

# The Prospects of 21st Century Constitutionalism

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*“Wir leben insoweit von dem Gedankengut einer Welt, die nicht mehr die unsere ist und, wie wir immer deutlicher sehen, in den tiefen Wandlungen des ausgehenden 20. Jahrhunderts ihren Untergang gefunden hat. Über ihre Grundlagen, bisher als gesichert geltende Bestandteile der Staats- und Verfassungslehre, ist die Geschichte hinweggegangen.” (Konrad Hesse)*

- I. Introduction
- II. The Converging Evolution of Constitutional and Public International Law
  - 1. The Traditional Dichotomy Between International and Constitutional Law
  - 2. Towards Structural Rapprochement
    - a. The Impact of State Failures, Decolonization, Regionalization and Globalization
      - aa. ‘Internationalization’ of Constitutional Law
      - bb. ‘Constitutionalization’ of International Law
- III. Constitutionalism Beyond the Nation State
  - 1. The Contested Notion of the ‘Constitution’
    - a. Recourse to Constitutional Terminology
    - b. Descriptive versus Normative Concept of Constitution
  - 2. The Quest for a Graduated Approach to Constitutionalism
    - a. The Immobilizing Effect of Statism
    - b. The Need for Peaceful Constitutional Transitions
    - c. Constitutionalism as a Process
- IV. Towards a Five Storey House
  - 1. Multilevel Governance
  - 2. Shared Sovereignty

3. The Relationship Between the Different Levels of Governance
    - a. The Principle of Supremacy
    - b. Exceptions to Supremacy
  4. The Normative Interaction Between the Different Layers of Governance
  5. The Allocation of Powers
    - a. The Limits of Traditional Pattern of Power Allocation
    - b. Reallocation of Powers
    - c. Shared and Interlocked Powers
    - d. Substantive Remedies
    - e. Procedural Remedies
  6. The Role of the Judiciary
- V. Conclusion

## I. Introduction

At the outset of the Millennium and with the advent of a new Century, traditional foundations of constitutional governance face new challenges in the light of enhanced international interdependence, globalization of markets, of technologies and communication way beyond the boundaries of the Nation State. The moment has come to live up to these challenges in legal theory and constitutionalism. The goals of liberty, justice and dignity, of equity but also efficiency and security all remain unimpaired. But ways and means to secure them in coming decades and perhaps centuries need to be developed in the context of an increasingly globalized society.

The past, building upon the achievements and failures of the Westphalian system of Nation States and the republican ideas of the French and American Revolutions brought about the consolidation of constitutionalism within the Western Nation State. The theories of constitutional and traditional public international law emerged as a response to a Europe highly fragmented and torn by devastation. An account of the Thirty Years' War, of religious and political fragmentation, social misery and the decline of law reminds us of the implications of such disorder.<sup>1</sup> This experience created the underpinnings of the modern state.<sup>2</sup> The call for central governance and sovereignty in the writings of

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<sup>1</sup> Cf. G. Mann, *Wallenstein. Sein Leben erzählt von Golo Mann*, 1974.

<sup>2</sup> See C. Walter, "Constitutionalizing (Inter)national Governance", *GYIL* 44 (2001), 92 et seq.

*Bodin*<sup>3</sup> and *Hobbes*,<sup>4</sup> and for limited government and checks and balances in the works of *Locke*<sup>5</sup> and *Montesquieu*<sup>6</sup> all served in differing ways the causes of liberty and peace within the system of Nation States, at their respective times.<sup>7</sup> Indeed, it is important to recall that all these efforts were directed at achieving freedom and security through governance under contemporary conditions, within the bounds of society, markets and means of communication of that time, seeking to overcome incoherence, fragmentation and abuse of power. Yet, these endeavours were operational answers to their times and societies and cannot claim eternal truth.

Meanwhile, the historical, political and economic context has undergone important changes which a modern theory of constitutionalism has to account for if it is to ensure its traditional functions and to contribute to global governance. With technological advances of the past and present, interaction of states and societies has considerably increased, leading from traditional coexistence to cooperation and even to integration by means of international law and organizations. It is obvious that Constitutionalism of the 21st century needs to address these complexities and to reach beyond the boundaries of the Nation State. This raises difficult theoretical questions as to how this can be achieved. The current efforts mainly focus on the problem as to whether levels of governance other than the Nation State are constitutionally framed or not, and therefore what essential qualities and properties amount to a 'constitution'. No discussion of constitutionalism can ignore this debate. Yet, it will be submitted that attempts to draw strict conceptual boundaries between governance structures with or without a 'constitution' have become increasingly artificial in a world where the boundaries between domestic and international law have been progressively blurred and do not help to solve concrete problems. We shall therefore deal with the discussion on the notion of 'constitution' only to the ex-

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<sup>3</sup> J. Bodin, *Six livres de la République*, 1993 (first published in 1576).

