particular is not pursued without reference to European jurisprudence, although it can (and should) draw on other disciplines.

### **1.D Encounters of Political, Judicial and Academic Arguments and Judgements**

The situation becomes even more delicate when one has to deal with the direct association or the interrelatedness of political, scientific-analytic (or hermeneutic) and judicial arguments. We might recall this through brief reference to a case study, namely the debate surrounding the Treaty of Maastricht.

After years of 'Euro-sclerosis', the Delors Commission initiated something of a recrudescence around the mid-1950s. Initially the 'completion of the single market' was proclaimed; it was soon clear to the conversant, however, that the strategy was calculated to go far beyond this interim objective, that the project of an economic and monetary union was on the agenda and, finally, that the constitution of the Community was to be federal in design. After a brilliant start to this policy, which gained fresh momentum through a series of fateful developments in the political context (such as the East-West political turnabout, the fall of the Berlin Wall and subsequent German reunification), new forces of inhibition and restraint also surfaced, the result being that, in the end, the Treaty of Maastricht only partly conformed to the aim of the project.<sup>(9)</sup> All the same, the Union Treaty was liable to take the 'ever closer union among the peoples of Europe' to a new stage.

In Germany, the Union project triggered an intense political and scientific debate. One central concern of the economists was the prospect and shape of monetary union: Would the loss of the Deutschmark and the currency merger with countries notoriously prone to inflation be but the first step on a downhill slope?(10) The opinions of the legal experts were also divided. Authors who for years had been deeply involved with the Community and with the development of its legal system, and had been kindly disposed towards integration during this time, tended to be moderate in their assessment - to the effect that the Treaty was 'essentially nothing more than the normal continuation of the integration process, as it has been developing for decades in Western Europe'.(11) In no way, they believed, did it imply a 'qualitative leap', but was 'miles apart from a European federal state or any other form of state of the Union'.(12) However, other voices expressed an altogether different view: the Union Treaty would bring about the creation of a federal state or at least set in train an irreversible process culminating in this. There was no escaping the fact, these authors believed,(13) while others maintained that a referendum was imperative, which the German Basic Law omitted to provide for where regular changes to the constitution were concerned. (14) Opponents of the project lodged complaints of unconstitutionality with the Federal Constitutional Court at Karlsruhe: their fundamental rights or political rights on a par with their fundamental rights had been impaired through the act sanctioning the Treaty and the associated constitutional amendments (in particular the insertion into the Basic Law of the new Art. 23). (15) The Constitutional Court dismissed the claims of the appellants, especially after the Federal Government had adopted a clearly defensive line of argumentation in the proceedings before the Constitutional Court, emphasizing the point that the Member States would remain 'Masters of the Treaties'- thereby ruling out the possibility of any transformation into a federal state. The judges ruled that the Union Treaty established a ' Staatenverbund'(16) for the realization of an ever closer union among the - state-organized -peoples of Europe, not a state based on a European people'. With any continuation of the unification process, they believed, it was vital 'that the democratic foundations of the Union are developed in step with integration and... [that] in the Member States a living democracy is preserved.' Any further extension of the powers must have limits because (and as long as) the peoples of Europe impart democratic legitimacy to the common policy via the national parliaments.

The judgement(17) was received with relief by the German Federal Government and the majority in the Bundestag (and certainly by the European public) because the way was now free for the Union Treaty to come into force. Certainly, the Court of the day prevented the Union project from foundering, albeit by means of a very laborious state; an action of this nature was only inadmissible as long as there was 'still' no European people(18) - or, to put this in less 'statist' (*étatist*) terms, as long as the transnational European public was not yet sufficiently developed to act as an infrastructural basis for overall parliamentary representation of the Union's citizens. Admittedly, this was an opinion that differed considerably from that of Paul Kirchhof (member of the Court and in charge of drafting the judgement); Kirchhof in fact did not consider the foundation of a European federal state to be (simply) premature, but rather un-European in essence, which is why it had to be prevented in future. (19) This suggests that the wording of judgements themselves represent delicate compromises.

All this suggests that the consciousness of the lawyers (and presumably that of the other intellectual elites) was characterized by a very striking concurrence, even conflict, of very different basic European-policy understandings - as it were, below the level at which it was possible to estimate fairly conclusively the present state of the integration system, and also below the level of the legal and political interpretations (and maybe even the interpretations of the philosophy of history or the state) which were involved in the debates of the constitutional judges (in the back of their minds, so to speak), when they were arguing over a judgement on the Maastricht Treaty.

Since then, politics along with the academic 'community' has learned to live with this judgement, although all well-informed and sensitive contemporaries ought to be conscious of the delicate character of Karlsruhe's attempts to reconcile the opposing beliefs and assessments. This character shows itself in the fact that the various fundamental positions still confront each other, for example when discussions arise over the requirements, opportunities and problems of further democratizing the European Union, or over the feasibility or even the necessity of constitutionalizing the EU, and similar questions. (20) Some of these positions will be looked at in more detail in the following sections of this paper.

However, quite apart from this, the debate on the Maastricht project deserves a somewhat more detailed analysis with respect to the 'history of consciousness'. This should incorporate in its material base the legal disputes; however, not with the aim of assessing the contributions as regards their decisiveness or the weight they carry in the legal debate, but rather as raw data for the reconstruction of the European 'Zeitgeist'.

### **I.E Analysis, Scholarly Judgement and "Zeitgeist"**

Presumably, a more precise examination of the 'European policy Zeitgeist' and its development would be an undertaking from which both science and politics might stand to benefit, at least as regards the prospect of critically ascertaining their respective basic positions and their embedding in an ideal landscape (as one would have said in the past: in a force field of the currently effective 'objective mind').(21) The task is by no means an easy one, however. Even if one only wished to concentrate on a single country (which would be a problem methodologically in view of transnational communication in politics, science and the mass media), one would have to consider the peculiarities of the ways of seeing, the styles of thinking and the traditions of the particular 'epistemic sub-communities'. In particular, one would have to try and do justice to the 'pluralistic' structure of the ideal force field, and possibly its dialectic association with political and social power constellations. As already mentioned, in modern societies, politics take place as an interaction between exponents and holders not only of different interests but also of different political worldviews. At the same time, the field of scholarly or scientific discourse - relatively disconnected from the political force field - is also determined by a concurrence and, sometimes, a conflict of disparate perspectives. Hence the particular constellation of relations and forces will change.

The dynamics of these changes, admittedly, does not conform to the schema that Thomas Kuhn produced for the natural sciences:(22) with 'normal science' epochs (in which a certain paradigm will tend to pervade research and teaching) followed by 'scientific revolutions' (which replace a hitherto dominant paradigm with a new one). 'Normal' is, rather, the more or less peaceful coexistence of several paradigms - with consensus or conflict on the part of their respective supporters, with attempts to gain hegemony or dominance, with efforts to achieve mediation and synthesis, but also with far-reaching changes in relative influence, both in the field of scientific communication and where the impact on public opinion is concerned. No doubt this is also connected to the fact that the academic analysis of European policy issues is not divorced from politics itself- not simply to the extent that current problems in politics stimulate the scientific work (insofar as this serves to advise politics), but also in that the Zeitgeist also impacts on the attractiveness of certain perspectives and the paradigms behind them and, through this, on the power constellation of different scientific 'directions' in the academic arena. We can briefly illustrate this too from the example of a confrontation.

In the debate on the realization of the 'Maastricht project', there were in Germany (though, no doubt, in the other Member States too) only few, if any, renowned politicians or legal scholars who declared their support for a European federal state, if one ignores their deliberations on the possibilities of a distant future. In the debate on the Union Treaty, some of them warned about the danger of a transformation of the rather confederal existing community into a sovereign federal state (be it through the enactment of the Treaty itself,(23) be it through the creation of the Union setting in motion a dynamic leading to the creation of a state),(24) and many additional arguments were introduced to corroborate this danger.(25) Others endeavoured to prove this fear unfounded, by referring to the fact for example - as already mentioned - that the Member States would remain as before, as 'Masters of the Treaties'. What was barely disputed in the discussion of the time was the detail that although the original constitutional provision, namely Art. 24 of the Basic Law, which arranged a 'transfer of sovereign rights' to intergovernmental bodies, was supposed to facilitate Germany's involvement in international organizations and supranational communities, it omitted to deal with integration in a possible European Federation. There are different ways of looking at this: either the requirement provided by the said article for a simple act of legislation was insufficient if considerable complexes of state competences, not just individual sovereign rights, were to be 'transferred',(26) or an integration of this type might not be permissible at all because this would forfeit the state quality of the Federal Republic.

If one compares these rather dominant interpretations found in the Maastricht debate with the general 'state



of mind' as to European policy in the early days of the Federal Republic, then one is struck by a considerable change in the *Zeitgeist*. This applies to the interpretations of how the 'transfer of sovereign powers' might be understood, the new Article 23 incorporated into the Basic Law on the occasion of the imminent creation of the EU being one such interpretation. The Federal Constitutional Court spoke in the Maastricht judgement about performing a public duty through a 'Staatenverbund' (confederation-plus) of democratic states. (27) About the ensuing exercise of sovereign powers through this 'confederation-plus'(28) and about 'relocating the exercise of sovereign rights';(29) there was no talk of assigning these rights, however. At the same time, the Court declared that the Member States had established the EU 'in order to discharge a part of their duties jointly and, in this respect, exercise their sovereignty jointly' .(30) By contrast, it was stressed in the 1950s that the 'transfer' was 'not just a simple 'entrusting', or 'conceding' of sovereign rights' to 'intergovernmental bodies', but rather an 'assignment', which was not compatible with the conventional idea of the indivisibility of the state authority (and of the resulting non-disposability of sovereign rights).(31) What is more, the term 'intergovernmental organizations' (to which the 'sovereign rights' were to be transferred pursuant to Article 24 Para.1 of the Basic Law) was understood to mean pure and simply that 'non-domestic organizations' were involved - among them not only 'international' institutions or organizations of an internationally legal character in the conventional sense, but also 'supranational' ones.(32) These were attested to at the time by respected legal scholars that their fundamental legal order was to be seen as a constitution, although they were not federal states (even if their creation might have been with the intention of working towards a European federal state).(33)

The former interpretations of legal scholars recalled here were not plucked out of thin air. The fact that Ulrich Scheuner, for example, described the European Communities at the time (i.e. the 1960s) as 'pre-federal' structures(34) was based on very unequivocal political declarations of intent on the part of the initiators and promoters of integration politics: Jean Monnet had explicitly stipulated in the concept for the first supranational integrated community that this should be a foundation stone and a first step towards a 'federation'.(35) In the EDC Treaty of 27 May 1952, the development of the institutional system was explicitly provided for in such a way that it would ultimately be realized in a political community of a federal or confederate character. (36) The constitutional opportunities and the related criteria were also regarded quite differently then than they were at the time of the controversy surrounding the 'Maastricht project'. The telling evidence for this is no doubt the resolution of the German Bundestag of 26 July 1950 passed virtually unanimously (against only four communist votes) in favour of a 'European federal pact', which would create a 'supranational federal authority', which in turn would be 'based on general, immediate and free elections and enjoy legislative, executive and judicial competences. '(37) Remarkably, the resolution stipulated expressly that the Preamble and Article 24 of the Basic Law should 'provide for' - not merely permit - a federal pact of this nature, not to mention that such a measure might not be covered by Article 24. In the light of this, it was not surprising that in the 1950'ies the view was represented that the Basic Law permits the self-integration of the Federal Republic even in a European federal state. (38)

Both the fundamental interpretations of statehood and the concrete wordings of the Basic Law were therefore seen at the time by key representatives of the doctrine quite differently than they are today. It was not that the academic teachers - in keeping with the spirit of the times - assessed the political opportunities for establishing a federal state in 1992 very differently than they did in 1952 or even 1962, rather that changes in consciousness in the elite and in public opinion determined the jurisprudential view of the problem or, at any rate, affected people's inclination to allow themselves to be influenced by this or that theoretical paradigm. The legal discussion of the 1950s reflected the European policy *Zeitgeist* of its day in an apparently similarly conspicuous way to the manner in which the academic opinions prevalent at the time of the Maastricht controversy were determined by the European policy *Zeitgeist* of the early 1990s - when the integration tendency had retreated significantly in public opinion,(39) when the reunification of Germany had led to a renaissance in the fascination with national identity,(40) and when even the most prominent advocates of the 'United States of Europe' distanced themselves from this slogan.(41)

It is therefore moot to regard the course of the scholarly discussion, in particular the question of the appropriate characterization of the integrated communities and the EU, with its focus on the problems of their constitutionalization, as an 'advance in understanding'. Likewise, it would be out of place to consider the earlier explanations 'naive' and less thought out, as if it was not until later that more appropriate

definitions of analyses were arrived at - as if one had initially conversed on the basis of certain prejudices and as a result of an undifferentiated way of viewing and discussing on the EC as a 'pre-federal' structure, and had only come to a more accurate view of the EU/EC as time progressed.

Clearly, it cannot be denied that the politically crucial ideas and viewpoints shaping public opinion (and their constellation of relations, including their relative influence) were affected, and are still being affected, by scientific discourses and by the political and public reception of these discourses and the 'theories' they present.(42)

### **1.F Subjective and Contingent Selection of Topics and Issues**

It is in the context of such observations that the focus and purpose of this paper has been chosen, though it can hardly (let alone adequately) do justice to the real complexity of the object of enquiry. The choice of the concepts and theories made the subject of the following sections - of which only one can be presented here - will seem arbitrary; yet there is a danger of losing all sense of proportion. Quite properly, the manner in which the concepts and theories selected are argued about is determined by the point of view (and prejudice) of the author. Fundamentally, elements of the debate actually conducted ought to be reflected at a meta-level. In contrast to such a demanding venture, however, much of what follows is generally familiar territory and possibly sounds trivial. Whether this paper is worthwhile and suited to achieving what is desired, only the discussion will show. Conceivably, the project itself may not seem very interesting. It may even be that the proposal is considered over-subtle and superfluous - especially if one compares the arguments that follow with the impressions that come to mind regarding the current work of the Convention: apparently, that here, in fact, theories and arguments are presented and received apparently in a very sturdy way, with not too much regard to ambiguities and hidden depths.

It is quite conceivable that a constitution concept will emerge from these discussions which at first sight appears virtually consistent (or perhaps only slightly contradictory), practicable and even quite capable of meeting with broad acceptance. It is even possible that such a construct, although it originally had the character of a cobbled-together combination of heterogeneous elements, will be perceived in time as a definitive conceptual architecture; subsequent rationalizations, especially of contingent and strained institutional arrangements, are not unusual.(43) Perhaps European constitutional policy is going to disregard, maybe in an aloof, uncaring and smug manner, and even finally successfully, reflections like the ones entered into here. Yet this is by no means certain. It is perhaps better to make the attempt to elucidate some of the ambiguities of the constitutional debate and then recognize that this was surplus to requirements - than to refrain from making it at all and realize at some stage that perhaps it should have been attempted to begin with.

### **1.G The Interrelation between Political Thought and Political Interests**

As I stated earlier, this paper is concerned to recall and 'illuminate' complexes of ideas, ways of thinking and European-policy worldviews, the understanding of which can be useful for the appreciation and productive development of the European constitution debate. The author is not intent on 'explaining' certain constitutional policy attitudes, standpoints and action perspectives (or general European policy attitudes and perspectives relevant to constitutional policy). He is not interested in investigating, for example, the question of how certain negotiating positions and strategies come about from the interplay of basic European policy conceptions (together with the 'theoretical' convictions associated with these) and of concrete interests or situation-specific decision coercions.(44) Hence, no reference is made to how, in the process of forming political opinions or preparing decisions, interpretations, basic conceptions and interest perceptions interact. (45)

Nonetheless, in view of the connection between political thought and political action (Karl Mannheim would have said: in view of the dependence of consciousness on being), reference to interest constellations cannot be excluded from the outset.

## **2 Continuities and Innovations in the Constitution Debate**

## 2.A Three Stages of Constitutional Politics: The First Stage

There have been proposals and discussions regarding a European constitution for a long time now. However, if one takes a close look at the variety of contributions made, it is hard not to detect several phases to 'European constitutional policy'.

It might be useful to regard as belonging to the first phase all contributions from early times up to the foundation of the first European Community of the Six.

Most of the projects for an organized association of European states that have been designed and discussed in the course of the centuries - from Pierre Dubois' tract 'De recuperatione terrae sanctae' (1306) to Richard Coudenhove-Kalergis' 'Paneuropa' (1923) - more properly belong to the history of ideas than to the history of European political realism. It is perhaps a different matter with Aristide Briand's proposal to create a European Union in the interwar years(46) and with the efforts at the end of World War II, initially to set up the Council of Europe at Strasbourg and then with regard to its framework. However, in this first phase, which lasted until the post-war period, those interested and involved were primarily intent on elaborating drafts for a legally constituted association of the states and peoples and on promoting the project. 'Constitutional policy' debates were at best theoretical and academic, centring on how a future European state system should appear and how the approval of the elites and the peoples might be gained for the relevant projects. Admittedly, there was, particularly in the interwar years, a special concern, namely the direct or indirect strategies that might be developed to generate or improve the conditions for the creation of a constituted community - by way of using the connections between politics and business, for example. An expansion and intensification of economic exchange and integration beyond the national economic areas was frequently propagated, particularly after the collapse of the 'global market' (dominated by the industrially developed states), as was a European customs union also. Devotees of political unification pointed out as early as the 1920s that the expectations associated with this would not only require the abolition of the customs authorities under the given conditions, but also the realization of that which in later decades came to be called economic and monetary union. The economic and political 'integration' of Europe, therefore, ought to be introduced together and pressed on with, including making precautions for supranational legislation with the aim of stabilizing a 'secured internal market'. Likewise, the ideas developed at the time for the institutional blueprint for a control and decision-making system foreshadowed vital elements of the subsequent integration policy: from the creation of a kind of permanent intergovernmental conference (with responsibilities comparable to the Bundesrat of Bismarck's constitution) via the establishment of a relatively depoliticized control institution ('... removed from the political game of chance of diplomatic congresses') down to the appointment of a parliamentary representation of the people, who would become interested and involved in unification as a result. Although this parliamentary body should initially only have advisory functions, it would develop in time into a political engine. Not all these elements were combined in the design plans and, moreover, the relation between economic and political objectives was assessed differently: for some authors, economic integration was intended to serve political unification; for others, the establishment of international or supranational institutions was to be a means to economic integration in the service of promoting prosperity. (47)

The constitution discussions of the post-war period had a previous history. In the resistance movements and the debates of the exiled groups, in which opponents of National Socialism and fascism from the countries occupied by Hitler and his allies met together, the constitution idea was regularly the expression of the desire and determination for federation. (48) The idea of the 'European constitution' was the positive counterpart to those European circumstances that people wished to overcome once and for all time with victory over the Axis powers. The conventional power play of sovereign states with its structural lack of peace, which had led in but a few decades to two world wars, was regarded as a wretched inheritance. At the same time, after experiencing the installation of totalitarian dictatorships and the slide of democratic constitutional states into authoritarian regimes, the wish was for an organization of the European state community that might solidly and reliably safeguard the state of law and democracy; federal constitutionalism should prevail over the principle of non-involvement and thus provide against future assumptions of power by authoritarian and totalitarian forces.

These ideas were effective when the European 'maximalists' demanded at the end of the war that a process of constitutionalization must be initiated as soon as possible. (49) But things did not progress beyond wishes and demands.

## **2.B A Second Stage: "Indirect Constitutional Policy" Starting in 1950**

A second phase of 'European constitutional policy' began with the initiatives for founding the European Communities. The 'Schuman Plan' of 9 May 1950 marks the start of these. It expressly emphasized that the proposed organization for the joint control of the coal and steel industry should represent the foundation stone or first step towards a European federation. (50) Europe could not be built 'at a stroke', according to Jean Monnet (borrowing a phrase from Konrad Adenauer); it was first necessary to bring about a 'solidarite de fait'. In other words, the politics of economic integration (the integration initially of the primary industries and then the national economies through merger of the national markets) was, as defined by the inventors, actually a kind of indirect constitutional policy. A federation would have presupposed that the participants were prepared to establish a genuine political community and show steadfast solidarity. To consider this possible just a few years after World War II, once the wrongdoings of National Socialism became known, when occupying troops were still forbidden to fraternize and when the war crimes trials were still in process, was more than audacious. Hence the concept of integration was conceived as a solution to this dilemma with the aid of a 'list of interests': the linking of solid material interests of the peoples of Europe through the integration of their national economies would establish a community with a shared destiny; the integrated 'economic basis', while not automatically causing the development of a political and ideal 'superstructure', would nevertheless facilitate this. At the same time, in order to direct and harmonize the economic integration process, a communal political system was created which was intended to serve as a nucleus of crystallization for the political superstructure of the 'federation'.

This 'indirect constitutional policy' - a policy aimed at gradually creating the social and political conditions needed to make the community 'capable of a constitution'-was tangibly different in conception and style from the more 'programmatic' policy of the first phase. At times it was frankly at pains to turn the projected 'constitutional' ideas into small print, if not to conceal these ideas altogether - especially since the constitutionalization of the Community, ever since the transition from the Fifth Republic in France and the first enlargement, was no longer the undisputed and -together with integration - underlying object. The creators of the European Communities, however, worked on the assumption that a demand for political integration would emerge in the course of continuing economic integration and at some time or other put direct examination of constitutional policy back on the political agenda. Economic integration would improve the infrastructural conditions for political integration, while the 'system evolution list' would at least raise the question of the politicization of Community development even against the reluctance of some partners.(51)

## **2.C Characteristics of Constitution Building Efforts in the EC Context**

This is indeed what happened, in fact always when extending the control system of economic integration was the issue, normally according to a dialectical linking with the development of material integration, i.e. with the initiation and extension of the common policies on the one hand and with the enlargement of the Community on the other. In this third phase, the constitutional policy was therefore a consequence of the integration process and its progress. This became patently obvious when plans were being made for the European Defence Community (EDC) and then again at the planning and (finally) realization of European Monetary Union (EMU).

When the European Defence Community was being considered as the legal and political basis for a largely supranational army, Italy raised the question of general joint political responsibility for defence policy; a simple 'specialist authority' adapted from the technocratic model of the ECSC executive seemed too limited and therefore too inadequate to safeguard the primacy of politics over the military and to embed defence policy in an overall foreign and security policy concept. This led to the introduction of a kind of 'constitutional convention' (under the modest description of an 'ad hoc assembly') with the job of producing a

constitutional draft for the more comprehensive 'European Political Community' planned. The work was, however, in vain because, with the failure of the EDC project, the idea of the Political Community also disappeared from the agenda. (52)

Integration continued to be pursued by concentrating on uniting the national economies, with the gradual implementation of market freedom involving unfettered competition representing the hard core, linked to flanking policies. It was clear to the fathers of the treaty that this would lead to challenges which could cause political problems: it had long since been a widespread notion that a common economic and monetary policy would be desirable (if not altogether necessary) to bring about permanent consolidation of a Common Market. In view of the structural and economic disparities (at any rate, the time lags), however, it was clear that a coherent economic and monetary policy could only be introduced and maintained against the unwillingness of many of those involved and affected by it, and that this would require some power. A European economic government cannot be tied to the apron strings of the Member States, with some yelling 'Turn right!' and others 'Turn left!' However, should those shouldering the responsibility for this policy desire their own power base, then this power has to be democratically legitimized and controlled. Hence the so-called 'Political Union' became a matter of concern together with EMU, and this led to the thematization of the key word 'constitution'.

This third phase regularly involved, on the one hand, safeguarding the 'acquis communautaire' and, on the other, identifying constructive possible solutions for new, current problems with the integration system (institutional, but not just institutional) and translating these into constitutional system designs.

## 2.D Common Features of the 1953,1984 and 1994 Drafts

Under these circumstances, a very large number of contributions to the issue of constitutionalization were presented: among them several drafts for a constitution or a constitutional treaty, which were more than just 'private actions' but also boast an official character. Much of this is to be found again in today's debate conducted in the context of the Convention or its environment, as a few quick references confirm: in the three drafts presented in recent decades - i.e. 1953,1984 and 1994 -several basic ideas recur with very much the same meaning.(53)

- First: these entail drafts which, in terms of substance, are deemed 'constitutions' but are to be achieved by means of treaty under international law. The recently discussed concept of the 'constitutional treaty' forms the basis each time.(54)
- Second: The Community or Union to be furnished with a constitution should receive a dual basis of legitimacy, predicated on both the citizens (or at least the peoples) and the states.
- Third: The Community or Union should be in a position to deal independently with the duties assigned to it by the constitution; where determining and implementing its policy is concerned, however, it should be dependent on the cooperation of the Member States.(55)
- Fourth: In principle, the aims and duties are framed very broadly, but their performance is made dependent on explicit acts for the transfer of competence.(56)
- Fifth: A government system involving a bicameral legislature is envisaged for the Community or Union level. (57)

The two later drafts distinguish 'organic laws' (which are meant to define the duties and working practices of the institutions or internal transfers of competence on the basis of greater majorities) and ordinary laws. The text from 1994 also planned for 'constitutional laws', which require an even broader basis of approval, while

transfers of competence to the Union in conformity with the aims (comparable with the practising of Art. 308, the former Art. 235 TEC) were also to be made possible by means of organic laws; the authors of this text thus wanted to grant the Union a kind of 'owned competences' (*Kompetenzkompetenz*).

– Sixth: In each of the three texts, an executive responsible to Parliament is considered; the two texts drawn up under the historical conditions of an already functioning EC envisage the reorganization of the Commission into an executive body. (58)

There is thus fairly extensive continuity, at least in the constitutional models presented by the parliamentarians. The strong vote in favour of a parliamentary government system was not only attributable to general constitutional policy preferences, but also corresponded to the specific interests of the MEPs. Governments, obviously, saw things differently: they were not in favour of simply reducing the Council to a mere legislative chamber - even more so where the domestic system of government gave the governing body or the executive a relatively strong position, as in the case of the Fifth French Republic, and especially where there were difficulties with federalism and it was possible to imagine this at European level at best as 'fédéralisme intergouvernemental' (as, once again, in Paris). Yet the conflict of ideas over a future system of government for the Union, too, has a long history.(59)

## 2.E A New Stage: Different Intentions of Constitutional Projects

In contrast to all the continuities, the substance of the present European constitution debate is marked by a new aspect: we should not simply be looking at the commonalities and differences in the usual chapters of a European constitution (dealing with the institutional set-up, the competences, etc.); we now need also acknowledge that fundamentally different ideas have been expressed as to what a European constitution is good for. These different ideas are reflected in recent drafts, or pre-drafts, too.

In earlier phases, constitutional initiatives and projects had, as a rule, a clear political thrust: they were considered the crowning glory of the integration process. Integration had been set in motion as the *creatio successiva* of a transnational political community, (60) with the creation of the constitution representing, so to speak, the last great act of consolidation of the unification project, carrying it into its final stage.

At the same time, there were various models for this final stage. Originally the traditional antithesis of federal state and confederation of states was crucial, although, admittedly, simplified models of federal or confederate order were very often employed here, which had been designed and disseminated in black-and-white terms while federal states were actually being created. (61)

Today the constellation is more complicated. This is true of the much clearer differentiation between various models for a 'final stage' to European unification, of the no longer self-evident coupling of constitutional projects with the idea of the 'final stage', and to the not infrequently abandoned linking of constitutionalization and consolidation.

While, here and there, the drawing-up and enactment of a constitution is still associated with the idea of 'finality',(62) this is no longer the dominant, and certainly not the sole, interpretation represented - quite apart from the notion that the constitutional history of a community does not end with the enactment of a constitution, anyway, because further developments, even significant infringements, can still take place.(63) What is more, the three constitutional concepts presented over the past decades were not intent on cementing the order created either directly or indirectly by them; they at least envisaged the possibility of enlargement, together with further structural improvements. (64) In the course of time, however, the terminological field has become more 'flexibilized', if one might call it that. This is based on several factors.

In the constitution discussions of the early period of integration politics, the issue regularly centred on whether, how and according to which models the European Community should acquire a constitution. That is to say, the Community treaties themselves were not yet deemed to have 'constitutional' character and

status - admittedly, the term 'constitutional treaty' was already being bandied about in the talks on bringing the Schuman Plan to fruition, but the authors of the treaty gave up using it. (65) Since the European Court of Justice (ECJ) referred to the Community treaties as a 'constitutional charter' (or 'document'),(66) the talk of an EC or EU constitution already in force is no longer merely a suggestive formula, with which supporters of the federal state wish to influence the political thinking of their contemporaries in the sense of upgrading the Community's legal order, but rather a seriously tenable characterization.

This has several consequences, however. On the one hand, the hitherto customary linking of the constitution concept to the concept of the state - in accordance with the formula 'Where there is no state, there is no constitution ...'(67) - has become slack or has even dissolved, the reference here being to the not atypical use of the term 'constitution' to signify various types of rules of association. (68) On the other hand, the idea of the EC/EU being subject to a policy of successive constitutional development is now established: the view that the EC/EU is to be found 'in a state of continuous constitutionalization and constitutional development', not only through successive development of the *treaties' provisions agreed upon in intergovernmental conferences* (there has, after all, been well over a dozen amending and supplementary treaties over time), but also, for example, through the judiciary of the European Court of Justice developing the constitution(69) or, again, by way of interinstitutional agreement. (70)

It has been concluded from this that a European constitution can 'never be a condition, but must always be a development, remain a process'(71) Even where such a view might be considered extreme, the ideas associated with the constitution project or constitutional reform have changed.

The constitutionalization of the European Union is now

- advocated in some quarters in the traditional sense still, albeit occasionally with fresh emphasis (point I)
- disassociated explicitly by other authors from structural finalization (point II)
- no longer regarded uncritically and by all advocates as a (definitive or intermediate) step towards consolidation (point III)
- no longer apparent to many advocates as a consistent, possibly crowning, continuation of unification policy hitherto, but rather as somewhat of a retreat from this (point IV).

On point I:

Traditionally the European 'constitutionalists' were advocates of transforming the EC/EU into a federation, and this included the goal of finalization. A political unification surpassing the quality of a federation, hence tantamount to a European unitary state (*Einheitsstaat*), has been and is still being propagated by 'outsiders' to the debate, who are clearly fixated with a 'statist' policy.(72) This has given rise to the view that there is ultimately only a clear alternative between national sovereignty and European sovereignty, with the result that federal systems (with a 'divided' sovereignty or sovereignty which is granted to both federation and members, as it were, for the sake of the collectivity) are weak and thus not able to survive in the long run. (73) The same applies, however, to authors who, although they use the expression 'federal state', can only conceive of a federal state in statist terms as a highly decentralized but nevertheless unitary state, so that consequently the federal government is granted its own competences (*Kompetenzkompetenz*), for example.(74)

Any politician who has placed great emphasis on the idea of the European federation has no doubt come to accentuate the statehood of the federation so strongly that in the process the statehood of the members has been called into question (or reduced to a simple honorary title).(75) A certain current of Germanic constitutional law proceeds from its conceptual assumptions to a similar viewpoint. There are political consequences of this, which are diametrically opposed to those likely to be produced by the views of 'radical' Euro-federalists. Any further tightening integration that goes beyond the status quo of the

'confederation-plus' (*Staatenverbund*) would turn the European Union into a state itself, downgrading the Member States to subordinate territorial sub-units like provinces. This would be bad - not just today but for the foreseeable future - because the transformation of the EU into a state presupposes a 'European people', which does not exist or, at least, not yet, and possibly not in the future either. (76)

Such arguments have given grounds for reappraisal where there has been sympathy in past decades for a federal-state-type final shape to the system of integration, such as in Germany. The old formula of the 'United States of Europe' is out of favour, however. Admittedly, there are also advocates of a federally constituted Union who do not consider the model adopted by statist theorists (since this is the only one deemed possible) to be necessary and desirable, but instead have their eye on a 'new type of federation', such as a federal 'union of the states and citizens', or a 'federation of nation states' with a complex (multidimensional) legitimacy structure.(77) Many promoters of such innovative federal structures also regard these as appropriate over the long term: the particular political identities of the state-constituted national societies should be preserved, they believe, and that is why a unitary federal state system, as normally found with a nationally (almost) homogeneous citizenry, is not desirable for a united Europe in their opinion.(78) Others, in contrast, only see the 'federation of nation states' as an interim solution, which they concede is fairly unavoidable over the long term, and ultimately declare their support for a structure comparable with the system of the German Basic Law. (79)

All the same, there have been in recent times pleas for the foundation of a fully-fledged federal state. The supporters advocate the assignment of statehood to the EU so that it can be allocated regulatory and redistributive functions and powers that are considered necessary for socio-political reasons. Jürgen Habermas developed this concept some years ago in salient fashion. (80) The individual European states, he believed, are too weak to protect the societal common good from the dynamics of globalization. Market-correcting decisions, needed to secure solidarity and social justice, are only feasible still in the context of a European federal state. Only a federal state, he feels, can take responsibility for the socio-ethically and politically necessary levelling between regions of rich and poor, and effectively counter a disastrous division of society. For the sake of gaining acceptance for an appropriate policy, a cross-regional and transnational willingness on the part of the citizens to show solidarity is required, as has so far been at best effective on the basis of a national collective identity. (81)

On point II:

The traditional linking of the constitutionalization of the EC to its transformation into a federation is no longer self-evident.

(II. 1) The drawing-up and implementation of a 'constitution' for the European Union may also be propagated without it having to be associated with any substantial changes to the system of principles and standards. Once again, two variants of intentions for such a project can be distinguished here.

The first includes the desire that the legal basis of the Union should acquire a more lucid, clearer and, as far as possible, comprehensible structure and wording for the citizens of the Union and thus come to resemble more the architecture and style of a constitution. (82) The complexity and opacity of the primary law has often been lamented and a revision of the numerous underlying texts (treaties and protocols) has been thought necessary for a long time now.(83) There have frequently been pleas to 'extract' the fundamental provisions and combine them in a constitution-like document; this might help to rectify the confusing incomprehensibility of European law and of the integration system as a whole, providing both politicians and citizens with clearer orientation. Of course, it might be difficult to do justice to this objective without creating complications, whereby what results is more than a new version with its substance intact. This is to be expected, however, because the selection criteria for the 'fundamental' or 'essential' elements of Union or Community legislation combined in a constitution-like 'basic treaty' are by no means self-evident.(84) Moreover, the division of the primary law into a basic treaty, on the one hand, and the combination of the remaining primary law components into a kind of 'small print' second part to the overall compendium, on the other, suggests a further distinction in relation to the hierarchy of norms, as expressed, for example, in the



ideas of the 'three wise men' who had to deal with the institutional requirements and effects of enlargement - that is in terms of their ideas concerning the various innovation procedures. (85)

Yet even without such complications, a simplification conducive to legibility and comprehensibility would not be politically without consequence either. This applies especially to the focus on the 'large print' of the 'essential', as it were. The hopes and expectations at times associated with this indicate a second variant of the attempt to convert the substantially unchanged primary law corpus into a 'constitution'. This variant is normally closely related to the first, but can be associated with much more far-reaching revision objectives. To the extent that simplifying matters works against the complexity and incomprehensibility of the Union, it could tend to reduce public mistrust of the EU system. This would contribute to reducing the negative attitude to the EU in the consciousness of its citizens. The greater transparency of a Union constitution would reduce per se the cognitive 'alienation' obtaining between the Union and the citizens, i.e. contribute to the cognitive immediacy of the EU for its citizens and thereby to the Europeanization of their consciousness, i.e. promote a collective European identity .(86) Anyone desiring, for instance, a normative reinforcement of the Union's legal system - which is, of course, also synonymous with strengthening the prospects of loyalty - must approve of action designed to underpin the cognitive proximity of this legal system to the citizens (including simplification).

(II.2) In stark contrast to the idea of linking constitutionalization to further consolidation of integration are the proposals that, conversely, want to limit the extent of material integration to the status quo or reduce it altogether. There had been attempts of this kind in the past, but they were never explicitly linked to a so-called constitution project because the constitution concept at the time was so closely associated with the concept of the state that it was impossible to imagine anything else by a constitutionalization of the EC other than its transformation into a system with a considerably higher degree of supranationality - which, however, was diametrically opposed to the initiators' aims. The reference here, of course, is to the Gaullist endeavours of the early 1960s to subordinate the Community to a union of states under intergovernmental control and with a character of an international organization according to traditional international law rather than Community law.(87)

Recently there have been explicit requests for an EU 'constitution' expressly described as such to be drawn up and implemented with a view to curbing at the highest normative level any further consolidation of integration, which is abhorred by many of its critics as leading to the creation of a 'super state'. It is in such terms that the British government has recently abandoned its reservations about constitutionalizing the EU. (88) This was preceded by proposals and plans which either wanted to give a constitution the function of a legal and political check on all efforts at supranational politicization and further institutional centralization or expected it to establish the status quo minus of supranationality or political integration - to the benefit of the state or the economic subjects. In this view, the primacy of deregulation over other integration measures (hence the primacy of market integration over political integration) should also be established on occasion. (89)

On point III:

(III.1) In another entirely different perspective, the call for an EU constitution comes from authors and actors who, while concerned about seeing a substantial change in the system of the Union, are not (or not primarily) interested in an 'increase' in material integration. In their view, 'consolidation' should not provide for, say, an expansion of Community responsibilities and powers, but rather a reassignment of competences. However, the polity (*Herrschaftsverband*), which the European Union happens to be, could perhaps be structurally rationalized and politically democratized, they believe. This should not include (at least not necessarily) any steps towards 'deepening' (i.e. reinforcing) integration still further, but rather involve an essential change in the political system. This is at any rate the opinion of the President of the Union Européenne des Fédéralistes, Jo Leinen, who holds a seat in the European Parliament as a member of the PSE Group. In his view, the European Union is already endowed with the sovereign power of a state - but this is disguised because, if it were not, the constitutional deficits of the political system of the EU likely to cause offence would be manifest. (90) In the light of this, it is time, he believes, to commit the unseen

supranational state power to the requirements for the exercise of democratic political power in accordance with the rule of law, i.e. to constitutionalize and democratize the Union.

In the academic literature, we have already witnessed the view, as stated above, on the occasion of the 'Maastricht project', that integration would either achieve or surpass with the Union Treaty and its consistent implementation the transformation of the integration systems into a state.(91) Anyone sharing this view may find it is high time that the unseen supranational state authority were committed to fulfil the requirements for the exercise of democratic political power in accordance with the rule of law, i.e. that the Union were constitutionalized and democratized - unless, on the other hand, they prefer that the depth and density of integration should return to the level of a confederation.