<sup>4</sup> T. Hobbes, *Leviathan*, 2000 (first published in 1660).

<sup>5</sup> J. Locke, *Two Treatises of Government*, 1999 (first published in 1690).

<sup>6</sup> Ch.L. De Montesquieu, *De l'esprit des lois*, 1998 (first published in 1748).

<sup>7</sup> See e.g. J.P. Müller, "Wandel des Souveränitätsbegriffs im Lichte der Grundrechte – dargestellt am Beispiel von Einwirkungen des internationalen Menschenrechtsschutzes auf die schweizerische Rechtsordnung", in: R. Rhinow/ B. Ehrenzeller (eds), *Fragen des internationalen und nationalen Menschenrechtsschutzes*, *Zeitschrift für Schweizerisches Recht* 116 (1997), 45 et seq. (57 et seq.), who points out that the purpose of sovereignty was, historically speaking, to secure peace.

tent that it is necessary to demonstrate that an exclusive focus of constitutionalism on the Nation State cannot be maintained. It needs to give way to a graduated approach which views constitutionalism as a process, extending constitutional structures to fora and layers of governance other than nations. The main aim of this article is thus not to define whether different levels or layers of governance, national or international, have a 'constitution', or amount to one, and what the minimal content of the normative concept of 'constitution' should be. Rather, we are interested in the necessary relations and functions of different and existing layers of governance, whatever their nature and quality, considered as an overall complex. Allocating powers among and between these layers, establishing adequate safeguards on different levels of governance — whether or not termed a Constitution — and defining the relationship and interaction between these layers, for example in the field of human rights protection or market access rights, is one of the main tasks constitutionalism will have to achieve in this century. We conceive the core of constitutionalism as a matter of interfacing different layers of governance from local to global levels, building a house with different storeys. This approach satisfies the need to look at different layers in a coherent manner, as forming part of an overall system. Such a system is not static. It rather depicts a process with changing allocations of powers and functions of governance. Many different types of structures and combinations are possible.

Our approach may be an unusual angle to look into constitutional law as it inherently entails an important focus on international law. Yet, we shall argue that, far from being two essentially different systems, public international law and constitutional law have increasingly influenced each other. This has led to a structural rapprochement and great permeability of both legal orders. The gradual process of convergence between international and constitutional law is described in the first part of the article. We then depict the current debate on the notion of 'constitution' to conclude that constitutionalism needs to be decoupled from the Nation State and should be conceived as a graduated concept. On this basis, we finally turn to developing some elements for a theory of 21st century constitutionalism.

## II. The Converging Evolution of Constitutional and Public International Law

### 1. The Traditional Dichotomy Between International and Constitutional Law

The prevailing understanding of constitutionalism, as it developed in the 18th and 19th centuries, was shaped within, and limited to, the boundaries of the Western Nation State. It is worth recalling that the latter also was, and still is, the central concept of classical international law of coexistence, as it emerged in the aftermath of the Peace of Westphalia.<sup>8</sup> However, in contrast to the integrated hierarchical legal order of the Nation State, the international “unsociety”<sup>9</sup> was essentially a society of sovereign, juxtaposed states. International law was conceived as a little institutionalized, decentralized system,<sup>10</sup> the sovereign states being both “the creators and the subjects of its norms”,<sup>11</sup> the individuals its objects.

Since inter-state relationships were mainly perceived as a threat to the very existence of the Nation State,<sup>12</sup> foreign policy was considered

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<sup>8</sup> For a description of the so-called Westphalian System, see S. Hobe, “The Era of Globalisation as a Challenge to International Law”, *Duq. L. Rev.* 40 (2002), 657 et seq.; A. Rosas, “Globaler Konstitutionalismus, Menschenrechte und staatliche Souveränität. Die Meilensteine von 1945 und 1948”, in: H. Brunkhorst/ M. Kettner (eds), *Globalisierung und Demokratie, Wirtschaft, Recht, Medien*, 2000, 153 et seq.; D. Thürer, “Recht der Internationalen Gemeinschaft und Wandel der Staatlichkeit”, in: D. Thürer/ J.F. Aubert/ J.P. Müller (eds), *Das Verfassungsrecht der Schweiz*, 2001, 39 et seq., who uses the term state-“world” instead of Westphalian System.