(III.2) In the milieu of the Austrian Greens (who in party-political terms have for some time positioned themselves to the left of the Social Democrats, under the label of the 'Green alternative list') and in other groupings geared towards 'alternative' political models, there is the idea of 'taming the Leviathan'.(92) Here, constitutionalization is not understood - as it is traditionally by the promoters of EC policy and academically by the 'neofunctionalists' - as the crowning glory of the unification project or, as it were, the final leg of the integration journey, but rather as the instrument and expression of a radical change of paradigm, namely the departure from a free-market-based deregulation technocracy towards a transnational republican-constituted political community, which - to borrow the terminology of Jiirgen Habermas - subordinates the (economically justified and administratively driven) 'system integration' to the normative 'social integration', which is determined by the primacy of politics.(93) (This is, so to speak, the directly opposite position to the proposal referred to in the paragraphs in point II.2 above at 25, i.e. constitutionalization as a means of establishing the primacy of deregulation and the obstruction of political integration.)

## 2.F Conclusions

To sum up this section of the paper: The field of competing ideas, as to why a new constitution for the European Union is supposed to be desirable or necessary, has very much grown in complexity and dimensional differentiation, if compared with earlier phases in the constitution debate. As a result of this state of affairs, individual discussion topics of the Convention take on additional shades of meaning, which presumably do not occur to the observer straightaway, and which, it would seem, not even all members of the Convention are conscious of. This does not need to have unfortunate consequences. On the contrary, it may be advantageous for the work of the Convention because the discussion may be easier, the less the participants are 'infected by the pallor of the thought' where ambiguities and multiple meanings are concerned.

Nevertheless, it still may be useful to give some attention to the essentially different ideas of what a European constitution may be good for. Some of them may be compatible with one another, but some of them may not. Is there an opportunity to resolve contradictions? Is there a need for a common denominator? Or can we simply leave things as they are? It depends on what we expect from the process of drafting a new constitution, and from that constitution itself. A constitution deserves its name if it meets with not only permissive acceptance but also reliable loyalty. Therefore, it needs a broad consensus. Perhaps, it will be a difficult task to come up with adequate terms without indulging in ambiguous phrasings.

## 3 Statics and Dynamics in the Constitutional Conception

### 3.A Dynamic Elements in the EC System: Change as a Constitutional Brief

In many accounts of constitutional theory, it is stressed that constitutions are meant - at least conventionally - to stabilize certain achievements. Authors talk, for example, of the 'ordering function' of the constitution, (94) which defines fundamental rights (human and civil rights) with binding force, creates a political institutional structure, takes action to safeguard the rule of law and democracy (say, through mechanisms of controls, checks and balances and the participation of the people in the formation of the political will) and thereby provides the 'cross-generational stabilization of a historically based fundamental consensus'.(95)

The constitution 'offers ... fossilized polities', as it has been styled, for it 'is in essence immutable'. (96) Centuries ago, this was actually the way things were perceived,(97) though we know today that fossilization can be a bad thing: 'Movement and adaptation are indispensable for a constitution, if it is to endure.'(98) Furthermore, constitutions also receive their orders: 'their outlook is towards the future',(99) freedom and justice are supposed to be increased, not simply preserved.

Nevertheless, the relationship between the preservation and modification of existing conditions in the constitution of the EU is a different matter than the usual type of democratic national constitution. Even if it appears a simplified stylization, the description of the 'Community Treaties as planning constitutions' is due to the fact that they typically 'plan the framework for a dynamic development they have set in motion', whereas national constitutions 'statically mark out the framework of an existing situation.'(100)

Ophüls originally only thought that the 'planning constitution' represents the legal basis and the framework for a comprehensive work of social change: by stipulating deregulation programmes and flanking policies and by entrusting its own created institutions with the implementation of these programmes, it causes the economic subjects to effect a sweeping and far-reaching reorganization of its relations. The system of integration displayed from the start a 'touch of motor, project and time-related impulsiveness'; it revealed a 'tendency to bring about change and development.'(101) This orientation towards change - initially to economic interaction and interdependence, then, and actually through this, to adjustment too - recalls the constitutions of 'real socialist' countries. Here 'the government mechanism ... [served] the political realization of the social programme', and the system of institutions defined in the constitution was fashioned in such a way that it 'best [enabled] the realization of the social and economic postulates of socialism'(102)

Obviously, the comparison is limited. In the 'planning constitution' of the Communities, the objectives, which are supposed to be achieved dynamically and successively, are formally defined as the outcome of the Treaty negotiations; they concentrate extensively on uniting the national economies. The 'real socialist' constitutions, however, were instruments for realizing objectives, the priorities of which were defined each time according to the concrete situation by the 'leading political power' (the 'party of the working class', in alliance if need be with other progressive, i.e. socialist-minded, forces) because the party claimed to recognize the laws of societal development and translate the political imperative into action; the whole of the law served as a 'lever' for the controlled realization of an 'objective legitimacy of societal development'.(103) This interpretation of the law also defined the understanding of constitution. (104)

One feature of the Community constitution is particularly remarkable, however: the desired change does not just refer to economic or social relations that are directed by means of the law in line with political objectives; it also affects the basic legal system itself. This has continued to be developed time and again in a variety of ways. At times it was pre-programmed in the texts of the Treaties themselves; striking examples could already be found in the EEC Treaty, such as

- the expansion of the Community's field of activity, insofar as this was required for its core responsibility (the creation and consolidation of the Common Market),
- the transition from the unanimity of Council resolutions to decisions based on qualified majority voting and the introduction of direct election to the 'assembly' in the EEC Treaty,
- the continued development of the Community finance constitution through the introduction of independent revenue,
- the transition from delegating Member State parliamentarians to the 'assembly' to direct election of MEPs in accordance with a unified election procedure.

Time and again the Treaties were expressly amended or supplemented, either with the aim of incorporating more material in the remit of the cooperation and/or integration or so as to continue to develop institutional and procedural systems. In related reform treaties, too, system developments were provided for the future, as

for example

- the orientation of 'European Political Cooperation', included in the Treaty system with the Single European Act, towards the introduction of a common foreign policy,
- the orientation of the Common Foreign and Security Policy introduced in the Maastricht Treaty towards the inclusion of defence policy and the possibility of introducing joint defence.

In addition the 'accession clause' of the Treaties meant that a possibly successive improvement in the basic Community system had been considered; the fathers of the Treaty could hardly be accused of not having taken into account the situation that the institutional and procedural system designed for the Six ought to be reformed for a considerable increase in the number of Member States.

Furthermore, many of the Treaty's provisions were progressively interpreted, occasionally even reinterpreted, by the European Court of Justice. The Court of Justice has often been chided with being too Community-friendly and with pursuing a progressive integration-driven constitutional policy, instead of providing correct legal interpretation and application and of dealing impartially with both sides - the federation and the members - like the constitutional court of a federal community. Admittedly, the progressive integration trait lies in the 'planning constitution' of the Communities itself and is therefore pre-given for the Court of Justice. The judicial tendency in the direction of the 'ever closer union' is not simply based on an inappropriate self-politicization on the part of the Court of Justice, but rather is an (at least additional) outcome of the dedicated orientation to the progressive-dynamic feature of the Community's applied legal system.

The criticism of the Court of Justice judiciary did not just come from nowhere originally. It expressed a very widespread unease about the increased power displayed at the Community level, which, in conjunction with the lack of transparency on the part of the 'Eurocracy', created the fear of an increasingly selfish 'Leviathan'. (105) This unease was also felt in another way: through the call for greater closeness to the citizens (*Bürgernähe*), through the increasingly insistent stress on the subsidiarity principle, through the proposals for greater -judicial or political - control of the balance of competences, and so on. Yet it might be worth seriously considering whether such worries can again be dispelled simply by the introduction or amendment of detailed provisions in the context of the Union's legal system. Might it not be that the underlying constitutional understanding also plays a part - to such an extent that the concept of the 'planning constitution' should be adopted and, with that, the idea of integration being driven increasingly, possibly ad infinitum, by the constitution? Its replacement by a less progressive-dynamic concept, which would also give the Court of Justice the chance to adjudicate in a 'more balanced' way (more akin to a federal constitutional court) should also be taken into account.

### **3.B Statics and Dynamics in the Constitutional Concept: The Union and its Constitution as a Process**

The concept of the 'planning constitution' as a constitutional framework for a Community policy resolved to bring about successive integration, first of the primary industries and then the national economies, need not have implied per se that the constitutional order created for this ought itself to be successively developed. It was of course possible, as has already been shown, to incorporate provisions for progressive changes to the political system within the 'Community constitution' from the outset. In actual fact, the authors of the Community Treaties envisaged it this way, some times expressing this explicitly, sometimes deeming it a good idea to refrain from making any relevant declarations on the subject.(106) The reason for this was the limited inclination of the parties to the Treaty to decide on more political integration and 'sovereignty transfer' than seemed necessary for the management of the material integration programmes arranged each time.(107) In this sense, the system of the institutions and their powers was supposed to comply with the relativity principle. (108) The system of material integration was, however, designed in such a way that the action initially taken should trigger tendencies to enlargement and consolidation, whereby it was expected that the 'Masters of the Treaties' would see themselves induced to make appropriate decisions so as not to jeopardize the whole project.(109) And this meant, in fact, that decisions to consolidate the material

integration necessitated or, at least, suggested the need for corresponding 'relative' reforms to the 'political superstructure'.

Clearly, it would have been advisable to understand this *creatio successiva* of the European Community as a process that comes to an end once the last desirable degree of material integration and political unity has been reached. However, this notion was largely without prospect because those involved could not agree this on the optimum level of integration and, with that, on the finality of the enterprise.(110) A somewhat dubious virtue was made out of this necessity: the 'masters of integration' took the finality question off the agenda. In its place, the notional figure of the ongoing process, which was a long way off reaching its final stage and thus had much to achieve in the future, was declared to be the positive feature of European unification policy, whereby it remained unclear whether there would ever be a final stage without its characteristics already having to be fixed, or whether the process would be pursued ad infinitum. In keeping with the Preamble expression of the 'ever closer union among the peoples of Europe', the slogan 'the European Union as a process' was articulated and this same notional figure was also applied to the 'constitutedness' (*Verfaßtheit* - a term used by Joschka Fischer and others, pointing to the quality of a polity having a marked structure which can be regarded as a constitution) and the 'constitution' of the EC and thus the EU. Perhaps the reason was that the 'union among the peoples of Europe' was, of course, supposed to be a legally and politically organized one and that therefore the organizational structure too should or at least might become 'ever closer'.(111)

Since the heads of state and government ceremoniously declared their intention in October 1972 to 'transform the totality of relations between the Member States into a European Union' by the end of the decade, one can also refer to this statement for an appropriate perspective.(112) Admittedly this is not much use with methodically thought-out conceptualization efforts, especially since there are indications that the original coiner of the phrase did not necessarily associate precise meanings with the term 'European Union'. (113) Nevertheless, the proclamation of the 'European Union' put the accent on the procedural, while at the same time suggesting another idea, because the term 'Union' has been used time and again in the course of European policy to indicate a shortcoming compared to the models of the integrated community (involving supranational elements) or the federation.

Already in the interwar years, the term 'European Union' was used as a term for projected organizations that were not supposed to impair the sovereignty of the participating states.(114) When in the early 1960s, the Gaullist government of France propagated a 'Political Union' by means of the so-called 'Fouchet Plans', the term 'Union' was the antithesis to the project for a European (Political) Community pursued in the previous decade, which displayed intergovernmentalist tendencies and was directed against supranationality.(115) This too was not a chance notion; already in the first big debate on the shape of the future cooperation of the European states, namely at the (first) Hague Congress in May 1948, the advocates of the genuine assignment of sovereign rights to a European body were opposed to those who only advocated a joint exercise of certain sovereign rights, without the states ever relinquishing these sovereign rights. (116) The first group were classed en masse as 'federalists', the others as 'unionists', with the disagreement between the two schools of thought finding its expression in the political resolution of the Congress, which talked at several points of a future 'union or federation'.(117) It was only much later that the attempt was made to relate the two terms to each other,(118) but official efforts to this effect met with massive dissent, especially British.(119) Later it was said in certain circles in Bonn that the inclusion of the phrase 'ever closer union' in the text of the Treaty was, as it were, the compensation for omitting the reference to the federal perspective; the phrase had already been used in the preamble to the integration treaties since 1957.

It should not be forgotten meanwhile that the idea of the progressive process character of integration was already being applied to the Community constitution before the Union concept in the sense outlined here was brought into play: as with integration policy generally, constitutional policy, too, was to be made more dynamic and understood accordingly. It was this that the likes of Walter Hallstein(120) and Willy Brandt(121) were pleading for in the 1960s and 70s respectively. Subsequently, academic authors also shared the belief that the European Parliament should provide the impetus, as a body especially appointed to deal with constitutional policy. (122) In their view, it should assume the initiative and the main responsibility not merely for integration remaining a 'reality in the making' (as Walter Hallstein suggested -

integration, he claimed, is like a bicycle: if it stops, it falls over),(123) but, specifically, for the constitutional character and status of the EC, too.

This last notion has since gained fairly general acceptance, especially where the constitutional suitability and the constitutional need of the EC has been approved, and the constitutional character of the basic order of the EU likewise. This is accounted for in a variety of ways. Occasionally, reference is made to the dynamic moments and the changeability of the state constitutions. In connection with this, it is stressed that the difference between the strong constitutional dynamics of the EC/EU and the equally apparent, albeit more moderate, constitutional dynamics of modern states is not so great, and thus it is inappropriate, in terms of the dynamics of the EU constitution, to reject the qualification of the basic order of the EC/EU as a 'constitution'. The most obvious reference here is to the evidently increasing frequency of constitutional changes in many countries.

Even more interesting is the reference to a fundamental 'theoretical' understanding of the state constitution as a 'dynamic' reality, as with Rudolf Smend's integration theory of the state and the state constitution. For Smend, 'integration' as a 'restricting merger' is the basic process by which a state maintains its existence, since it has its reality only in the life expressions of the citizens: in that the citizens orientate their action (and thought) to the system of logic and values objectified in the constitution, they 'integrate' themselves into the community of state citizens and thereby lend reality to the state. Meanwhile, 'integration' as an 'underlying existential process of the state' overcomes the tendency to entropy, which is effective in all social structures, because the system of human coexistence does not function 'by nature' (i.e. instinctively). The state exists therefore only in its perpetual reconstruction in the experience and activity of the citizens, through the 'constantly self-renewing constitutional life'.(124)

After the concept of 'European integration' had acquired its succinct content in the prevailing political linguistic usage,(125) the attempt was made to relate Smend's ideas on European integration conceptually and theoretically.(126) This was based, however, on conceptual restrictions. As well as his much-emphasized statement that European integration is not a being but a constant becoming,(127) Walter Hallstein frequently used the formula of integration as a *creatio continua*. (128) At the same time he interchanged two terms from creation theology,(129) *creatio continua* in this terminology being the divine act of preserving the world in its existence so that in a way it is constantly being recreated.(130) The 'dynamic', ongoing creation of a being would be described in contrast as a *creatio successiva*. Smend's integration concept, specific to a 'really existing' state and its constitution, therefore corresponds to the *creatio continua*, while the 'becoming' (the progress or, more accurately, the hastening of the progress) of European unity would be described rather as a *creatio successiva*. The dynamics and process nature of 'integration' therefore characterized different concepts in both cases.

### 3.C *Creatio successiva* - ad infinitum or ad finem?

Notwithstanding, the understanding of the EU constitution as a process structure committed to the *creatio successiva* has prevailed in the eyes of many observers in such a way - originally, as stated, through the attempt no doubt to make a virtue out of necessity - that it is talked about as if it were a self-evident truth. It is not always clear whether what is being considered is a critical point at which the constitutional dynamics alters in quality, with the result that the *creatio successiva* tends to turn into a *creatio continua*. This might be the case whenever a relatively consolidated structure to the constitution is reached, which, for the sake of its own stability, no longer gives grounds, as it were, for taking it beyond the constitutional status quo.(131) (This does not mean, of course, that the *creatio continua* might preserve some achieved constitutional state, which is regarded as final, causing it to become fossilized ... )

It seems that various views are possible here, as the recalling of certain examples serves to elucidate and confirm.

– From the outset, Walter Hallstein presented the EC as an institution 'bent on growth' and left no doubt that it was necessary to keep a dynamic development going that, ultimately, must lead to a federal state.(132) At the same time, however, Hallstein was obviously thinking of several, successive stages bringing the

Community that bit closer to a federation, while he seems to have imagined the final stage of the federal state as relatively stabilized. This is borne out by his repeated unequivocal denial of any further unitarization. (133)

– Already in the early 1980s, Hans Peter Ipsen described the dynamic character of the EC constitution as follows: 'It is ... as a constitution of integration itself principally designed for change.... This change is ... not, as in constitutional law, a reaction to factual changes in the subject area of the relevant constitutional norm. This change is itself action, the concrete fulfilment of the EC constitution designed for change. It is - expressed as a play on words – a changing constitution of a unique, otherwise non-existent type.'(134) Where this ultimately would lead to, that would have to remain open, Ipsen believed.(135)

– Roland Bieber - at the time the Union Treaty of Maastricht was being prepared - argued that the European Union must be understood as a process, with the result that 'the route itself becomes the goal'. Hence an appropriate European constitution must continue to keep looking for a balance of commonality and diversity because 'between the Member States and the Community, and between the institutions of the ECJ, a continually self-redefining equilibrium [must be] sought'. The European constitution 'can therefore never be a state, but must always remain a development, a process.'(136) As he later stated: 'The term used in the Preamble to the Union Treaty "ever closer union" ... reflects something fundamental. Reaching the goal is not a question of the speed of the train used only to drive ultimately into a siding; rather the goal is in the movement itself. It consists in the endeavour for unification. This endeavour can never end if one seriously proceeds from the continued existence of smaller units - the states. It would be inappropriate to associate with the Union the idea of an ideal state that is to be attained sooner or later.'(137)

Ideas like these deserve closer reflection. First of all, it is not self-evident that the dynamic process character of integration also requires a corresponding permanent dynamic of constitutional change. (138) Secondly, in every federal system there are recurring problems of balancing the whole with the parts, as well as the unitary institutions with the institutions at the federal level, without this giving rise to a situation whereby a condition or 'state' could never - i.e. not for a more or less long period of time - exist. Thirdly, the unattainability of ideal states is axiomatic, but the transition to a relatively stable constitutional state, to the extent that it does not need to be pursued ad infinitum to an increasingly higher degree of unity, is another matter. This is also tacitly recognized by Bieber himself, for he proceeds from the assumption that the parts of the whole should maintain their statehood, since to intensify the legal-political unit ad infinitum would quite possibly lead to the unitary state. Fourthly, the state constitution - regardless of whether this involves a unitary state or a federal state - is incontrovertibly not divorced from history, and there are therefore continually fresh emphases on the understanding and the interpretation, as well as changes to the wording. (139) The argumentation is thus more suited to playing down the differences between the prevailing understanding of the state constitution and a constitutional conception oriented to the phrase 'The route is the goal'.

– Soon after the Maastricht Treaty was signed, Eberhard Grabitz described the Community constitution as a *constitutio emergens* and remarked that, although in the development process of this constitution a current status can be described at a particular point each time, this is always relatively coincidental. (140) That is to say, the particular momentary states or intermediate stages are transitory; it would therefore seem obvious to question the long since current description of the interest association structure as *sui generis* because no actual 'genus' is involved. Until it reaches a state of relative completion (which Grabitz conceived of as federal in design),(141) the Community or, rather, the Union constitutionally is in a condition in which the moment of the 'already' and the moment of the 'not yet' are balanced against each other to a varying degree. The Union is en route to its goal - the goal is not identical with the route.