<sup>9</sup> P. Allot, “The Concept of International Law”, *EJIL* 10 (1999), 31 et seq. (35).

<sup>10</sup> J.A.C. Salcedo, “Reflections on the Existence of a Hierarchy of Norms in International Law”, *EJIL* 8 (1997), 583 et seq.

<sup>11</sup> Salcedo, see above, 583; see also Hobe, see note 8, 657.

<sup>12</sup> The Swiss Federal Constitution of 1848 illustrates this point. Its article 2 ascribed the task to the Confederation to safeguard the independence and the security of the country “against foreign powers” [“contre l'étranger”]. See T. Cottier/ M. Hertig, “Das Völkerrecht in der neuen Bundesverfassung: Stellung und Auswirkungen”, in: U. Zimmerli (ed.), *Berner Tage für die juristische Praxis 1999: Die neue Bundesverfassung. Konsequenzen für Praxis und Wissenschaft*, 2000, 2 et seq.; G. Malinverni, “L'indépendance de la Suisse dans un monde interdépendant”, *Zeitschrift für Schweizerisches*

the exclusive prerogative of the executive branch, a domain, as *John Locke* put it, “much less capable to be directed by antecedent, standing, positive Laws”.<sup>13</sup> The rule of law, and the principle of separation of powers, both core precepts of liberal constitutionalism,<sup>14</sup> thus only applied within the Nation State,<sup>15</sup> whereas international law remained a “constitution-free” and “morality-free zone”,<sup>16</sup> dominated by utter *Re-*

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*Recht* 117 (1998), 1 et seq. (7). Similarly, the founding fathers of the United States invoked the hostile international environment as one of the main reasons justifying the foundation of the federal state: “It is true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, that absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” Cf. A. Hamilton/ J. Madison/ J. Jay, *The Federalist Papers*, 1969 (first published in 1788), Paper No. 4 (Jay), 46; see also Paper No. 6 (Hamilton), 59 et seq.

<sup>13</sup> J. Locke, *The Treatises of Government* 395-99, 1965, 411, quoted in E.U. Petersmann, “How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society”, *Mich. J. Int’l L.* 20 (1998), 1 et seq. (25 et seq.).

<sup>14</sup> For a definition of constitutionalism, see for example M. Rosenfeld, *Constitutionalism, Identity, Difference and Legitimacy*, 1994, 3, according to whom “constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.” Similarly E.U. Petersmann, “Constitutionalism, Constitutional Law and European Integration”, *Aussenwirtschaft* 46 (1991), 247 et seq. (252 et seq.): “Constitutionalism” denotes the basic idea of limited government under the rule law.” See also U.K. Preuss, “Patterns of Constitutional Evolution and Change in Eastern Europe”, in: J.Hesse/ V. Wright (eds), *Constitutional Policy and Change in Europe*, 1995, 95 et seq. (95): “[C]onstitutionalism embraces essentially the idea of limited government”.

<sup>15</sup> T. Cottier/ D. Wüger, “Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage”, in: B. Sitter-Liver (ed.), *Herausgeforderte Verfassung, Die Schweiz im globalen Kontext*, 1999, 241 et seq. (242 et seq.); the view according to which no constitutional constraints should be imposed in the field of foreign policy is also reflected in the *Federalist Papers*: “The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances”, Hamilton/ Madison/ Jay, see note 12, Paper No. 23 (Hamilton), 153.

<sup>16</sup> Allot, see note 9, 35.

*alpolitik* and the barrel of the gun. Domestic and international law were thus, in principle, looked upon as two essentially distinct systems.

## 2. Towards Structural Rapprochement

### a. The Impact of State Failures, Decolonization, Regionalization and Globalization

During the 20th century the concept of coexistence remained of paramount importance and still shapes international law to a large extent. Yet, the boundaries between domestic and international spheres gradually blurred, with public international law evolving from a law of coexistence to a law of cooperation<sup>17</sup>, increasingly addressing domestic matters, and, partially, to a regional or even global law of integration.<sup>18</sup> The latter can be described as the making and shaping of uniform or approximated domestic legal standards by way of international treaty making, particularly in the field of economic regulation.

The legacy of two world wars, led in the name of the Nation State, saw the advent of the United Nations, the Bretton Woods Institutions and a relatively open global trading system based upon the GATT, now the World Trade Organization (WTO). In Europe, the Council of Europe and the European Communities were founded with a view to assuring peace and prosperity. International instruments for the protection of human rights, namely the European Convention on Human Rights and the two United Nations Covenants of 1966, were set up as minimal safeguards for the citizens against the failure and abuse of state power.<sup>19</sup>

These developments are partly rooted in enhanced interdependence, partly in assisting newly independent states, but mainly in failures of states to protect and promote human well being, world peace and stability on their own. They were implicitly guided by the aim of intro-

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<sup>17</sup> The term 'law of co-operation' was coined by W. Friedmann, *The Changing Structure of International Law*, 1964, 60-68.

<sup>18</sup> The term 'global law' instead of 'law of integration' is increasingly used, cf. Hobe, see note 8, 663, see also the series of 'Studies in Global Economic Law', Vol. I-VI., (Peter Lang).

<sup>19</sup> See T. Cottier, "Trade and Human Rights: A Relationship to Discover", *JIEL* 5 (2002), 11 et seq. (116).

ducing a new layer of constitutional checks and balances so as to constrain the power of the sovereign states.

At the same time, bilateral and multilateral cooperation increased dramatically so as to cope with the profound technical, social, ecological and economic changes commonly described as globalization.<sup>20</sup> Nowadays, states are locked in and bound by many treaties. These agreements not only define external relations, but increasingly shape national law. In the case of the WTO, the process is accompanied by effective dispute settlement and enforcement. Even the United States of America as a superpower grudgingly adheres to this in principle with a view to securing its own market access and legal compliance interests abroad.<sup>21</sup> The same holds true for the European Communities. Failure to comply with a number of big WTO cases across the Atlantic must not detract from the fact that overall levels of compliance are high. The more so, this is true within regional integration. Contemporary law of the European Union and the Community not only limits the powers of Member States but also those of non-members, like Switzerland, who see themselves under factual constraint to adapt and implement European Community law with a view to minimizing trade barriers and distortions to their own disadvantage. As a legal phenomenon, regionalization and globalization can be described as a process of “legal and de facto denationalisation”,<sup>22</sup> resulting from the declining regulatory

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<sup>20</sup> For a succinct description of the process of globalization, see K. Dicke, “Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems auf universaler und regionaler Ebene sowie gegenläufige Renationalisierungstendenzen”, in: K. Dicke/ W. Hummer/ D. Girsberger et al. (eds), *Public Law and Private International Law in a Globalising International System*, Berichte der Deutschen Gesellschaft für Völkerrecht 39 (2000), 13 et seq. (14 et seq.); P. Pernthaler, “Die Globalisierung als Herausforderung an eine moderne Staatslehre”, in: H. Schäfer/ W. Berke/ H. Stolzlechner/ J. Werndl (eds), *Staat – Verfassung – Verwaltung: Festschrift anlässlich des 65. Geburtstages von Prof. Dr. Dr. h.c. Friedrich Kojas*, 1998, 67 et seq. (69 et seq.); D. Held/ A. McGrew/ D. Goldblatt/ J. Perraton, “Rethinking Globalization”, in: D. Held/ A. McGrew (eds), *The Global Transformations Reader. An Introduction to the Globalization Debate*, 2000, 54 et seq.; U. Beck, “What is Globalization?”, in: Held/ McGrew, see above, 99 et seq.

<sup>21</sup> Cf. in this context the seminal work of L. Henkin, *How Nations Behave*, 1979, 12 et seq.

<sup>22</sup> C. Tietje, “Global Governance and Inter-Agency Co-operation in International Economic Law”, *JWT* 36 (2002), 501 et seq. (502 et seq.); D. Thürer, “Die Bundesverfassung von 1848: Kristallisationspunkt einer Staatsidee”,



capacity of the Nation State<sup>23</sup> and consisting in the transfer of policies traditionally regulated by domestic law to international or supranational governance structures or regimes.<sup>24</sup>

All these changes have deeply affected the structure of law in general and both constitutional and public international law in particular. *Giovanni Biaggini* put it succinctly: “constitutional law is becoming more international, international law more constitutional”.<sup>25</sup>

*aa. ‘Internationalization’ of Constitutional Law*

As regards constitutional law, the growing interdependence of states and their declining regulatory capacity have caused, in *Biaggini’s* words, a “partial outsourcing” of constitutional functions.<sup>26</sup> Importantly, the protection of fundamental rights and safeguarding peace are no longer the exclusive responsibility of national constitutions.<sup>27</sup> They have also become important tasks of international and supranational organizations.<sup>28</sup> The same is particularly true in economic relations. Market access rights and level playing fields are secured by basic treaty principles of non-discrimination (most favoured nation and national treatment) which do not form part of the introverted traditions of constitutional law.<sup>29</sup> They are accompanied by a multitude of rules which in certain fields are more detailed than corresponding domestic regulations.