– Gunnar Folke Schuppert recognized - several years after the EU Treaty was concluded – that it was a 'general view... that the European constitution displays exceptional qualities compared to the classic national [constitution]...'. While 'in the national constitution, elements of stability and dynamism, rigidity and flexibility stand in a balanced relationship, the constitution of the European Community is necessarily dynamic and designed for change'. Furthermore, the European constitution 'must as a constitution reflect the particular state of integration so that... the organizational purpose of the Community implies the extrapolation of its constitution in the sense of a programmed constitutional change.'(142) The EC is, Schuppert believed, 'always en route somewhere' and is in fact 'following the guiding star of a European Union', and for this condition of being en route 'the concept of the political finality of the European Community [has] developed', although in substance this 'cipher' - the author quotes the Karlsruhe judgement on Maastricht - remains open, at least for the present.(143) The 'dynamic' character of the EC system, in Schuppert's view, is not merely given until the Community has become a federal state (assuming this happens at all)(144) because the federal order, too, can 'only be suitably captured as a dynamic system.'(145) This usually means, however, that in federal systems 'the territorial units at the individual levels ... [form] an action structure, which is not rigid, but rather variable'. Since the conditions for the competent bodies at various levels to fulfil their duties change and since it is not 'generally' and for all time possible to overcome interdependency problems, the federal system cannot be fixed in its structure, but rather it is adapted to 'processes of centralization and decentralization... its ... problem-processing structures to transformed action conditions' by means of 'political processes'.(146) One can try, of course, to understand the overall development of the integration system and its political dimension specifically according to this perspective of social scientific, organizational theory because, from the very start, the Community has involved a multi-level system, which means a 'structural affinity with the organizational principle of federalism'.(147) Nevertheless, Schuppert seems to answer in the affirmative the question of whether the process of rebalancing in the context of an existing federal constitution needs to be clearly distinguished from the process of the 'constitutional development' of nascent European unity, because he considers the 'general interpretation' to be accurate that the European constitution is specially designed for change compared to national constitutions. (148)

– Finally, several years ago Joachim Jens Hesse, with regard to the view that 'a Europe in the making' also needs 'a constitution in the making', considered it quite proper that the form of the Union constitution is 'more corpus than codex'. He clearly found that 'individual documents and rules of law found here and there' also appropriately document and reflect in form the incompleteness of the constitution. The type of European unit 'for which a constitution suitably appears as a self-contained document' would be that of a state.(149) It is necessary to recognize, he believes, that the current constitutional development is a 'real political process', 'within which a variety of actors and institutions interact.' On the other hand, it is inappropriate to pursue constitutionalization 'top-down'. Hesse is apparently opposed to a constitution discussion removed from the regular proceedings of European policy, in which 'European futures [are] anticipated' and which involve 'blueprints' convincing in their exemplary collusiveness, written in a 'prescriptive style' with 'shoulds', 'oughts' and 'mights', with formulations that are 'comparatively slightly reality-specific', and not, as would be desirable, guided by empirical findings and articulated needs. In this sense, it is necessary 'to turn the discussion surrounding a European constitution ... on its head' and 'adapt to the undeniable development dynamics of the Union' in the process, which involves 'considering functional requirements more effectively than before'.(150) Only when progress has been made by this route will it be essential 'finally... to take the plunge and give European development a framework and not evade the finality question any longer.'(151) The appropriate response to this question, in Hesse's view, is in the direction of a 'European Federation' under the banner of 'unity in diversity', to achieve which, however, would mean eradicating prejudices still found in the unitarily structured Member States.(152) Thus the creatio successiva



is once again given a goal. Conversely, it is recommended of constitutional policy that it formulate this goal less and, instead, proceed in such a way that each current problem-solving requirement and the likely prospects of consensus or compromise are thereby taken into account. How it can be ensured that this step is taken in the counter-direction to the goal is not explained, especially since the direction of the route 'to somewhere or other' can in reality 'change and the succession of forward and backward steps at times recalls the jumping parade of Echternach.'(153) The conditions allowing the 'plunge' into finality to be made also remain unexplained. The criterion ought to consist in the fact that the discrepancy between the successively achieved constitutional state and the surrendered normative federal claim is reduced to such an extent that the requirement of constitutional loyalty does not expect too much of the political forces and actors (especially the Member States).

The numerous references to the dynamic development of a European constitution - to its *creation successiva* - thus signify very different things ;(154) a general reference to a simultaneously political and constitutional genetic process conceals this.(155) What may be denoted is the currently ubiquitous process, whereby an existing constitution changes more or less profoundly, be it through the exercise of a constitution-amending power, be it in another way.(156) That is to say: there was once a polity (possibly endowed with all the features of statehood), but the associative structure changed - and did so without any written constitutional law being expressly amended. This can be applied to the development of the European constitution if one regards the founding of the first 'European Community' (for Coal and Steel, 1952) as the act of original constitutionalization and the subsequent development as a succession of amendments.(157) The *creatio successiva* of the European constitution is understood, however, at least by a number of authors, in another sense too: namely in such a way that the quality of the constitution changes in a manner that becomes clear if one reflects that the quality of a federal constitution differs from that of a confederate constitution in the weight of its normativeness, as it were. Legal scholars refer in this context to the different associative nature (*Verbandsnatur*) of federal and confederate communities and contrast the associative nature with the associative structure.(158) Some authors proceed from the assumption that everything can be reduced to the alternative of state vs. non-state. Hence, 'international organizations' could only have a 'constitution' (in the shape of an international treaty) in an extended or analogous sense. Soon after the creation of the first European Community, it was assumed - by characterizing them as '*sui generis*' organizations - that the European Communities were not states, but qualified polities, whose 'constitutedness' was already deserving of the description 'constitution' in a more refined sense. (The Treaties were, in the opinion of the European Court of Justice with its subsequently much-quoted phrase, 'the constitutional document of a legal community' which did not exercise the state authority of the Member States, but rather its own Community authority.) It is unclear whether, in the event of the Communities being transformed into a federation, the constitutional quality, too, would experience an improvement, as it were. Obviously, this is affirmed by those who in principle only recognize state constitutions as constitutions in the proper sense and in whose eyes the Community or Union constitution to date is a pseudo or, at best, quasi-constitution. (159) As yet, though, the question has hardly ever been discussed as to whether there might also be a difference in quality of the constitutedness of a 'federation of nation states' ('federation des etats-nations') on the one hand and a typical 'federal state' (etat federal) on the other, no doubt because the special nature and structure of the 'federation of nation states' has only rarely been subjected to the 'strain of the concept' (Hegel's '*Anstrengung des Begriffs*'). If it had, one might have probably noticed that the 'federation of nation states' conforms fully to the features of a highly integrated confederation (if not the common, for politically reasons 'minimalist', caricature of the confederation).(160)

This suggests the notion of a differentiated successive order. Some authors, moreover, seem to plead that within such a successive order above the level of a 'confederation' - perhaps below the level of a 'federation of nation states' (?) form of the 'confederation-plus' should be assumed.(161)

One can view this question of various stages to the constitutional quality, possibly corresponding to different characterizations of the associative nature, as insignificant if one's sole aim is to demonstrate convincingly that there is a constitution of the EC/EU (say, because the 'normative mass ... satisfies ... the conventional

constitutional functions', with the result that the requirements of a constitution are fulfilled materially).(162) The problem acquires a certain explosiveness, however, if one concludes from the 'concept of constitutionalization as a process', 'that this process is continuing' - and 'necessarily' so(163) - and if one considers that some authors include in the development of an 'ever closer union among the peoples of Europe' the smooth and 'insidious' transition of the *sui generis* order to complete statehood. As already mentioned, the system of integration has already been claimed as the 'creation of a state' with regard to the Maastricht Treaty, yet while views to this effect have been rejected by the Federal Constitutional Court, talk of the *creatio successiva* of a European state possibly taking place on the quiet has not subsided even so. (164) Whether it is pertinent in view of this to pretend to be satisfied with the somewhat blanket assessment of the constitutional development dynamics of integration is probably doubtful because the concern over a European 'super state' is real in some circles and because this is not irrelevant where estimating the constitutionalization process is concerned, nor for the general acceptance of a Union constitution.

In view of such a range to the concept of the 'process constitution', which is constantly in the making, caution is advised with regard to using this concept uncritically.

### 3.D 'The Route is the Goal' - the Abandonment of the Constitution Concept?

Quite possibly, the wholesale affirmation and use of the concept of a constitutional development process occurring in the future could cast doubts on a received notion of the constitution; it could moreover even exacerbate, if not altogether prevent, the fulfilment of key functions of a European constitution.

The first of these two possibilities has been a common topos for decades now. It is based on the hypothesis that a constitution must show durability in its basic nature. Of course, today - there was already talk of this in the past - the idea of validity to a state constitution that is removed from historical change and precludes any change in meaning is no longer supported. Although in the early period of modern constitutionalism, and according to the then not uncustomary constitutional pathos, the immutability of constitutional principles and norms was happily sworn by, the historicity of constitutions was also stressed at the time; (165) Ulrich K. Preuss refers to the paradoxical character of linking the durability, sometimes immutability, of the constitution with the principle of popular sovereignty; this association is based, in his view, on the claim that certain constitutional norms express eternal and divine truths, which the sovereign people, guided by reason, can recognize and must consequently affirm. (166) The paradox has become a problem, mainly insofar as political reason is no longer understood as 'perceiving', but as empowered to create.(167) Supporters of the classical liberal constitution idea have for a long time been diagnosing a crisis in the notion of the constitution, which is expressed in a loss of constitutional normativeness and gives grounds for predicting a 'constitutional twilight'.(168) Are we, therefore, witnessing in the breakdown of long-term-based normativeness an inexorable trend in favour of the constantly amended constitution, so that the 'changing constitution' (*Wandelverfassung*) of the EC/EU is not an abnormal special constitutional case, but rather a prototype of the 'fluid aggregate state' of the constitution that can be expected everywhere in future? (169)

One concerned commentator sees in such tendencies the symptom of a fundamental crisis of legal and constitutional thinking in general, and regards this in turn as the expression of the 'decline of the normative in human social existence as a whole', linked to a devaluation or abdication of reason in favour of the affirmation of the factual, the utilitarian and the functional. This corresponds to a trend in transition from the state governed by the rule of law to the power state, in accordance with the maxim 'Nothing is true - everything is allowed!', together with the elimination of the distinction between rule and exception, and consequently the complete unbridling of power. (170) This sounds like lachrymose cultural criticism and should not be taken directly and nominally as a diagnosis of the present.(171) His arguments are worthy of mention and consideration, however, as indications of the extent to which the integration policy may seem strange to many citizens on the basis of its 'dynamic' character (in various meanings of the term) - rightly or wrongly. For this reason alone, the question of the implications and consequences of the 'fluidization' of the integration constitution deserves serious attention.

Werner Kagi, the concerned commentator of 'development tendencies in constitutional law' quoted above,

knows full well that the idea of 'eternal' constitutional norms is a thing of the past; it is all the more important, he believes, to secure 'relative immutability' of the constitution, (172) for 'the constitution as a normative system' finds its meaning as 'the system of the highest, resolute legal norms for the state', and it is '... necessarily linked to the idea of the permanent'. The idea of the law itself is 'of necessity linked' with the idea of permanence; it is in a very special way, however, that the 'idea of the permanent [is] contained... in the idea of the constitution ...'.(173) The increased formal legal force of a constitution is at the same time 'merely the expression of the essentialness of the content'.(174)

Does this only involve handed down, antiquated ideas or doctrines? There is something to be said for regarding not only the normative primacy, but also the (at least relative) permanence of the constitution as indispensable for its ability to discharge the functions assigned to it. I am not considering the wealth of such functions(175) but only referring to a few points of view.

It is one of the functions of the constitution to relieve the political debate of conflicts over that which debate itself normatively defines, i.e. of controversies over the foundations, yardsticks and procedures of politics. 'What is in the constitution is no longer the subject, but rather constitutes the premises of political decisions' (Dieter Grimm).(176) There are preconditions for this political relief: either there must be a broad and profound consensus, at least on the fundamental principles and norms, or the actors must be resolved to put aside reserves vis-a-vis these principles and norms in the standard political process regulated by the constitution, i.e. to act in a manner true to the constitution for as long as the constitution is in force.(177)

The constitution performs that which is expected of it only if it is based on public approval - and the broader and deeper its consensual basis is, the sooner it does so. At the same time, it contributes itself to stabilizing this consensual basis.(178) A constitution whose fundamental substance is very much contested cannot develop any normative power. (179) Admittedly, a broad consensus is barely possible in open societies, in which various convictions are commonly held and various interests are represented. Under such circumstances loyalty to the constitution can be all the more expected from the actors if the constitution does not demand identification with an ideological system; the less it requires total political consensus; and the more it does justice to the inescapable dialectics of permanence and historical open-endedness, and normative conciseness and interpretative openness. (180)

Such considerations were, to all appearances, scarcely uppermost in the minds of those who were intent on developing the integration system and related treaty innovations. They were more concerned with problem solving than with constitutional generation. As alluded to earlier, it was a peculiar strategy for dealing with the lack of political consensus on the finality issue to postpone the finality problems, occasionally to simply put them to one side with the argument that they were nonproductive and 'scholastic', and instead, by using ambiguities and provisional statements and by achieving package deals, to proceed gradually with the furtherance of integration (namely through the most progressive, 'spillover'- creating resolution of systemic tensions possible). The fact that, nevertheless, for the system of principles and norms achieved each time, its qualification as a 'constitution' won through - or, more accurately, the fact that the Court of Justice established this qualification - was more due to the fact that the obligatory nature of the legal system needed to be guaranteed for pragmatic reasons, viz. in an unequivocal interpretation; it was not by chance that the Court of Justice qualified the Treaties as a 'constitutional charter' and itself as the holder of the interpretative power and that the states accepted this, because they were interested in a clear and binding 'system of rules'. One can only take the resulting agreement as a 'constitutional consensus' *cum grano salis*. It is not one of the preconditions that a constitution meets the expectations made of it, but rather part and parcel of the relief provided that the political debate regulated by the constitution is not allowed at the same time to be a debate on the constitution itself. (181) Even if history never comes to a standstill, the history of a constitution included, there is of course a limit here to the simultaneous implementation of constitutionally linked 'normal policy' and constitutional review policy; this distinction must be made even where both kinds of policy take place at the same time and in combination with each other. To put it more pointedly: if chess players were to continue to change the rules in the middle of a game, chess would become absurd. The repeated changing of the rules in a rule-governed game is not the same thing as accepting that both communal and intergovernmental 'integration policy' can also bring about consequences for the structure of the political system and at times for the constitutional quality of the system too.

It is not just reasons of principle derived from the 'nature of the matter' (namely the requirements of a 'working' and functioning constitution) that argue against the inconceivability of the concept of permanent constitutional evolution, but rather a situation, which can only be addressed provisionally and casually at this point. (182) Nor is it only for the constitutional quality of the basic legal system of the EU that the constitutional loyalty of the political actors and - from a democratic perspective - that of the Union citizens is of crucial significance, but also for securing the continued existence of the Union per se. If the Union in fact no longer functions simply as a technocratically managed special purpose association ('Zweckverband', according to Ipsen), directing and organizing economic integration on behalf and under the control of the governments of the Member States, but increasingly as a politically organized community, which is designed as a 'Union of States and Citizens', then a positive basic attitude on the part of the political forces and, not least, the citizens towards the Union and its policies is an indispensable requirement for the continued existence and the thriving efficiency of the community. (183) A political community requires a sense of political community. But how can the sense of community that a political interest association like the European Union requires be acquired? Even if- and especially if- the EU is viewed as a political community, it will hardly be understood, let alone desired, to be a super state. (184)

A sense of community such as the European Union needs now and in the near future can scarcely equate to the national consciousness that is typical of the Member States. (185) Yet the formation of a 'European nation' is, as far as one can see, not a prospect for any future time that extends beyond this. In other words, there will have to be a consciousness of political belonging on the part of all the Union's citizens that can also motivate them to be willing to display a solidarity which overcomes the previous national delimitations; though this will have to be articulated differently than that consciousness of collective political identity which corresponds to that of the modern nation. The merger of the previous nations, or rather of the constructs of their collective identities is, as far as one can foresee, less probable in reality. Moreover, it is doubtful whether it is desirable if it did have any chance of coming to fruition. The realization would signify a political-ideational (if not a cultural) levelling each time. In view of the possible alternatives, the obvious conclusion is that the sense of political community the Union needs as a political community must be thought of instead as a kind of 'constitutional patriotism'. (186)

Serious constitutional patriotism, however, requires an identifiable object of reference, i.e. a constitution that is not just recognizable, but repeatedly so, in its essential make-up. It would be a caricature of the matter, if one were to rely on a merely manipulatively produced positive assumption of a constantly changing something which escapes clear apperception, as a substitute for recognition of the constitution based on understanding and conviction. At least the fundamental content of the Union constitution must be perceived by the citizens as being intelligible and worthy of recognition. Constitutional patriotism is not simply articulated by chance, as a collective inspiration, as it were, but rather it needs to develop and establish itself. To this, however, the identity of the object of reference must remain recognizable over time.

If once in a while detailed reforms to the constitution are unavoidable, then, firstly, they should not call the fundamental content into question and, secondly, the changes and the reasons for their necessity should be explained to the citizens through public debate in such a manner that the reforms do not weaken recognition of the constitution. (187)

### 3.E A Return to Old Ideas?

In the course of the discussions on the 'European Convention', a renunciation of the idea that the European constitution must change on a virtually permanent basis, in accordance with the dynamics of an 'ever closer union among the peoples of Europe', seems at least to be under consideration.

Not long ago, the President of the Convention replied to the question of whether 'the eternal building site of Europe [would] finally [be] closed' thus: 'I hope so, for at least 20 or even 50 years.' In response to subsequent queries, he added: 'Europe needs a long pause for breath in which to consolidate.' (188) Of course, this is a political statement, possibly motivated by the intention of upgrading the work of the Convention in the eyes of the public. Yet at least this might cause the balanced relationship of the

sustainability and changing dynamics of the constitution to be reconsidered.

Whether or not anyone will succeed in designing a constitution that will actually survive for decades and still enjoy a richness of substance, so that the design can meet with broad acceptance among the governments and the political forces at work in the Member States and among the citizens, is hard to predict at present. However, only if the attempt does succeed, can the product become the object of reference for a real sense of European political community.

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(1) The premise for this is an old and familiar one: 225 years ago, Lessing put the following words into the mouths of 'Ernst' and 'Falk' (G. E. Lessing, *Ernst und Falk - Erstes Gespräch*, 1777):

- *Wovon ich einen Begriff habe, das kann ich auch mit Worten ausdrücken.*

- *Nicht immer; und oft wenigstens nicht so, daß andre durch die Worte vollkommen ebendenselben Begriff bekommen, den ich dabei habe.*

- *Wenn nicht vollkommen ebendenselben, doch einen etwanigen.*

- *Der etwanige Begriff wäre hier unnutz oder gefährlich.*

(2) Max Weber referred to this in German as 'die Erhellung des Gemeinten', in a lecture delivered to students in Munich in 1919 (and published decades later by the *Süddeutsche Zeitung*).

(3) About which, see Schneider, 'Ein Wandel europapolitischer Grundverständnisse? Grundsatzüberlegungen, Erklärungsansätze und Konsequenzen für die politische Bildungsarbeit', in M. Jopp, A. Maurer and H. Schneider (eds), *Europapolitische Grundverständnisse im Wandel* (1998), at 19-147; also, 'Zusammenfassende Überlegungen zum Wandel europapolitischer Grundverständnisse', *ibid.*, at 193-209.