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*Zeitschrift für Schweizerisches Recht* 117 (1998), 163 et seq. (176); J. Delbrück, “Globalization of Law, Politics, and Markets – Implications for Domestic Law – A European Perspective”, *Ind. J. Global Legal Stud.* 1 (1993), 10 et seq.; Dicke et al., see note 20, 14.

<sup>23</sup> Hobe, see note 8, 656.

<sup>24</sup> The concept of regime can be defined as a set of “principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given cause-area”, S.D. Krasner, *International Regimes*, 1983, 1.

<sup>25</sup> G. Biaggini, “Die Idee der Verfassung – Neuausrichtung im Zeitalter der Globalisierung?”, *Zeitschrift für Schweizerisches Recht* 119 (2000), 445 et seq. (455) (translated by the authors).

<sup>26</sup> Biaggini, see note 25, 454.

<sup>27</sup> Biaggini, see note 25, 454 et seq.

<sup>28</sup> Biaggini, see note 25, 454 et seq.

<sup>29</sup> T. Cottier, “Structure-Substance Pairings in the EFTA Experience”, in: M. Hilf/ E.U. Petersmann (eds), *National Constitutions and International Economic Law*, 1993, 409 et seq. (434 et seq.)

The transfer of constitutional functions from the national to the international level has been described by some legal scholars in terms of “internationalisation of constitutional law”,<sup>30</sup> “the opening up of the constitutional state”<sup>31</sup> or the emergence of “international parallel constitutions”.<sup>32</sup>

*bb. ‘Constitutionalization’ of International Law*

As regards public international law, the increasing importance of non state actors, such as international and non-governmental organizations (NGO’s) and multinational corporations, are challenging the role of the state as the exclusive subject of international law.<sup>33</sup> The individual, traditionally considered an object of international law, is gradually gaining the status of a “partial subject”.<sup>34</sup> These developments mark a slow shift of paradigm from an international society of independent, sovereign states to the international community,<sup>35</sup> evoking the idea of interde-

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<sup>30</sup> Biaggini, see note 25, 452.

<sup>31</sup> G. Biaggini, “Die Öffnung des Verfassungsstaates als Herausforderung für Verfassungsrecht und Verfassungslehre”, in: B. Ehrenzeller et al. (eds), *Der Verfassungsstaat vor neuen Herausforderungen: Festschrift für Yvo Hangartner*, 1998, 957 et seq. (957); T. Cottier, “Globalisierung des Rechts – Herausforderung für Praxis, Ausbildung und Forschung”, *Zeitschrift des Berner Juristenvereins* 133 (1997), 217 et seq. (224); D. Schindler, “Der Weg vom “geschlossenen” zum “offenen” Verfassungsstaat”, in: Ehrenzeller, see above, 1027; S. Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz: eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation*, 1998.

<sup>32</sup> C. Tomuschat, “Der Verfassungsstaat im Geflecht der internationalen Beziehungen”, *VVDStRL* 36 (1978), 7 et seq. (9, 50); D. Thürer, *Perspektive Schweiz. Übergreifendes Verfassungsdenken als Herausforderung*, 1998, 86.

<sup>33</sup> Hobe, see note 8, 659 et seq.

<sup>34</sup> Hobe, see note 8, 661 et seq.

<sup>35</sup> One of the first proponents of the concept of ‘international community’ was the judge of the ICJ Hermann Mosler, see H. Mosler, “The International Society as a Legal Community”, in: *Collected Courses, The Hague Academy of International Law No. 4* (1974), 140 et seq. and id., *The International Society as a Legal Community*, 1980. For later works, see in particular C. Tomuschat, “Obligations Arising for States Without or Against Their Will”, in: *Collected Courses, The Hague Academy of International Law No. 4* (1993), 195 et seq. and A.L. Paulus, *Die internationale Gemein-*

pendence, shared responsibility and solidarity.<sup>36</sup> The departure from the voluntaristic, state-centred concept of international law and the emphasis on the interests of the community of states as a whole also affect the sources and the implementation of public international law. The idea of ‘higher law’, binding the states independently of their individual consent, is reflected in the concepts of ‘ius cogens’, ‘obligationes erga omnes’ and ‘international crime’.<sup>37</sup> However limited in scope, they have resulted in a rudimentary mandatory hierarchical structure of the international legal system which no longer is at the disposition of national law and the Nation State. As the creation of the European Court of Human Rights in Strasbourg, the ICC in The Hague, the WTO, the United Nations Convention on the Law of the Sea, and, most importantly, the European Union with their binding dispute settlement system shows, law enforcement mechanisms have been established with varying, but enhanced efficiency compared to voluntarist classical international law.<sup>38</sup> With human rights lawyers at the forefront, the changing structure of the international legal system and its increased focus on the rights of the individuals, is referred to as the “constitutionalization of public international law”.<sup>39</sup>

Before it was employed by international lawyers, the term ‘constitutionalization’ was introduced in the context of the European Community, describing the “process by which the ECJ [European Court of Justice] transformed treaty into constitution,”<sup>40</sup> mainly by attributing

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*schaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, 2001.

<sup>36</sup> Salcedo, see note 10, 588; Thürer, see note 8, 44.

<sup>37</sup> For these concepts, see, among the vast literature, for example the articles by J.H.H. Weiler/ A.L. Paulus, “The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?” *EJIL* 8 (1997), 545 et seq.; M. Koskeniemi, “Hierarchy in International Law: A Sketch”, *EJIL* 8 (1997), 566 et seq.; Salcedo, see note 10, 583 et seq. For a critical account, cf. P. Weil, “Vers une normativité relative en droit international?”, *RGDIP* 86 (1982), 5 et seq.

<sup>38</sup> See J.A. Frowein, “Konstitutionalisierung des Völkerrechts”, in: Dicke et al., see note 20, 427 et seq. (438 et seq.).

<sup>39</sup> For Frowein, the “constitutionalization of public international law means recognition of interests of the community of states and the introduction of mechanisms for their implementation”, Frowein, see above, 447.

<sup>40</sup> F. Snyder, “General Course on Constitutional Law of the European Union”, in: Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, Vol. VI, No. 1 (1995), 41 et seq. (56).

direct effect and supremacy to Community law and developing a fundamental rights doctrine for the European Union.<sup>41</sup> In comparison with the European Union, the theory of ‘constitutionalization’ is, of course, less developed and unsettled in public international law. It stands both for an analytical tool to describe the structural changes of the international legal system and for a strategy as to how to further enhance the efficiency, coherency and legitimacy of international law by applying constitutional law theories to the international system as a whole or to international organizations. The theory of constitutionalization is thus both descriptive and normative, which is illustrated by the ‘constitutionalization debate’ with regard to the WTO.

Within the community of WTO scholars, different schools of thought can be observed, ranging from general descriptions to specific normative claims. *Hannes L. Schloemann* and *Stefan Ohlhoff*, for instance, use the term ‘constitutionalization’ to describe the important substantive reach of WTO law, the quasi-obligatory dispute settlement system and the shift of the WTO from a power to a rule oriented system, which has developed into a “proto-supranational structure”.<sup>42</sup> Similarly, for *Deborah Z. Cass*, ‘constitutionalization’ characterizes “the generation of a set of constitutional-type norms and structures by

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<sup>41</sup> Snyder, see above, 56; J.H.H. Weiler, “The Transformation of Europe”, in: J.H.H. Weiler, *The Constitution of Europe*, 1999, 19 et seq., first published in *Yale L. J.* 100 (1991), 2403 et seq.; id., “The Reformation of European Constitutionalism”, in: Weiler, see above, 221 et seq.; E. Stein, *Thoughts from a Bridge, a Retrospective of Writings on New Europe and American Federalism*, 2000, 15. The first account of the ‘constitutionalization’ of the EC treaties is generally attributed to an article written by Eric Stein in 1981: “Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe. From its inception a mere quarter of a century ago, the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology”. E. Stein, “Lawyers, Judges, and the Making of a Transnational Constitution”, *AJIL* 75 (1981), 1 et seq. (1), also published in: Stein, see above, 16 et seq.