(4) The literature on this is immense and extremely varied - from (for example) the by now classic popular science book by H. Heller, *Die politischen Ideenkreise der Gegenwart* (1926) to the *Kursbuch der Weltanschauungen* (1981), for example, edited by A. Peisl and A. Mohler.

(5) The present author has been preoccupied with this problem for some time now. A key experience was the reception some 40 or so years ago of the minutes of the first 'constitutional convention' in integration history, namely the ad hoc assembly called to work out a status for the 'European Political Community' around 50 years ago. Another experience was having to frequently sum up the results at the end of interdisciplinary European science conferences; see Schneider, 'Synthese und Schlußfolgerungen', in R. Hrbek (ed), *Die Entwicklung der EG zur Politischen Union und zur Wirtschafts- und Währungsunion unter der Sonde der Wissenschaft* (1993), at 115-133; Schneider, 'Synthese und Schlußfolgerungen', in R. Hrbek (ed), *Der Vertrag von Maastricht in der wissenschaftlichen Kontroverse* (1993), at 133-157.

(6) I am thinking here, for example, of the remark made by Stefan Griller, that he does not understand the theory of the autonomy of the Community law system, no doubt because he never found Ipsen's version of the 'Gesamtaktlehre' ('whole act doctrine') comprehensible, since in traditional Viennese legal thinking the distinction between the reason (or ground) of origin and the reason (or ground) of validity ('Entstehungsgrund' vs. 'Geltungsgrund') makes little sense; see Griller's contribution to the discussion, 'Europäisches und nationales Verfassungsrecht', 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2001), at 392 f.

(7) Cf., for example, Hahn, 'Verständigung als Strategie', in M. Haller, H.-J. Hoffmann-Nowotny and W. Zapf (eds), *Kultur und Gesellschaft* (1989), at 346-359.

(8) The author employs as political usage the term 'primary political language' and not, as one might suppose, the term 'everyday language' because the semi-technical language of many politicians and journalists specific to the area of life (or, more appositely, the societal subsystem) known as 'polities' has often divorced itself considerably from the (real) everyday language of the ordinary citizen. The expression 'semi-technical language' has been used because it involves vocabulary and idioms which are employed on the basis of a certain familiarity with 'political life' and the customary articulation of political problems (etc.), without this necessarily involving methodically verified and standardized terminology. In the language of the scientists (as distinguished from the primary political language), in whose field of enquiry the primary political language is articulated, there are no standard terms to use (because it is not clear whether an assertion applies or not). The standard terms must also comply with certain demands as to their theoretical accessibility. Anyone who enters into a scientific explanation of politics is involved on both linguistic levels, which are not unconnected, however; even Aristotle knew this, and he elaborated his own theory by critically examining the linguistic expressions used in the primary language. See, for example, E. Voegelin, *Die Neue Wissenschaft der Politik* (trans. 1959; orig.: *The New Science of Politics: An Introduction*, 1952), at 50 ff. Often both linguistic levels are homonymic; time and again, the results of the critical (scientific) explanation of terms are introduced into the primary political communication process; doctrines of justification for political projects are often represented as scientifically proven; and doctrines ('-isms') are described as 'political theories'.

(9) See on this point the following articles by the present author: 'Europäische Integration – die Leitbilder und die Politik', in M. Kreile (ed), *Die Integration Europas*, (political quarterly / special edition 23/1992) (1992), at 3 ff; 'Europäische Integration im Wandel', in *Legitimation – Transparenz – Demokratie: Fragen an die Europäische Union* (ed by Bayer. Landeszentrale für politische Bildungsarbeit and by Akademie für politische Bildung Tutzing) (1999), at 8 ff; *Jacques Delors: Mensch und Methode* (ed by Institut für Höhere Studien, Vienna, political science series no. 73) (2001).

(10) Cf. the 'Dokumentation: Manifeste Pro und Contra Maastricht', in R. Hrbek (ed) (1993 b), *supra* n. 5, at 159 ff.

(11) Albeit 'with clear toning down and disaggregation of the classic Community system' on the basis of the three pillar construction, and with a lot of 'political bombast' instead of 'legal substance', according to Oppermann, 'Der Maastrichter Unionsvertrag - Rechtspolitische Wertung', in R. Hrbek (ed) (1993 b), *supra* n. 5, at 103 ff, here at 106 f. (The author had qualified with a standard textbook of European law, but had already edited the 'European speeches' of Walter Hallstein several years before.)

(12) *Ibid.*, at 109. 'Community and Union remain what they ... have increasingly become in the

course of 40 years, namely a very intensive, open-ended, legally stabilized and definitively intended form of state collaboration.'

(13) To quote a few striking examples of articles published in respected journals:

- Philipp, 'Ein dreistufiger Bundesstaat?', *Zeitschrift für Rechtspolitik* (1992), at 433 ff, where it is stated of the project associated with the Maastricht Treaty: 'The project is aiming ... towards a multi-national state on a scale that has never been seen before in

history ...' (at 433), and that, in the view of the Joint Constitution Commission, the EEC should be 'certified as enjoying "independent statehood" ... no later than with the ratification of the Maastricht resolutions ...' (at 434). The 'entry into force of the Treaty on the European Union' would 'simply remove the inherent basis from the internal state structures of Germany' (at 437). However, 'the idea underlying the Maastricht Treaty, to create a European federal state, [was] politically and constitutionally inappropriate in approach' (at 438).

– The aforesaid author refers, as mentioned, to the Joint Constitution Commission of his day; its chairman, who was a constitutional jurist and member of the Bundestag, really did share the corresponding view, namely that the founding of the EU would bring the transition from an 'inter-state' to an 'independent state' quality of the Community; see Scholz, 'Grundgesetz und europäische Einigung', *Neue Jurist. Wochenschrift*, (1992), at 2593 ff, here at 2594.

– Wolf, 'Revision des Grundgesetzes durch Maastricht - ein Anwendungsfall des Art. 146 GG', *Juristenzeitung* (1993), at 594 ff; here at 597 f: 'The creation of the "European Union" decided at Maastricht means ... the final transition from the Member State structured European Community to the European federal state while simultaneously reserving the decision on future new constitutional concepts for this federal state.'

– Di Fabio, 'Der neue Artikel 23 des Grundgesetzes', *Der Staat* (1993), at 191 ff, argued inter alia that at the hearing on the Maastricht Treaty and the new Article 23 of the Basic Law the renowned constitutional legal scholars involved were 'essentially' in agreement that, behind European integration with and after Maastricht, the 'nation state of Europe', the federal state, was emerging with increasing clarity, with respected scholars such as Klaus Stern or Albrecht Randelzhofer having questioned the compatibility of the Union Treaty with Article 79 Para. 3 of the Basic Law. Di Fabio also noted that, at the time of writing his report, Leo Tindemans too was of the opinion that the Maastricht Treaty set the course for the federal state.

(14) That is to say, the accession to the European Union was only permissible on the basis of an act of will on the part of the holder of the constituting authority (*pouvoir constituant*), i.e. it implied a change to the constitution of the German people and state, which went beyond the constitution-amending powers primarily intended for the legislative bodies, hence called into question the identity of the Federal Republic. The position was succinctly expressed, for example, by Murswieck, 'Maastricht - nicht ohne Volksentscheid! Eine verfassungsrechtliche Analyse', *Süddeutsche Zeitung* (Munich) of 14 October 1992, at 11: 'The aim of European integration is the creation of a European federal state. With the founding of the European Union, the Member States, which previously existed as individual sovereign states, would lose their sovereign statehood. They would become de facto constituent states of the federal state. Their new status would be comparable with the German *Bundesländer*. The founding of a European federal state would therefore do away with the Basic Law in its capacity as a state constitution and simultaneously make it a constituent state constitution.... Now, admittedly, the Treaty of Maastricht does not lead directly to the founding of a European federal state'; rather, it sets in motion a kind of gradual and irreversible transformation of the EU into a federal state, in Murswieck's view, and therefore a sanctioning act of the people is crucial. The more detailed work by the same author intended for a specialist readership presents a similar view: 'Maastricht und der Pouvoir Constituant', *Der Staat*, (1993), at 161 ff. Other pleas for a referendum on the Maastricht Treaty can be found in Benda, 'Deutschland braucht einen Volksentscheid über den Vertrag von Maastricht', *Impulse* (1992) no. 11, at 32 ff; Doehring, 'Staat und Verfassung in einem zusammenwachsenden Europa', *Zeitschrift für Rechtspolitik* (1993), at 98 ff; Rupp, 'Muß das Volk über den Vertrag von Maastricht entscheiden?', *Neue Juristische Wochenschrift* (1993), at 38 ff.

(15) The transfer of competence to the EC and to the EU, they claimed, violated the democratic right to participate in the exercise of state power, and the democratic deficit of the EU/EC (namely the transfer of legislative powers to the executive, i.e. to the Council composed of executive officers) meant a reversal of the democratic principle and the principle of the legality of the administration. In significant areas, they believed, the Federal Republic was surrendering German statehood and, by virtue of introducing Union citizenship, a people of the European Union would now exercise state power because, with the Maastricht Treaty, the development towards the insidious creation of a European federal state would be irrevocably initiated. In contrast, every German had a right to a defence of the constitutional system (Art. 20 Para. 4 Basic Law); the complaint of unconstitutionality was appropriate for taking remedial action and preventing developments close to civil war.

(16) The coiner of this term 'Staatenverbund', Paul Kirchhof, stated elsewhere that a 'Staatenverbund' is something which is more integrated than a normal confederation; cf. Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland', in J. Isensee (ed), *Europa als politische Idee und als rechtliche Form* (1993), at 63 f, here at 92 f. Therefore, the term 'Staatenverbund' may be translated as 'confederation-plus', a term which will be used henceforth in this paper.

(17) Judgement by the Bundesverfassungsgericht (Federal Constitutional Court, 2nd Senate), 12 October 1993, 2BvR 2134/92, 2BvR 2159/92; published in 89 *Entscheidungen des Bundesverfassungsgerichts* (1994), at 155 f.

(18) Hans Hugo Klein on 18 November 1993 at an event in Luxembourg, taken from Kahl, 'Bundesstaat - Staatenbund - Staatenverbund', *Der Staat* (1994), at 242; see also at 251.

(19) Kirchhof *ibid.*, see above n. 16, here at 89: 'A constitution shaped by European legal thinking demands a reliable community of constitutional states, not a European super state' (similarly at 63: 'European legal thinking demands ... a ... community of constitutional states, not a European mega-organization ...'). We should also bear in mind that, for Kirchhof, a federal state can only thrive as a nation state, i.e. is conceived within the context of a Unitarian preconception of statehood.

(20) To take one example: the persisting apperception problems which the participants experienced in the discussion at the 2000

Annual Conference of Constitutional Law Scholars on the topic of 'European and national constitutional law'; see 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* .

(21) Cf, for example, N. Hartmann, *Das Problem des geistigen Seins*, 2nd edn. (1949). An approach employing more recent cultural-anthropological approaches and approaches from the sociology of knowledge would be useful.

(22) Cf. T. S. Kuhn, *The Structure of Scientific Revolutions* (1962).

(23) They claimed, for instance, that the Treaty established owned competences of the Union ( *Kompetenzkompetenz* ), namely on the basis of the provision of Article F, to wit the Union should endow itself with the means necessary to achieve its objectives and to implement its policies.

(24) For example through the introduction of the common currency.

(25) A typical suggestion was that the European Court of Justice had arrogated a de facto (and, through use of Articles 100a and 235 of the EEC Treaty pre-Maastricht, also a normative) own competence and that, with the proposition it expressed in the EEA Report 1/91, that the subjects of the Community legal system were both the Member States and the citizens, it had described 'the Union citizens as subjects of the Community authority' and thus turned the EEC Treaty, which was under international law, into a 'self-supporting' state constitution; see, for example, di Fabio (1993), *supra* n. 13. here at 196 f, at 206.

(26) From the start, the interpretation of the Article attached importance to the distinction between 'individual sovereign rights' on the one hand and 'whole complexes' on the other; cf, for example, Mangoldt / Klein, *Das Bonner Grundgesetz* , 1 nd edn. (1957), at 660 f.

(27) Headnote 3.a to the Maastricht judgement (see *supra* n. 17), at 155; see also section C.I.I.b.1 of the judgement, *ibid* , at 184.

(28) Cf. *ibid* ., see note 26; concerning the translation, see above n. 17.

(29) *Ibid* ., section C.I.3 of the judgement, at 187.

(30) *Ibid* , section C.II.a of the judgement, at 188 f, with reference to the resolution of the heads of state and government assembled in the European Council in Edinburgh (11-12 December 1992), and to Article 88-1 inserted in the constitution of the French Republic on the occasion of the Union Treaty.

(31) See on this point, for example, von Mangoldt / Klein (1957), *supra* n. 26, at 665, with further references, including to opinions submitted in the context of the constitutional legal debate on the EDC Treaty, and to the statements of the co-author, Friedrich Klein, on the difference between the 'genuine, final transfer' (as it is meant in Para. 1 of Art. 24 Basic Law under review here and signifies a definitive renunciation of the affected sovereign rights) and the 'simple transfer for exercise' (as it is addressed in Para. 2 of Art. 24, which refers to the participation of the Federal Republic in a system of mutual collective security); see Klein, legal opinion of 31 October 1952, *Der Kampf um den Wehrbeitrag* (published by the Institut für Staatslehre und Politik e. V. in Mainz), Vol. II, Part 2 (1953), at 456 ff, here at 468 ff.

(32) See von Mangoldt / Klein *supra* n. 26, at 664.

(33) This was concluded from the character of the new type of supranational communities, which differed in nature from the conventional international organizations. Instead of long explanations, the single detailed quotation below shows how prominently this distinction was emphasized in the jurisprudence of that period. Herbert Kraus stated in an opinion on the constitutional conformity of the EDC Treaty at the time of the legal debate:

Supranational organizations have so much in common with international law communities that they have come about through an agreement under international law. Here it is possible that, following the creation of the community concerned, certain clauses in the agreement continue to apply as international law.... Apart from this, however, the agreement will change into the constitution of the community at the point at which the latter is called into existence. The process corresponds to the one that occurs with the establishment of a federal state by treaty. The community, cooperatively borne by its members, begins in its own right to act within the limits defined by its constitution. At this point the definitive law is no longer international law. However it is not state law either ... because supranational communities, although they can develop into federal states, are not there yet.... Insofar as the community is competent, compliance with its abstract or concrete directions does not presume that the individual state commands its functionaries or subjects to comply with these directions. For these directions emanate straight from the community.... Given this state of affairs, supranational organizations are capable of taking on the sovereign rights of states, and this is even their duty. Their very existence is based on this....

Herbert Kraus, legal opinion of 9 November 1952, *Der Kampf...* *supra* n. 31, Vol. II, Part 2, at 545 ff, here at 549 and at 550. At 549 Kraus notes that the founding states would be intent on the individual communities 'combining and organizing themselves to form a European federal state'. With regard to these very circumstances, Kraus stressed in his advisory opinion the necessity for the structural congruence of the 'constitution' (sic) with the Community (here the EDC) and the constitutions of the Member States; the Community constitution, he believed, must have democratic, federalist and legalistic traits (cf. *supra* at 553). The discrepancy with the view predominantly found today in the Federal Republic as to the necessity for the application of German law for the effective 'reach' of Community law is obvious.

(34) Scheuner, 'Diskussionsbeitrag zum Thema "Föderalismus als nationales und internationales Ordnungsprinzip"', 21 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1964), at 122 ff, here at 123. Scheuner did suggest, however, that he considered the own competence of the 'decision-making centre of the Communities', that is 'without the involvement of the national instances', to be the criterion for a 'federal' system (i.e. he conceived 'federalism' in terms of a unitarian-statist understanding of political order)

(35) The 'Schuman Plan' of 9 May 1950 referred several times to the aim of the 'federation'. Thus it was that, when the British revealed that, as far as they were concerned, only an international organization of the classical type was worth considering, it was



immediately intimated to them that their participation in the founding talks was pointless. While the Germans understood by the 'federation' referred to in the Schuman Plan quite simply a federal state, this was by no means the case with the French; cf. the contribution to the discussion from Mosler: 'Federalismus als national und international Ordnungsprinzip', 21 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1964), at 138.

(36) See further below, section 2.C. (at 16).

(37) The 'supranational federal authority' should 'be endowed with the powers necessary to (a) bring about the economic unity of Europe on the basis of social justice, (b) make possible a common European foreign and security policy serving world peace, (c) establish and continue to uphold the equality of the rights of all European peoples, and (d) guarantee and protect by law the fundamental rights and human freedoms of the European citizens.' Text of the resolution in *W. Lipgens, 45 Jahre Ringen um die europäische Verfassung 1939-1984* (1986), at 296. Also, at 280 ff, there are references to the underlying initiative of the UEF.

(38) See, for example, Jaenicke, 'Bundesstaat oder Staatenbund: Zur Rechtsform einer europäischen Staatengemeinschaft', *Festschrift für Carl Bilfinger* (1954), at 71 ff. At any rate, the rapporteur of the main committee in the second plenary session of the Parliamentary Council had unequivocally stressed that this provision should express the fact 'that the German people is at least resolved to move from the nation-state phase of its history to the supranational state phase' - Carlo Schmid on 8 September 1948, Stenographer's Reports at 15, right-hand column, quoted here in von Mangoldt / Klein (1957), *supra* n. 26, Vol. I, at 656 f. Carlo Schmid also declared at the setting-up of the German Council of the European movement in June 1949: 'If Europe is not to go under, then ... a truly political, economic and constitutional unity ... will have to be created.' This involved, he maintained, breaking away from the dogma of the indivisibility of sovereignty. 'Most speakers developed similar ideas' (C. Schmid, *Erinnerungen* (1981), at 428 f); extracts from the paper can also be found in W. Lipgens (1986), *supra* n. 37, at 271 ff.

(39) See the corresponding changes in the results of the 'Eurobarometer' surveys; cf. also Reif, 'Ein Ende des "Permissive Consensus"?' Zum Wandel europapolitischer Einstellungen in der öffentlichen Meinung der EG-Mitgliedstaaten', in R. Hrbek (ed) (1993 b), *supra* n. 5, at 23 ff.

(40) This should not be misconstrued as a relapse into nationalism brought on by a new sense of power; there are good reasons for assuming that, on the contrary, the socio-economic and ideological gap between the 'old' Federal Republic and the 'new states' that joined it urged the political elites to put the stress on national identity and solidarity.

(41) Chancellor Helmut Kohl was still convinced several months after signing the Maastricht Treaty that the European Union would lead 'in a few years' to the creation of 'United States of Europe' - as he said on 4 April 1992 at Koenigswinter: Auswärtiges Amt (ed), *Gemeinsame Außen- und Sicherheitspolitik der Europäischen Union (GASP) -Dokumentation*, 10th edn. (1995), at 511 ff, here at 513. Only a few weeks after that, he distanced himself from this expression used time and again by the supporters of European unification time ever since Winston Churchill's famous Zurich speech in autumn 1946; he said he had 'used it for decades', but now '[had] to learn that the formula is misleading' because it brought to mind the United States of America, whose citizens perceive themselves as belonging to a single nation, while the nations in the united Europe (which ought not to become a centralized super state) should endure: Kohl, 'Die einigende Kraft des kulturellen Erbes im zusammenwachsenden Europa', *Bulletin des Presse- und Informationsamtes der Bundesregierung*, No. 39 of 17 May 1992, at 341ff, here at 343 f.

(42) Thomas Oppermann points this out in his remarks on the change in the dominant European- policy model from federalism to pragmatism; see T. Oppermann, *Europarecht*, 2nd edn. (1999), at 344 f (marginal nos. 914 ff).

(43) This point is highlighted by P. L. Berger and T. Luckmann, *The Social Construction of Reality* (1966). It is one of the most astonishing examples that a power-sharing constellation based on a contingent constitutional ceasefire was subsequently rationalized and justified by Immanuel Kant with reference to the logic of the practical syllogism.

(44) See on this point, for example, A. Moravcsik, *The Choice for Europe* (1998); or M. Jachtenfuchs, *Die Konstruktion Europas: Verfassungsideen und institutionelle Entwicklung* (2002).

(45) Markus Jachtenfuchs is of the opinion, for instance, that 'interests' tend to 'conceal the framework within which political actors act, while 'ideas' then 'concretize ... this general orientation' (*supra* n. 44, at 31 and at 37). It might, however, be more fruitful to proceed from the assumption that 'basic understandings' or 'ideas' predefine the field of observation and conceptualization within which interests are articulated, and that they simultaneously provide normative reliability or acceptance criteria for the articulation of interests. It is a different matter whenever definitive systems of ideas and interest perceptions come into conflict with each other. Alexis de Tocqueville, in discussing the creation of the North American federal state, was of the opinion that, the fathers of the constitution bent the rules of logic and added that this 'almost always happens when the interests are in conflict with the grounds of reason'. In the constitution of the USA 'the two theoretically irreconcilable orders have been forcibly reconciled'. See A. de Tocqueville, *De la Democratie en Amérique* (1835-40).

(46) The most important texts on this are to be found in *Europa: Dokumente zur Frage der europäischen Einigung* ( *Dokumente und Berichte des Forschungsinstituts der Deutschen Gesellschaft für Auswärtige Politik*, Vol. 17, in 3 parts) (1962), Part 1, at 27 ff.

(47) These ideas of the 1920s are examined in more detail in H. Schneider, *Leitbilder der Europapolitik I: Der Weg zur Integration* (1977), at 94 ff, 98 f, 100 ff, 104 ff, 108 ff.

(48) See, for example, W. Lipgens, *Europa-Föderationspläne der Widerstandsbewegungen 1940-1945* (1968); and, on the after-effects, id.: *45 Jahre Ringen um die Europäische Verfassung* (1986).

(49) For extensive detailed evidence, see *ibid.*

(50) See above n. 35.

(51) Cf, for example, H. von der Groeben, *Aufbaujahre der Europäischen Gemeinschaft* (1982).

(52) For further references, see Schneider, 'Von der "gemeinsamen Verteidigungspolitik" der EU zur Neuauflage der "Europäischen Verteidigungsgemeinschaft"?' in E. Reiter (ed), *Jahrbuch für Internationale Sicherheitspolitik* 2002, Vol. 1, (2002), at 79 ff, here at 83 ff.

(53) These drafts are (I) the Draft Statute for the European Community, passed on 10 March 1953 by the 'ad hoc assembly', (II) the Draft Treaty for the formation of the European Union, passed by the European Parliament on 14 February 1984 (the so-called Spinelli Draft), (III) the Resolution of the European Parliament on the constitution of the European Union of 10 February 1994 (the so-called 'Herman report'), to which a 'Draft for a Constitution of the European Union' is attached.

The German version of the texts is to be found, inter alios, in W. Loth, *Entwürfe einer europäischen Verfassung: eine historische Bilanz* (2002), at 73 ff, 129 ff, 205 ff.

The draft treaties for a 'Political Union' (the so-called 'Fouchet Plans') discussed in the early 1960s are not considered here; according to their Gaullist initiators, they were to place the EC under intergovernmental guardianship, i.e. revolutionize the constitutional character of basic Community law. The German of the texts is in Lippgens (1986), *supra* n. 37, at 426 f. In addition, see R. Bloes, *Le 'Plan Fouchet' et le problème de l'Europe politique* (1970); H. von der Groeben, *Aufbaujahre der European Gemeinschaft* (1982), at 127 ff; T. Jansen, *Europa: Von der Gemeinschaft zur Union* (1986). But see also under section 2.E, on point 11,2, below at 25. (54) In post-war European politics, this was in fact introduced on the initiative of the Union Européenne des Fédéralistes of October 1949 for the elaboration of a 'European federal pact' (*pacte fédéral*) by the Consultative Assembly of the Council of Europe; text (German version) in *Europa: Dokumente ...*, *supra* n. 46, Part 1, at 587 ff. The initiative led, among other things, to the resolution in the German Bundestag of 26 July 1950 for a federal pact; text in Lippgens (1986), *supra* n. 37, at 296.

The Draft Statute of 1953 was drawn up by order of the six governments and presented to them for further attention.

The Draft of 1984 was expressly submitted to the parliaments and governments of the Member States by the European Parliament itself. Its Article 1 reads: 'By this Treaty, the High Contracting Parties establish among themselves a European Union'. Altiero Spinelli in his capacity as rapporteur stated: 'In its contents [the draft treaty] represents a genuine constitution.... In its form it represents an international treaty since only the states ... are authorised to approve, ratify and thus put into effect the contents ...', European Parliament, Session Documents 1983-1984, Doc. 1-1200/83/B (Explanatory Statement), at 5, fig. 13.

The 'Herman report' was accepted in 1994 by the European Parliament shortly before the new parliamentary elections. Hence the MEPs could not do much more for its implementation. However, they did put in a plea that, prior to the opening of the intergovernmental conference planned for 1996, a 'European Constitution Convention of Members of the European Parliament and the Parliaments of the Member States' should meet and work out a new preliminary draft. A 'group of independent personalities' should also be brought in to help with the preparation, with the result being subsequently presented to the intergovernmental conference.

Furthermore, Article 1 of the Draft Treaty begins with the sentence: 'The European Union ... consists of the Member States and the citizens; all the power of the Union proceeds from the citizens.'

(55) The choice of words is based on Karl Lowenstein's trinity of 'policy determination', 'policy execution' and 'policy control'; see K. Lowenstein, *Verfassungslehre* (1959) (Orig.: Political Power and the Governmental Process, 1957).

(56) The Draft of 1953 had already called upon the ad hoc assembly of the European Community to create a Common Market and harmonize currency, credit and finance policy. The texts of 1984 and 1994 distinguish exclusive and competing areas of responsibility as well as the tasks to be fulfilled through the Member States cooperating together.

(57) The Draft of 1953 envisaged a people's chamber and a senate (the members of which would be elected by the national parliaments), whereas a council of national ministers should ensure the harmonization of Community and Member State politics (with the ECSC construction serving as a model). At the same time, this Council of Ministers would be authorized to empower the legislature to make decisions on the duties initially only assigned in principle to the Community (Common Market, Common Foreign and Security Policy), for which unanimity should be necessary. The texts of 1984 and 1994, on the other hand, declared themselves in favour of changing the function of the EC Council or 'Council of the Union' to a chamber of states with the same rights as the European Parliament.

(58) The Draft of 1953 envisaged the election of the President of the 'European Executive Council' by the senate and the appointment of the other members by the President. The executive council would require the majority confidence of both parliamentary chambers, while the senate would be empowered to make a 'constructive vote of no confidence'.

(59) The issue of the disputes over the 'Political Community' or the 'Political Union' was already current in the 1960s between the advocates of integration incorporating supranational traits, on the one hand, and the Gaullists, on the other (see on this point the literature cited in n. 53 on the so-called 'Fouchet Plans'). It subsequently found expression in the variety of conceptions for the European Parliament and the European Council; see H. Schneider, *Rückblick für die Zukunft: Konzeptionelle Weichenstellungen für die Europäische Einigung* (1986), at 51 ff. and 65 ff. Today's controversy is particularly worthy of special attention (it will be dealt with in a section of this paper not included in this publication).

(60) This clearly applied to the initial phase: Jean Monnet regarded the ECSC specifically - as can be seen from the declaration of 9 May 1950 (in the so-called 'Schuman Plan') - as the foundation stone or first stage on the way to a European federation. It also applies, however, to the period following; for the focus of the Treaties of Rome on bringing together the national economies, namely under the banner of an at first forcefully asserted primacy of market integration, continued to be determined by the basic intention of the leading actors 'to lay the foundations of an ever closer union among the peoples of Europe' (Preamble to the EEC Treaty). For the view of the promoters, see, for example, W. Hallstein, *Die Europäische Gemeinschaft*, 5th edn (1979), where on the one hand the author states: 'Der allgemeinste Zweck des Vertrages ist die Verschmelzung der nationalen Märkte zu einem gemeinsamen Markt' (The most general purpose of the Treaty is the merger of the national markets to form a common market: 57); '... das Grundgesetz der Europäischen Wirtschaftsgemeinschaft, ihre "Philosophie", ist klar marktwirtschaftlich. Den unverfälschten Wettbewerb im ungeteilten Gemeinschaftsraum ins Spiel zu setzen, das ist das Leitmotiv' (the basic law of the European Economic Community, its "philosophy", is clearly free-market. To bring unadulterated competition to play in the undivided Community area, this is the leitmotif: 28). On the other hand, however, he notes: 'Der politische Charakter der sogenannten wirtschaftlichen Integration ist... evident. Diese ist nicht nur ein Schritt auf dem Wege zur politischen Integration ..., sie ist bereits ein Stück davon' (The political character of so-called economic integration is ... evident. This is not just a step on the path to political integration ..., it is already part of it: 27) - because the EC is, in the writer's opinion, an economic and socio-political union (at 29, with the quotation from the Commission memorandum of 24 October 1992 on the 'Community Action Programme for the Second Stage'). It is not just that political unity might only be achieved via economic unity; it is only possible, in fact, to achieve economic unity through political unity (31f). One can virtually interpret the politics of economic integration as an 'indirect constitutional policy', the theoretical rationalization having been made by the creators of the so-called neofunctionalist integration theory. Cf. Schneider, 'Föderale Verfassungspolitik für eine Europäische Union', in H. Schneider and W. Wessels (eds), *Föderale Union - Europas Zukunft?* (1994),

at 21 ff.

(61) See on this point Schneider, 'Optionen der politischen Finalität: Föderation - Konföderation - Verfassung', in H. Schneider, M. Jopp and U. Schmalz (eds), *Eine neue deutsche Europapolitik? Rahmenbedingungen - Problemfelder - Optionen* (2001), at 583 ff, esp. at 604 ff.

(62) As revealed, for example, by Germany's Minister of Foreign Affairs Joschka Fischer in his Berlin address on 12 May 2000, with which he initiated the constitutional debate that brought about the Convention on the Future of Europe; see Fischer, 'Vom Staatenverbund zur Federation - Gedanken über die Finalität der europäischen Integration', *Integration* (2000) 3, at 149 ff.

(63) The constitution of the USA is famous for proclaiming 'a more perfect union' as a project which is to be made possible and advanced through the constitution, but whose objective, clearly, constitutionalization has not yet managed to achieve.

(64) The EC Draft Statute of 1953 goes back to Article 38 of the European Defence Community Treaty of 27 May 1952, in which the EDC assembly was called upon to prepare both its own direct elections and the transformation of the EDC organization envisaged in the Treaty for a 'final organization'. This organization should 'be such that it can form the integral part of a subsequent federal or confederate community', in which other 'already existing or still to be created organizations of European cooperation' should be combined. Even before the Treaty was signed, the six foreign ministers agreed on 28 January 1951 'that the organization of the organs of the Community will [only] remain in force until transferred in a federal or confederate form, which should take place as soon as possible.' And before the ratification process of the EDC Treaty got properly underway (ultimately to founder on 30 August 1954), the six foreign ministers decided to hand over this work on the constitution - before the Treaty came into force - to the ECSC parliament, which was extended for this purpose. This 'ad hoc assembly' was instructed 'to work out the statutes for a Political Community of a supranational character', which was 'open to all Member States of the Council of Europe and offers those of these states that do not wish to join this Community opportunities for an association'. At the same time, the ministers stressed that 'the constitution of a European Political Community in the form of a federal community or a confederation [should combine] with the creation of common foundations for economic development and with a merging of the essential interests of the Member States'. See the texts in Lippgens 1986, *supra* n. 37, at 314 f, 316 ff. On the procedure, see Lippgens, 'EVG und politische Federation', 32 *Vierteljahreshefte für Zeitgeschichte* (1984), and in R. Magagnoli, *Italien und die Europäische Verteidigungsgemeinschaft* (1999). In addition, the Draft of 1953 combined federal and confederate features, which even then led to characterization with the formula *sui generis*. The 'Spinelli Draft' of 1984 went on to proclaim in its preamble the intention to 'continue and lend new impetus' to European unification, while the preamble of the draft contained in the 'Herman report' talks about the 'continuity of the European integration process' and about the 'federally oriented development'; Article 46 provides for opportunities for consolidating integration in a smaller circle of Member States.

(65) There had been talk of naming the subsequent ECSC founding treaty '*Traité portant Constitution de la Communauté Européenne pour le charbon et l'acier*'. However, the idea was abandoned in view of the constitutional ring to the term: Mosler, 'Die Entstehung des Modells supranationaler und gewaltenteilender Staatenverbindungen in den Verhandlungen über den Schuman-Plan', in E. von Caemmerer, H.-J. Schlochauer and E. Steindorff (eds), *Probleme des europäischen Rechts* (Festschrift für W. Hallstein) (1966), at 355 ff, here at 382.

(66) Case 294/83, *Les Verts v EP* [1986] ECR, at 1339, para. 23; Opinion 1/91, *EEA I* [1991] ECR, 1-6079 (= the first report on the EEA Treaty).

(67) Quoted in Kirchhof, 'Kompetenzaufteilung zwischen den Mitgliedstaaten und der EU', *Europäisches Forum: Die künftige Verfassungsordnung der Europäischen Union* (*Europäische Gespräche* 2/94), ed by the Representation of the European Commission in the Federal Republic of Germany, Bonn (1994), at 57 ff, here at 59.

(68) Hence reference is often made to the designation of the statutes of international organizations as a 'constitution'. Walter Hallstein himself adopted this analogy, although he moved the Community constitution very close to the state constitution, on the basis of his assessment of the EC as pre-federal; see Hallstein, *supra* n. 60, at 64: 'Each association, be it people, be it private or public communities, has a constitution. This orders the members in relation to each other and to the whole, it determines the common goals, it organizes the association ...'. The Community, however, is 'similar to a federal state' (63), especially since it 'observes functions otherwise reserved for states' (83). This problem is discussed in a section of the more extensive German paper.

(69) Bieber, 'Verfassungsentwicklung und Verfassungsgebung in der Europäischen Gemeinschaft', in R. Wildenmann (ed), *Staatswerdung Europas?* (1991), at 393 ff. The figure quoted here (in parenthesis) is at 398. As to the judicial development of the constitution, Bieber points out that the priority of Community law and its immediate validity were first placed beyond doubt by the ECJ's ratification: in 1990, the ECJ granted Parliament the right to bring an action against the other organs contrary to the wording of the EEC Treaty; see *ibid.*, and at 404 f.

(70) *Ibid.*

(71) *Ibid.*, at 413. This issue is discussed in a section of the more extensive German paper.

(72) On this 'statist' policy understanding and its alternative, cf. Schneider, 'Die Europäische Union als Staatenverbund oder als multinationale "Civitas Europea"?', in A. Randelzhofer, R. Scholz and D. Wilke (eds), *Gedächtnisschrift für Eberhard Grabitz* (1995), at 677 ff.

(73) One thinks, for example, of contemporary French 'souverainistes', who in the tradition of Rousseau and the Jacobins (*Il n'ya que l'individu et l'État*) can only imagine a political community as a sovereign state and therefore, whenever they deem political unification of Europe to be desirable or necessary, think of an order that at least tends to be unitary. Hartmut Marhold has recently drawn the attention of German-speaking readers to this in several publications. Cf, for example, the journal *La Souveraineté. Horizons et figures de la politique* No. 610 (2000), with articles by, inter alios, Lefort, 'Nation et souveraineté', at 25 ff; Balibar, 'Prolégomènes à la souveraineté: La frontière, l'État, le peuple', at 47 ff.; Alliès, 'Souverainistes versus fédéralistes. La controverse française', at 120 ff. Monod and Magoudi, 'Manifeste pour une Europe souveraine,' Paris 1999.

(74) As early evidence of this, see, for example, U. Campagnolo, *Repubblica Federale Europea* (1945).

(75) A typical exponent of this viewpoint was, for instance, Altiero Spinelli in the 1950s and early 60s; see A. Spinelli, *Manifest der Europäischen Föderalisten* (trans. 1958, ital. Orig. 1957); also H. Schneider, *Europäische 'Volksdemokratie': Kritik eines politischen Trugbildes* (1958).