<sup>42</sup> H. Schloemann/ L. Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence”, *AJIL* 93 (1999), 424 et seq. (424) and footnote 1. Cf. also id., “Transcending the Nation State? Private Parties and the Enforcement of International Trade Law”, *Max Planck UNYB* 5 (2001), 675 et seq.

judicial decision-making".<sup>43</sup> *John Jackson's* constitutional analysis of the WTO focuses mainly on the institutional structure of the Organization.<sup>44</sup> He emphasizes the need to increase transparency and the participation of non-governmental organizations in the decision-making procedures of the WTO, without advocating fundamental changes in the structure of international and inter-governmental law.<sup>45</sup> *Markus Krajewski* also considers transparency an important legitimating strategy. But contrary to *Jackson*, he does not believe that NGO's participation would increase the legitimacy of the WTO.<sup>46</sup> Similar to *Krajewski's* opinion,<sup>47</sup> *Steve Charnovitz* defends the view that international governance must meet the standards of legitimacy according to constitutional principles and writes in support of what he calls cosmopolitics as opposed to traditional intergovernmental diplomacy or ortho-politics:<sup>48</sup> "The individual wants legitimate, democratic governance at all levels, be it the local school board, the city, the province, the nation, or the WTO".<sup>49</sup> *Ernst-Ulrich Petersmann* has made a passionate claim for integrating human rights law into the WTO, arguing that national courts should directly apply WTO norms, which embody the fundamental right to free trade, whereas panels should construe the general exception and safeguard clauses in the light of international human rights

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<sup>43</sup> D.Z. Cass, "The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade", *EJIL* 12 (2001), 39 et seq. (39).

<sup>44</sup> J.H. Jackson, "The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited", *JIEL* 4 (2001), 67 et seq. (70 et seq.); for a summary of Jackson's view, see J.L. Duvigneau, "Die Konstitutionalisierung des WTO-Rechts. Zur juristischen Diskussion über Verfassungsstrukturen im Bereich des Handelsvölkerrechts", *Aussenwirtschaft* 56 (2001), 295 et seq. (300 et seq.).

<sup>45</sup> Jackson, see note 44, 76 et seq.

<sup>46</sup> M. Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)*, 2001, 252 et seq. (261 et seq.).

<sup>47</sup> Cf. M. Krajewski, "Democratic Legitimacy and Constitutional Perspectives of WTO Law", *JWT* 35 (2001), 167 et seq. (171).

<sup>48</sup> The term "orthopolitics" describes a state-centered view of international law, according to which the individuals only participate in international policymaking through their own governments, S. Charnovitz, "WTO Cosmopolitics", *N.Y.U.J. Int'l L. & Pol.* 34 (2002), 299 et seq. (306).

<sup>49</sup> Charnovitz, see above 48, 310 et seq.

norms.<sup>50</sup> This strategy has been criticized on different grounds.<sup>51</sup> *Philip Alston*, for instance, fears that *Petersmann's* theory of constitutionalizing the WTO will result in the instrumentalization of human rights for trade liberalization purposes.<sup>52</sup> *Robert Howse* and *Kalypto Nicolaidis* warn against constitutional language and concepts being imported into the debate about the WTO, fearing an increased polarization between free trade advocates and its detractors. In general, they argue that constitutionalizing WTO law goes too far, as it impedes Member States from pursuing legitimate policy goals domestically, and overstrains the international system.<sup>53</sup> In a similar vein, *Armin von Bogdandy's* coordinated interdependence model emphasizes the regulatory autonomy of WTO members, highlighting the important differences between the European Union and the WTO.<sup>54</sup> *Eric Stein* also points out that the differences, in terms of the integration level achieved, between the international structure of the WTO and the supranational European Union "make transfers of the basic features of the European Union difficult to envision".<sup>55</sup> *Joseph H.H. Weiler* considers " 'constitutionalizing'

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<sup>50</sup> Cf. E.U. Petersmann, "Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", *EJIL* 13 (2002), 621 et seq., also published in The Jean Monnet Working Paper No. 12, 2002; *ibid.*, "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston", *EJIL* 13 (2002), 845 et seq.

<sup>51</sup> P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law. A Reply to Petersmann", *EJIL* 13 (2002), 815 et seq., also published in The Jean Monnet Working Paper No. 12, 2002; R. Howse, "Human Rights in the WTO: Whose Rights, What Humanity? – Comment on Petersmann", *EJIL* 13 (2002), 651 et seq., also published in The Jean Monnet Working Paper No. 12, 2002; Krajewski, see note 47, 179 et seq.; D.K. Tarullo, "The EU and the WTO: Legal and Constitutional Issues", *JIEL* 5 (2002), 941 et seq. (942).