- (76) See, for example, Kirchhof, 'Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland', in J. Isensee (ed) et al., *Europa als politische Idee und als rechtliche Form*, (1993), at 63 ff. In addition, see Schneider, *supra* n. 72. With his initiative for a 'Congress of the European People', Altiero Spinelli wanted to set precisely this pre-constitutional formation of a transnational collective identity in motion. This problem is discussed in a section of the more extensive German paper.
- (77) See, for example, Arbeitsgruppe Europäische Verfassung (European Constitution Working Group comprising Karl Dietrich Bracher, Ulrich Everling, Meinhard Hilf et al.), 'Wie Europa verfasst sein soll', in W. Weidenfeld (ed), *Wie Europa verfasst sein soll* (1991), at 11 ff, here at 19; Schneider, *supra* n. 60, here at 42 ff; Fischer, *supra* n. 62; Schneider, *supra* n. 61, *passim*.
- (78) *Ibid.* (i.e. last reference of the previous note).
- (79) As did Joschka Fischer a year or so after his Berlin address of May 2000. See *Süddeutsche Zeitung* of 25 June 2001, at 6 ('Föderale EU-Verfassung in 100 Jahren möglich').
- (80) Habermas, 'Der europäische Nationalstaat unter dem Druck der Globalisierung', *Blätter für deutsche und Internationale Politik* (1999) 4, at 3425 ff. See also Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratie', *ibid.* (1998) 7, at 804 ff. Similarly, Habermas made a plea for the constitutionalization of the Union in a lecture given as one of the 'Hamburg Lectures' of June 2001; see *Süddeutsche Zeitung* of 28 June 2001, at 17 ('Die Euro-Form: Jürgen Habermas' energischer Vortrag bei den Hamburg Lectures').
- (81) One should not ignore the fact that there is a counter view that also goes under the name of 'federalism': that of 'competitive federalism', as was recommended by Wolfgang Schäuble and Karl Lamers in 1999 in their 'reflections' on European policy. In their view, only monetary policy should be pursued in a 'centralized' manner, while federal variety should enable 'competition for the best solution' to take place and, with that, performance-related adaptation of the economic and social realities to the globalized reality. 'See 'Überlegungen zur europäischen Politik II. Zum Fortgang des europäischen Einigungsprozesses', presented to the press in Bonn on 3 May 1999. On the concept of competitive federalism, see H. Schatz, R.C. van Ooyen and S. Werts, *Wettbewerbsföderalismus: Aufstieg und Fall eines politischen Streitbegriffs* (2000).
- (82) On the intended simplification and its various motives and forms of realization, see, for example, Muller-Graff, 'Der Post-Nizza-Prozess: Auf dem Weg zu einer neuen europäischen Verfassung?', *Integration* (2001), at 208 ff, here at 213 f.
- (83) Waldemar Hummer points to the fact that the 'primary law' consists of 10 treaties and numerous protocols, and that the four fundamental treaties (TEC, TEU, TECCS, TEAC) alone contain more than 700 articles, while the written corpus of primary law consists of more than 1,000 articles: Hummer, 'Ursprünge, Stand und Perspektiven der Europäischen Verfassungsdebatte', in S. Gfriller and W. Hummer (eds), *Die EU nach Nizza* (2002), at 325 ff, here at 340 and fn. 70.
- (84) Suffice it to recall that the provisions for the fundamental or central role of the 'hard core' of the First Pillar (i.e. the integration of the markets) in the overall system of integration were understood very differently by the authors of consolidated draft treaties.
- (85) The three were Jean Luc Dehaene, Lord David Simon of Highbury and Richard von Weizsäcker; their ideas were expressed in their Report to the European Commission of 18 October 1999.
- (86) Already in the context of the preliminary work on the Treaty of Amsterdam, this 'alienation' was described as a major problem for European policy (especially by the chairperson of the think tank preceding the intergovernmental conference, Carlos Westendorp). On the concept and problems of so-called 'closeness to the citizens' (*Bürgernähe*), see Schneider, 'Leitbilder zur europäischen Integration', in Bayerische Landeszentrale für politische Bildungsarbeit und Akademie für politische Bildung (eds), *Legitimation - Transparenz - Demokratie; Fragen an die Europäische Union* (1999), at 65 ff, here at 78 ff. The problem is further discussed in a section of the more extensive German paper.
- (87) Cf. the references above in n. 53.
- (88) The constitution should only allow Community institutions to be strengthened to the extent that this is clearly in the interest of the Member States. Moreover it should reinforce the situation whereby the decision-making power remains in future in the hands of the Member State governments, as the British Foreign Secretary Jack Straw maintained in a speech entitled 'Strength in Europe begins at Home' delivered on 27 August 2002 in Edinburgh. Since then - around mid-October 2002 - a draft for a 'constitutional treaty of the European Union', prepared under the direction of Alan Dashwood (Cambridge), has been submitted: A. Dashwood et al., *Draft Constitutional Treaty of the European Union and Related Documents*, typescript, 18/10/02. Foreign Secretary Jack Straw also explained a motive report in a magazine article ('A Constitution for Europe', *The Economist*, 12-18 October 2002). According to newspaper reports (see *Süddeutsche Zeitung* of 17.10.02, at 1: 'London will EU-Verfassung gegen "Superstaat" (London Wants EU Constitution Against 'Super State')) the draft is at the behest of the Foreign Office and is to be submitted to the Convention by European minister Peter Hain; Prof. Dashwood explained that he was concerned to develop 'an anti-federal concept'. This finds expression in the text particularly in the way in which it talks of the sovereignty of the Member States being jointly exercised to a certain extent by the institutions of the Union (clearly dismissing any thoughts of assigning parts of sovereignty to the Union); on the other hand, however, the three pillar construction of the previous EU treaties is to be abandoned.
- (89) This includes inter alia the initiative of the 'European Constitutional Group', first submitted in 1993; the author has only had the summary of the revised version of August 1997 available to him: 'Proposal for a European Constitution (Summary of Main Features)', at 23 ff. See, for recent justification, R. Vaubel, *Europa-Chauvinismus: Der Hochmut der Institutionen* (2001). The constitution project of the *Economist* also belongs in the same category, about which see the issue of 28 October 2000, at 22 ff and the foreword at 11 f.
- (90) As he stated at a discussion event held by the Institut für Europäische Politik (Berlin); see also Görlach, Leinen and Linkohr, 'Europa als Bundesstaat' (2000), in H. Marhold (ed), *Die neue Europadebatte: Leitbilder für das Europa der Zukunft*, (2001), at 289 ff.
- (91) See above notes 13 and 14. But even years after the Maastricht ruling of the Federal Constitutional Court, the question of the transformation of the Union into a state did not become obsolete. Compare, for example, the argumentation of Zuleeg, 'Die föderativen Grundsätze der Europäischen Union', *Neue Juristische Wochenschrift* (2000) at 2846 ff, here at 2851, who asserts that the widespread consensus, that the EU is not a state, ought to amaze people because: 'The EU is endowed like a state with sovereign authority and amalgamates several states. If one takes the formula of independence externally and the highest authority internally as a basis, the Member States have lost their sovereignty.... The Member State no longer has ... the sole supremacy on its territory. If the

own competence is regarded as the crucial criterion for the quality of the state, it should be remembered that the EU and its Member States are together the constitution makers of the Union... If the conventional characteristics of an independent state no longer apply to Member States of the Union, it is obvious to suppose that the interest association vested with higher authority is a state ...'.

However, the 'legally oriented indicators' may 'not be decisive alone' in answering the question of the state quality of the EU. All the same, foreign policy and defence are 'not or only slightly Communitized', and the Member States should have reserved the power of enforcement. The EU is therefore, Zuleeg argues, not a federal state, but a 'federation'. Karl Doehring, 'Demokratiedefizit in der Europäischen Union?', 112 *Deutsches Verwaltungsblatt* (1997), no. 9, at 1133 ff, here at 1136, talks in terms of a 'quasi state authority of the European Community'.

(92) Cf. S. Puntischer-Riekmann, *Die kommissarische Neuordnung Europas: Das Dispositiv der Integration* (1998); id., 'Demokratie im supranationalen Raum', in E. Antalovsky et al. (eds), *Integration durch Demokratie* (1997), at 69 ff, here esp. at 103 ff.

(93) See J. Habermas, *Theorie des kommunikativen Handelns*, Vols. I/II (1981). On the European policy perspective, cf. R. Erne et al. (eds), *Transnationale Demokratie - Impulse für ein demokratisch verfaßtes Europa* (1995) (including the articles by Evers at 139 ff, Gross at 178 ff, and Schiller at 196 ff).

(94) See, for example, Huber, 'Europäisches und nationales Verfassungsrecht', 60 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2001), at 200 f (here with direct reference to 'Union constitutional law').

(95) D. Grimm, *Die Zukunft der Verfassung* (1949), at 427 f- Among the several authors who have written on this subject, see, for example, Scheuner, 'Verfassung' in *Staatslexikon*, 6th edn., Vol. 8, (1963), column 117 ff, here column 118 f: 'It is the purpose of a constitution to define the basic legal order for a state which is to fit the future political development into a secure framework over the long term.... The concept of the constitution comprises ... the long-term supreme legal norms, civil liberty and the organization of the state institutions, as well the central ideas of state planning as a basis for the political community of a people.'

(96) Leisner, 'Antigeschichtlichkeit des öffentlichen Rechts?', *Der Staat* (1968), at 137 ff, here at 144 and 152.

(97) 'These Fundamental Constitutions shall be and remain the sacred and unalterable form and rule of government... for ever' - these being the 'Fundamental Constitutions' of Carolina of 1669, taken from U. K. Preuss, *Revolution, Fortschritt und Verfassung* (1990), at 19.

(98) Scheuner *ibid*, (see n. 95). Cf. also Haberle, 'Zeit und Verfassung', in R. Dreier and F. Schwegmann (eds) *Probleme der Verfassungsinterpretation* (1976), at 293 ff, here at 299: 'If the "duration" of a constitution is a compliment to it, this is because it is able to "last" over time by accompanying [time]. See also R. Baumlin, *Staat, Recht und Geschichte* (1961).

(99) E. Schmidt-Assmann, *Der Verfassungsbegriff in der deutschen Staatslehre der Aufklärung und des Historismus* (1967), at 58.

(100) Ophüls, 'Die Europäischen Gemeinschaftsverträge als Planungsverfassungen', in J. H. Kaiser (ed), *Planung*, vol I (1965), 229 ff. Cf. also the statements of Walter Hallstein on 29 July 1958, 'Europäische Integration als Verfassungsproblem' in W. Hallstein, *Europäische Reden*, ed. by Th. Oppermann (1979), at 70 ff, here at 80: '... this European integration is not a being, but rather it is a constant becoming', and on 9 January 1959 'Die EWG als Schritt zur europäischen Einheit', in *ibid*, at 103 ff, here at 109: 'Integration is not a being, it is a becoming. It is ... incessant change'. In addition, see the characterization of the European Parliament as a 'constitutionally developing assembly', in E. Grabitz and T. Laufer, *Das Europäische Parlament* (1980), at 378 ff, also at 385, according to which the European Parliament, in contrast to 'normal' state parliaments and as distinct from the common catalogue of functions dating back to Walter Bagehot, found in his *The English Constitution* (1867), was also assigned a 'system-forming function' (*Systemgestaltungsfunktion*); Grabitz et al., 'Das Europäische Parlament - verurteilt zur Machtlosigkeit?', in *Aus Politik und Zeitgeschichte*, (1986), edition B 28, at 22 ff, here at 30 f. This went significantly further than Eberhard Grabitz's earlier invitation to Parliament in 1979 to conceive of itself as a 'constitution- promoting assembly'; see E. Grabitz and T. U. Meyer, *Europawahlgesetz /Kommentar* (1979), at 1 ff.

(101) H. P. Ipsen, *Europäisches Gemeinschaftsrecht* (1972), at 11: '... eignet zahlreichen Komplexen des Gemeinschaftsrechts ein Zug motorischer, plan- und zeitbestimmter Impulsivität und eine Tendenz,... Veränderung und Entwicklung hervorzurufen'.

(102) Löwenstein 'Verfassung, Verfassungsrecht', in C. D. Kernig (ed), *Marxismus im Systemvergleich / 'Politik' series*, Vol. 4, 1973, at col. 249 ff, here col. 288; see also *ibid*, column 279: 'The socialist constitution is not only the framework for the management of the political process ... In view of the social duty that it has to fulfil, it is at the same time an action programme for political practice ...'; and column 280: 'The socialist constitution is not understood to be static; it is in constant forward motion in the direction of the ... socialist society of the future .... The legislator is obliged by constitutional law ... to realize the socio-economic imperative of the constitution.'

(103) E.-W. Böckenförde, *Die Rechtsauffassung im kommunistischen Staat* (1967), at 35.

(104) 'The socialist constitutions are founded on the realization of the historic mission of the working class. They are directed towards eliminating the exploitation of man by man, to creating and increasing socialist social ownership of the chief means of production, to creating and securing social relations of comradely cooperation and mutual assistance between the masses of working people led by the working class on the basis of socialist ownership, and to practically developing the personal skills and talents of the human being in the socialist community': 'Verfassung', *Kleines politisches Wörterbuch* - a semi-official Marxist-Leninist dictionary published in the former German Democratic Republic - (1973) at 880 ff, here at 881, right-hand column.

(105) One reason for the impression that the power of the 'Eurocracy' was recklessly expanding was because of the original idea that the duties of the Community and the extent of their intervention were objectively limited by their commitment to the functional integration of the economy (and, moreover, the Community institutions would operate under the control of the Member States). In modern societies, which are very much permeated by the economy, there is virtually nothing that might not be economically relevant or dependent on economic actualities or dynamics. That is why the 'Eurocracy' felt duty-bound, by virtue of its commitment to universal implementation of the four freedoms and unadulterated competition, to involve itself in all possible areas, hence to subject the transmission of TV programmes to the regulatory demands of the service market or to control education policy with respect to how vocational training qualifications meet the requirements of the freedom of establishment, the freedom to provide service or Community-wide access to jobs ('freedom of movement'). It was precisely this that provoked, first, the concern of the Member State governments and bureaucracies over Brussels' lack of respect for national sanctuaries and, second, the tendency of those involved

and their interest representations to influence the relevant Commission projects. The consequence was an obscure tug-of-war between those with influence and decision-makers of various hues, which made the accountability structures increasingly complex and opaque.

(106) See the references above in section II.B, above at 15 f.

(107) The course was already set while drafting the Treaty of Rome; the architects endeavoured, in the face of the failure they had already experienced in the first run-up to a supranational Community, to produce a design that would protect national sovereignty. First of all, agreement was sought on the plan for material economic integration, and only then were the institutional and procedural arrangements necessary to achieve this discussed. At the same time, the orientation was towards a two-dimensional subsidiarity principle, as it were: firstly, in the sense of the maxim 'As much market integration as necessary, as much political integration as necessary' and, secondly, in the sense of the maxim 'For political integration as much intergovernmental cooperation as possible, as much supranational authority as necessary.' Cf. the so-called 'Spaak Report' of the intergovernmental committee appointed by the Conference of Messina: Report of the Heads of Delegation to the Foreign Ministers of 21 April 1956, Document MAE 120 d/56 (corr.). See also H. J. Küsters, *Die Gründung der Europäischen Wirtschaftsgemeinschaft*, (1982).

(108) The principle of enumerated competencies (recently the board of the Convention introduced the term 'principle of conferral') fits this notion most concisely.

(109) Such spillover effects are highlighted by so-called neo-functionalist integration theory as being characteristic of integration; see on this point E. B. Haas, *The Uniting of Europe* (1958), 2nd ed. 1968; L. N. Lindberg, *The Political Dynamics of European Economic Integration* (1963). In fact, however, this 'theory' is nothing but the conceptual clarification and systemization of the strategy designed and practised by the fathers of Community policy.

(110) With regard to the material integration, there were various opinions on the model for the integrated economy and the relevant responsibility for economic policy, especially on the extent of 'positive integration'; cf. for example, D. W. Rahmsdorf, *Ordnungspolitischer Dissens und europäische Integration* (1982). As to the politico-institutional (or 'constitutional') finality, the development of integration was marked from the start by the disagreement between the advocates and critics of supranationality and, above all, between the advocates of a federal, confederate or rather intergovernmentalist target model. This disagreement was already present from the start of European policy in the post-war period; see more about this in the main body of the text, in the paragraph at n. 116 f.

(111) It is in this sense that the theory of Ipsen is probably best understood, namely that the change in the Community constitution is itself a process of 'constitutional realization' (*Verfassungsverwirklichung*); Ipsen, 'Die Verfassungsrolle des Europäischen Gerichtshofs für die Integration', in J. Schwarze (ed), *Der Europäische Gerichtshof als Verfassungsgericht und als Rechtsschutzinstanz* (1983), at 29 ff, here at 50 f. The expression referred to in the Preamble to the EEC Treaty was obviously chosen in line with the Preamble to the Constitution of the USA. Yet the corresponding wording there can hardly be understood in the way that has just been suggested, however, because 'ever closer union' certainly did not imply the intention to constantly improve the federal constitution and thereby make the union of the citizens closer.

(112) The wording seems to suggest that a variety of different relations (and interactions) is to be led to a certain development perspective and thus brought to a coherent whole, which definitely means, however, that all these relations would have to be arranged in a certain constituted system (say with institutions and competences). This would mean in turn that outside of this system no relations between the Member States would be allowed to exist. The connotation should not be, however, that the expression 'European Union' describes a collective actor or a legal subject. In connection with this, it is worth noting that the term 'union' in both French and English has a clear procedural denotation; see on this point Schneider and Hrbek, 'Die Europäische Union im Werden', in H. von der Groeben and H. Moller (eds), *Die Europäische Union als Prozeß* (1980), at 209 ff, here at 440 ff, esp. at 442 ff. The dominant German understanding, however, was different: the expression 'European Union' was understood to designate a structure constituted in a particular way; see, for example, the statements of German foreign minister Walter Scheel on 14 February 1974 in Munich, here quoted in H. Siegler (ed), *Europäische politische Einigung III, 1973-1976* (1977), at 30 f: 'This Union will be a federal structure. In certain areas it will have a common executive with the capacity to act... Another part of joint responsibility will perhaps also be dealt with in 1980 on an intergovernmental basis. A broad range for the autonomous responsibility of the nine Member States will continue to exist. A confederation or federal state will always have to be based on a well-balanced equilibrium between the central organs and the Member States ...'. Just over a year later, on 21 April 1975, Scheel declared in Paris, now as Federal President: 'We cannot expect that the European Union will one day fall into our lap like some ripe fruit. And we do not have the time to wait for this to happen.... Anyone who seriously wants the European Union also knows that it needs a clear constitution ...' (quoted in *ibid*, at 144 f, here at 145). Other political actors and literary authors also understood the European Union to describe the next stage in integration, to the effect that the European Union was, so to speak, 'in the process of becoming' and this process would be ultimately seal with a formal act of establishment. After the heads of state and government, years after the Paris Summit, had commissioned one of their number, Leo Tindemans, to formulate how the Declaration of Intent of 1972 might be understood and realized, the Community institutions also communicated their opinions to the Belgium premier. The report of the EC Commission on the European Union of 26 June 1975 assumes as a matter of course that the Union should be the holder of competences, enjoy legal personality, have a budget and be in charge of institutions that constitute a system of government (see *ibid*, at 158 ff, here at 160 f, 163 f, 180 ff), while the European Parliament voiced the opinion in its resolution of 10 July 1975 that the Union ought to 'evolve gradually through more rational and efficient forms of the relations obtaining between the Member States' and 'be based on an institutional structure that guarantees their cohesion', which involved 'the transformation of the present Community into an organization whose decisions are binding for all' (*ibid*, at 190 ff, here at 191, 192). Commission and Parliament were no doubt interested in interpreting the proclamation of the European Union as an initiative benefiting the further development and reinforcement of the existing Community. Most of the authors of the opinions communicated to Premier Minister Tindemans saw things in a similar light, in all likelihood because this was the most obvious and comfortable way of formulating suggestions. There were already plenty of proposals for reforms to improve or perfect the EC. Quite frequently, the introduction of a constitutionalization project for the EC was promoted or advocated as an especially important step towards implementing the Summit proclamation, as it was, for example, by the European movement (see the opinion of 9-10 May 1975, *ibid*, at 147 f). On the

other hand, there was also the tendency to understand 'Union', in contrast, 'as a becoming', and occasionally this was even expressed by German voices, as for example in a dictum of State Secretary Dr. Peter Hermes at the Annual Conference of the Federation of German Industries 1978 in the 'Focus Europe' working party, that the European Union was 'developing almost silently with informal agreements'; see the conference report on the working parties, Document AK III/p. 10.

(113) One clever observer expressed the opinion that 'the secret effect of the compulsion for publicity success' had given President Georges Pompidou the idea on 20 October 1972 of 'crowning' the results of the summit conference 'with the statesmanlike notion that the Member States should change the totality of their relations into a European Union'; see Sasse, 'Zur Verfassung der Europäischen Union', in H. Schneider and W. Wessels (eds), *Auf dem Weg zur Europäischen Union? Diskussionsbeiträge zum Tindemans-Bericht* (1977), at 189 ff, here at 191. On the negotiation constellation at the summit, cf. Schneider, 'Anlauf ohne Sprung', in *ibid*, at 11 ff.

(114) As was found, for example, with the Briand Initiative of 1929-30: Briand talked about a 'federal association, which leaves the sovereignty of the participating nations untouched': Aristide Briand before the tenth League of Nations Assembly on 5 September 1929, quoted in *Europa ...* (1962), Vol. I, *supra* n. 46, at 27 f, here at 28). In an intergovernmental memorandum on the organization of a European federal order of 1 May 1930, it is stressed that this should involve 'a federation on the basis of the idea of unification, not unity', and this is claimed to signify that the independence and national sovereignty of each state is preserved, but the benefit of collective solidarity should be guaranteed for all; *ibid*, at 29 ff, here at 36.

(115) See above n. 53.

(116) The majority opted for the formula that it was necessary 'to transfer and merge some portion of their sovereign rights', while the advocates of the view that the nations 'must jointly exercise some portion of their sovereign rights' remained in the minority: W. G. Grewe, *Deutsche Außenpolitik der Nachkriegszeit* (1960), at 306. The distinction then played an important role in the discussions on Article 24 of the German Basic Law; cf. as an early contribution towards clarification, K. H. Klein, *Die Übertragung von Hoheitsrechten* (1952), at 29 ff; subsequently: A. Ruppert, *Die Integrationsgewalt* (1969), at 84 ff.

(117) Text correct with W. Lippgens (1986), *supra* n. 48, at 240 ff, here at 241.

(118) Cf. H. Schneider and W. Wessels (1994), *supra* n. 60, although the tendency could already be seen in Leo Tindemans' report on the European Union, for the text of which see, H. Schneider and W. Wessels (1977), *supra* n. 113, at 239 ff.

(119) On 6 December 1990, President Francois Mitterand and Chancellor Helmut Kohl, in a letter to the then President of the European Council Giulio Andreotti, in connection with transforming the totality of relations between the Member States into a European Union and endowing them with the requisite means to do so, declared themselves in favour of establishing the foundations and structures of a Political Union, which 'corresponds to its federal mission' (Text in *Europa-Archiv* (1991), at D. 25 ff, here D. 26). Accordingly, in the course of the EU Treaty negotiations in September 1991, the Dutch presidency presented a draft, in the preamble to which the new 'European Community' to be constituted was described as 'a new stage in the gradual realization of a union with federal orientation' (Text in W. Weidenfeld (ed), *Maastricht in der Analyse* (1994), at 305 ff). The Dutch had to withdraw their draft on 30 September 1991 because of other progressive integration elements (e.g. the intention to replace the three pillar construction already presented by Luxembourg with the inclusion of the subject areas of the Second and the Third Pillars in the Community Treaty), while Germany and France provided no backing (the German delegation declared that the draft would not give Parliament enough power). Cf. Schneider, 'Deutsche Europapolitik: Leitbilder in der Perspektive - Eine vorbereitende Skizze', in H. Schneider, M. Jopp and U. Schmalz (eds), *supra* JL 61, at 69 ff, here at 99.

(120) After his retirement as Commission President, when he was elected president of the European movement, Hallstein declared in his inaugural speech on 20 January 1968: 'The process must be stimulated toward a permanent evolution and revolution of the constitution in the sense of an ever stronger intensification of the merger, indeed the process must be almost forced... The organic development into a full federation will... only take place if the model of the constantly progressing European Communities, their constitutions and the driving force emanating from their existence works out fully in the course of the Seventies and pushes the governments in the desired direction ...'. Taken from W. Lippgens (1986), *supra* n. 48, at 489 ff, here at 491.

(121) In a speech as part of a congress of the European movement held in Brussels, the SPD Chairman Willy Brandt voiced the view, on 6 February 1976, that the European Parliament, which was about to be directly elected for the first time, would 'have to understand itself as a permanent constituent power of Europe'; cited in W. Lippgens *supra* n. 48, at 620, here at 621. It is admittedly doubtful whether Brandt meant the expression in the usual sense, i.e. whether he wanted to urge Parliament to claim the power to frame a constitution.

(122) Cf. n. 100 above.

(123) Quoted in A. von Bogdandy, 'Konturen des integrierten Europa', *Europa-Archiv* 1993, 40 ff, here at 49.

(124) R. Smend, *Verfassung und Verfassungsrecht* (1928), and by the same author, 'Integrationslehre', *Handwörterbuch der Sozialwissenschaften*, Vol. 5, (1956), at 299 ff.

(125) Originally, very different ideas were associated with this expression in the post-war period, and the meaning was somewhat diffuse; soon after 1950, however, it became usual to denote as 'integration' the concept of a gradual bringing together of national economies and states, oriented towards an economic and political unity exceeding conventional forms of international cooperation; see on this point H. Schneider (1977), *supra* n. 47, at 225 ff.

(126) See, for example, Guggenheim, 'Die Problematik des europäischen Zusammenschlusses' (and the subsequent discussion), *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (1965), at 95 ff, 102 f, at 105 f and *passim*.

(127) See above n. 100.

(128) As he did (according to Meyer-Cording, 'Die europäische Integration als geistiger Entwicklungsprozeß', *Wirtschaft, Gesellschaft and Kultur, Festgabe für Alfred Müller-Armack* (1961), at 291 ff, here at 293) in June 1960 before the European Parliament, and, in French too, at the Karlspreis award ceremony in Aachen on 11 May 1961, where he described integration 'as incessant change, a permanent becoming, a "création continue"', and not as a 'state, not as something static' (W. Hallstein (1979), *supra* n. 60, at 276 ff, here at 277).

(129) See, for example, J. Brinktrine, *Die Lehre von der Schöpfung* (1956), at 72 ff.

(130) Cf. Klemm, 'Schöpfung IV.B: Dogmatisch', *Die Religion in Geschichte und Gegenwart* (1986). Vol. 5 column 1484 ff, here

column 1486 f.

(131) This could be paraphrased by saying that the spillover dynamics as defined by neo-functionalist 'integration theory' (cf. above n. 109) have now reached saturation point .

(132) W. Hallstein (1979), *supra* n. 60 *passim*.

The title of the first edition of this book expresses this in a succinct manner: *Der unvollendete Bundesstaat* (1969) - in English: 'The Unfinished Federal State'.

(133) Cf. *supra* n. 98. How this can convey Walter Hallstein's dictum of the bicycle that must keep moving if it is not to fall over (see above n. 123) remains to be seen.

(134) H. P. Ipsen (1983), *supra* n. 111.

(135) Cf. the statement by H. P. Ipsen (1972), *supra* n. 101, at 175: 'Vergemeinschaftung ist ein Prozeß, sie hat keinen anderen formulierten Zielsinn des Integrationsprozesses als eben den seines Fortgangs' (Communitization is a process; it has no other formulated purpose than precisely that of its continuation.)

(136) Bieber (1991), *supra* n. 69, here at 410 and at 413. Cf. also the repeated emphasis on the 'process quality' of the constitution, Bieber, 'Verfassungsentwicklung der EU: Autonomie oder Konsequenz staatlicher Verfassungsentwicklung', in P.-C. Miiller-Graff and E. Riedel (eds), *Gemeinsames Verfassungsrecht in der Europäischen Union* (1994), at 209 ff, here at 214.

(137) Bieber, 'Steigerung einer europäischen Union: Eine europäische Verfassung', *Verfassungsrecht im Wandel, Festschrift für den Carl Heymanns Verlag* (1995), at 291 ff, here at 296.

(138) The fathers of the federal constitution of the USA considered this to be a sufficient basic legal system per se for promoting and stabilizing the 'more perfect union'. When the first discussions were held on the ways and means of achieving European economic integration, convinced federalists were of the opinion that only strong federal institutions were capable of effecting the amalgamation of the national economies successfully; see *supra* section 2.B, at 15.

(139) See above n. 98 and the related text; cf. also the references in A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001), at 73.

(140) Grabitz, 'Institutionelle Anpassung der EC' - paper presented at the 25th FIW symposium, held in Innsbruck (March 1992), typescript, at 41 ff and at 2.

(141) See Schneider (1995), *supra* n. 72.

(142) Schuppert, 'Zur Staatswerdung Europas', *Staatswissenschaften und Staatspraxis* (1995), at 35 ff, here at 37.

(143) At 35-36.

(144) Schuppert does in fact state that this is the case; see below, n.144.

(145) *Ibid*, at 36 f.

(146) A. Benz, *Föderalismus als dynamisches System: Zentralisierung und Dezentralisierung im föderativen Staat* (1985), here at 253 ff. Schuppert refers to this work as 'fundamental' for capturing the dynamics of federal systems.

(147) Schuppert (1995), *supra* n. 142, at 36, with reference to Renate Mayntz.

(148) *Ibid*, at 37.

(149) Hesse, 'Die Diskussion um eine europäische Verfassung: Vom Kopf auf die Füße zu stellen', in T. Bruha, J. J. Hesse and C. Nowak (eds), *Welche Verfassung für Europa?* (2001), at 63 ff, here at 63.

(150) *Ibid*, at 64 f, 66 f, 68. The article has its origins in a lecture delivered on 26 November 1999 in Hamburg, the published version of which was 'extended and updated' in the light of the Berlin speech given by Joschka Fischer on 12 May 2000, which was quoted in the text and substantiated with n. 62. There had scarcely been any constitutional discussion that was relatively detached from regular EU policy in the years prior to Fischer's speech, however.

(151) *Ibid*, at 67.

(152) *Ibid*, at 83.

(153) *Ibid*, at 35. The expression suggests the principle of 'Two steps forward, one step back'.

(154) On this point, see A. Peters (2001), *supra* n. 139. at 360 ff.

(155) De Vigo and Tsatsos - Report for the Institutional Committee of the European Parliament of 5 November 1997, Introduction para. 2, 25 *Europäische Grundrechte-Zeitschrift* (1998), at 72 f, here taken from A. Peters (2001), at 378.

(156) Probably the most striking 'classic' case of this was the English Revolution of 1603-89; cf. the statement of Sidney Low: 'Other institutions have been built, that of England has been allowed to grow ... and so the organism has gradually adapted itself to its environment'. This begs the question of the original creation of the constitution, together with the question of whether or not it is a genetic process extending over time, but probably this matter seems irrelevant in its underlying perspective. See S. Low, *The Government of England* (1911), at 5 f, quoted in W. Kagi, *Die Verfassung als rechtliche Grundordnung des Staates: Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht* (1945), at 92.

(157) Cf. A. Peters (2001), *supra* n. 139 at 375 f.

(158) See, for example, H. Wagner, *Grundbegriffe des Beschlußrechts der Europäischen Gemeinschaften*, (1965), at 37 ff and *passim*. Anne Peters apparently points to this type of change when she states: 'The ongoing character of constitutionalization is so distinct that it is difficult to fix the point of transition from the constitution-less state to the state of having a constitution' (*supra* JL 139, at 376). This implies that, for the time being, the basic legal system of the European Community/ies has not as yet been granted a constitutional character.

(159) The latter by analogy with the 'quasi state authority' ascribed to the Union by, for example, Doebling (1997), *supra* n. 91.

(160) See on this point H. Schneider 2001, *supra* n. 61. here at 604 ff, 612 ff, 627 ff and, on the concept of the 'federation of nation states', *ibid*, at 632 ff.

(161) Cf, for example, the explanation of Kirchhof (1993), *supra* n. 76, at 92 f, that to 'strengthen a union of states' an 'organization in Europe between confederation and disestablishment of the Member States' must be found. Caution is advised here, however, since Kirchhof wishes to reserve the constitution concept for the state.

(162) A. Peters (2001), *supra* n. 139 at 378, where with regard to this very aspect 'the selective fixing of a specific act of constitutional creation' is described as 'neither possible nor necessary'.



(163) Ibid.

(164) Reference has already been made earlier to at least some evidence for the tendency to adopt this viewpoint; see the references to statements by J. Leinen (2001), *supra* p. 26 and n. 90, by K. Doehring (1997), *supra* n. 91 and by M. Zuleeg (2000), *supra* ibid. (n. 91). Among others, the article quoted earlier by Schuppert (1994), *supra* n. 142, is significant - if only because of its title 'Zur Staatswerdung Europas' (On the Creation of Europe as a State); the title of the edited volume by R. Wildenmann (ed), *Staatswerdung Europas? Optionen für eine Europäische Union* (1991) was at least suffixed with a question mark. Schuppert, on the other hand, is of the opinion that it is necessary to understand the progressive creation of the state as a real process that 'must be understood as the evolutionary process of a non-governmental union of states, which follows its own logic of development and movement' (Schuppert at 56). He quotes with approval a discussion article of Hans Meyer from the 1990 Annual Conference of Constitutional Law Scholars at Zurich: 'Obviously we are dealing ... with a smooth system of insidious transformation into a state ...' (ibid, at 53-54), although, he believes, Member State and emerging Union state legal systems enter into an 'osmosis' (at 58) and that is why it is necessary to look at the whole system (at 59 f, with reference to Daniel Thürer; Hans von der Groeben had been recommending this for decades, incidentally, for the understanding of the Community, its structure and its politics, about which see H. von der Groeben, *Die Europäische Gemeinschaft zwischen Föderation und Nationalstaat* (1977); also in the 151st instalment to the *Handbuch für Europäische Wirtschaft*, at 3 f and passim). In 1996, Stefan Griller professed the view that, legally, the EU (or rather the three Communities) had '... already come so close today to being a European federal state that the debate ...' - over whether the EU is already a state or is to become one - is '... largely academic in character'. As to its transformation into a genuine state, no substantial changes to its basic legal system would be necessary, in his opinion; an act of intent to this effect on the part of the Member States would suffice, and such would already find expression if the basic codified legal system acquired the title 'Constitution of the Union of European States'. In particular, the recognition of the Union has having an own competence, frequently deemed necessary to constitute a state, was not required for this purpose; S. Griller, *Ein Staat ohne Volk? Zur Zukunft der Europäischen Union* (1996) (IEF Working Paper No. 21, ed. Forschungsinstitut für Europafragen an der Wirtschaftsuniversität Wien), at 17, 19, 23, 25. See also H. Wimmer, *Die Modernisierung politischer Systeme* (2000), at 77 (in a section of the introduction entitled 'Die Europäische Union auf dem Weg zur Staatlichkeit' (The European Union En Route to Statehood)): '...the government complex of the Union is on the point of absorbing the sovereignty of the segments and transforming the segments into subordinate subdivisions of a European federal state. Since the integration process is only at the start and yet has already reached an irreversible level, the endogenous dynamics of this process give little reason to suppose that the final state has already been reached with the Maastricht state and that, therefore, the Union is in the long term a political system *sui generis*.'

(165) With respect to the idea of popular sovereignty, the French Declaration of the Rights of Man and the Citizen of 1793 proclaimed the right of every people to revise, improve and amend its constitution (Art. 28). For Immanuel Kant, the process of progressive enlightenment held the justification for revising the legal system: 'An age cannot ally itself and conspire to place the following one in a condition in which it is inevitably impossible for it... to make progress in enlightenment'; although it might be sensible to remove a particular system for a certain time from possible improvement, it is not sensible over the long term (see Kant, 'Beantwortung der Frage: Was ist Aufklärung?' (1784/85), in *Werke*, ed. W. Weischedel, Vol. 9 (1968), at 53 ff, here at 57 f.

(166) U.K. Preuss (1990), *supra* n. 97. here at 19.

(167) Fichte writes in his *System der Sittenlehre* (1798): 'A constitution that contradicts the principles of reason needs to be changed; a sensible constitution must not be changed.' - The expression 'perceiving reason' is from W. Kamlah, *Der Mensch in der Profanität* (1949).

(168) W. Kägi (1945), *supra* n. 156. at 9 ff, at 35 ff.

(169) Over a century ago Carl Hilty, following W. Kägi (1945), noticed that the basic state law was turning more and more into a 'fluid aggregate state' as a result of its frequent revisions (C. Hilty, *Die Verfassungen der schweizerischen Eidgenossenschaft* (1891), at 409).

(170) W. Kägi (1945), *supra* n. 156. at 19, 21, 23, 25.

(171) Kägi ascribed his 'critical self-contemplation of constitutional jurisprudence' to the years 1940 and 1941, as he noted in the preface to his habilitation thesis published in 1945. Obviously, he had the totalitarian system of government in mind as a degeneration and negation of the state of law.

(172) Ibid, at 51.

(173) Ibid, at 41 und at 51-52.

(174) Ibid, at 59.

(175) On the functions of a European constitution, cf, for example, Huber (2001), *supra* n. 94, at 199 ff and A. Peters (2001), *supra* n. 139. at 76 ff.

(176) Grimm, 'Verfassung', *Staatslexikon*, 6th edn., Vol. 5, (1989), column 633 ff, here column 636.

(177) This clearly precludes neither differences in interpretation nor constitutional amendment objectives.

(178) Cf. Dieter Grimm (1989), *supra* n. 176. esp. column 635 ff.

(179) Suffice it to recall the normative weakness and the fate of the Weimar constitution in Germany or the constitution of the Republic of Austria in the interwar years.

(180) See, for example, R. Bäuml, *supra* n. 98.

(181) See also on this point the comment in n. 177.

(182) This problem is discussed in a section of the more extensive German paper.

(183) The characterization of the EU as a 'Union of states and of citizens' has often been brought into play, especially by the official German position. The expression has also been taken up in the 'Convention on the Future of Europe', viz. in a whole series of constitutional drafts (which will be examined in a section of the more extensive German paper). The idea probably harks back to the formulation of the European Court of Justice, to wit that the subjects of the Community legal system are the states and their citizens. The hypothesis represented here, however, does not depend on this interpretation of the EU.

(184) There are, however, 'sovereignists' or 'nation-statists' who maintain that real political unity in Europe is only conceivable according to this idea. For French examples, see *supra* n. 73, while we might cite Paul Kirchhof as a German representative, q.v. n.

16 and 19. Yet such explanations should hardly be taken *sine grano salis* as a plea for a policy of merging the nation states into a 'super state' of this kind, but rather as abstract constructs or as negative models.

(185) This statement does not deny the fact that 'national consciousness' can be quite different in character - both within a nation (there are different forms and contents to patriotism, nationalism, etc.) and from nation to nation - in both respects on the basis of dissimilar traditions of collective experience, as well as divergent political world views, etc.

(186) 'Constitutional patriotism' ( *Verfassungspatriotismus* ) was a much-discussed concept in the 1980s and 90s in Germany. The discussion centred on how a democratic consciousness of national identity might be separated from 'nationalism'; cf, for example, Sternberger, *Verfassungspatriotismus* (Schriften, Vol. X) (1990); ' Jürgen Habermas, und nationale Identität', in *ibid.*, *Faktizität und Geltung* (1992), at 632 ff; Haungs, 'Verfassungspatriotismus oder was sonst?', in O. W. Gabriel, U. Sarcinelli and B. Vogel (eds), *Der demokratische Verfassungsstaat* (1992), at 202 ff; Gebhardt, 'Verfassungspatriotismus als Identitätskonzept der Nation', *Aus Politik und Zeitgeschichte*, B 14/93 (2 April 1993), at 29 ff.; Sarcinelli, "'Verfassungspatriotismus" und "Bürgergesellschaft" - oder: Was das demokratische Gemeinwesen zusammenhält', in *ibid.*, B 34/93 (20 August 1993), at 25 ff; Behrmann, 'Verfassung, Volk und Vaterland - Zur historischen, pädagogischen und politisch-kulturellen Verortung des Verfassungspatriotismus', in *idem* and S. Schiele (eds), *Verfassungspatriotismus als Zielpolitischer Bildung* (1993), at 5 ff.; Schneider, 'Patriotismus und Nationalismus', *Concilium - Internat. Zeitschrift für Theologie* (1995), at 499 ff.

(187) Given this perspective it is somewhat astonishing that at the time of preparing the first reform of the Maastricht Treaty, in a discussion of the Academic Board of the of the Institute for European Policy ( *Wissenschaftliches Direktorium des Instituts für Europäische Politik* ), a high-ranking German ministerial official was of the opinion that the best thing would be to set up a permanent intergovernmental conference entrusted with the ongoing development of the constitution.

(188) See *Der Spiegel*, No. 43 (of 21 October 2002), at 50 ff. ('Neuer Gründergeist - Valéry Giscard d'Estaing ... über ein Grundgesetz für das Vereinte Europa'), here at 52.