<sup>52</sup> Alston, see note 51, 842 et seq.

<sup>53</sup> R. Howse/ K. Nicolaidis, "Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too far", in: R.B. Porter (ed.), *Efficiency, equity and legitimacy: the multilateral trading system at the millennium*, 2001, 227 et seq.; Thüerer, see note 8, 43, defends a similar view as regards the constitutionalization of public international law, considering this strategy too ambitious.

<sup>54</sup> A. von Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship", *Max Planck UNYB* 5 (2001), 647 et seq.

<sup>55</sup> E. Stein, "International Integration and Democracy: No Love at First Sight", *AJIL* 95 (2001), 502 et seq. (533).

the GATT in structural terms and in some ways using the EU as a ‘model’ [a] simplistic dream”<sup>56</sup> and “wholly misguided”.<sup>57</sup> Finally, one of the authors of this article advocates within the existing legal framework a modest shift, reflected in case law, from a functional paradigm, primarily aimed at trade liberalization, towards a framework capable of “reasonably balancing and weighing different, equally legitimate and democratically defined basic values and policy goals of a polity dedicated to promote liberty and welfare in a broad sense”.<sup>58</sup>

In other words, there is no common ground, at this stage, and different authors have different conceptions on whether constitutionalizing the WTO is possible or desirable in the first place, and if so, what the practical implications of constitutionalization are and should be. Despite the lack of common notions and perceptions, the constitutionalization discussion should be welcomed as a sign that strict separation between domestic and international law has come under challenge, opening the debate on the prospects for 21st century constitutionalism.

### III. Constitutionalism Beyond the Nation State

#### 1. The Contested Notion of the ‘Constitution’

##### a. Recourse to Constitutional Terminology

The debate on the ‘constitutionalization’ of European and international law goes hand in hand with an increasing, sceptics would say inflationary, use of the term ‘constitution’. While the traditional notion of ‘con-

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<sup>56</sup> J.H.H. Weiler, “Epilogue: Towards a Common Law of International Trade”, in: J.H.H. Weiler (ed.), *The EU, the WTO and the Nafta. Towards a Common Law of International Trade*, 2000, 230.

<sup>57</sup> J.H.H. Weiler, “Cain and Abel – Convergence and Divergence in International Trade Law”, in: J.H.H. Weiler (ed.), *The EU, the WTO and the Nafta. Towards a Common Law of International Trade*, 2000, 1 et seq.

<sup>58</sup> T. Cottier, “Limits to International Trade: the Constitutional Challenge,” *ASIL Proceedings* 94 (2000), 220 et seq. (221).

stitution' has been limited to the Nation State,<sup>59</sup> we observe that it is increasingly employed in the context of European and public interna-

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<sup>59</sup> For Swiss authors, see W. Kägi, *Die Verfassung als rechtliche Grundordnung des Staates. Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht*, 1945; A. Auer/ G. Malinverni/ M. Hottelier, *Droit constitutionnel Suisse*, Vol. I, 2000, 1: "La constitution est un ensemble de normes qui ont trait à l'Etat", ("The constitution is a set of legal norms which refer to the state"); for French legal doctrine, cf. G. Vedel, *Manuel élémentaire de droit constitutionnel*, 1949, 3; A. Esmein, *Eléments de droit constitutionnel français et comparé*, 1921, 1; it is true that the concept of 'constitution' is, according to French legal theory, primarily related to the nation, and not to the state (see A. Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, 97 et seq.), but since the state is considered the legal personification of the nation, state and constitution are clearly connected; cf. Esmein, see above, 1: "L'Etat est la personnification juridique d'une nation: c'est le sujet et le support de l'autorité publique [...]. Le droit public consiste en ce qu'il donne à la souveraineté, en dehors et au-dessus des personnes qui l'exercent à tel ou tel moment, un sujet ou titulaire idéal et permanent, qui personnifie la nation entière: cette personne morale, c'est l'Etat, qui se confond ainsi avec la souveraineté, celle-ci étant sa qualité essentielle", ("The state is the legal embodiment of the nation: it is the subject and the underpinning of public authority. Public law consists in giving to sovereignty, apart and beyond the people who exercise it at a given moment, an ideal and permanent subject or holder, which embodies the whole nation: this legal entity is the state, which herewith is identical with sovereignty, the latter being its essential attribute"). For a similar approach, see, among Belgian scholars, Y. Lejeune/ O. De Schutter, "L'adhésion de la Communauté à la Convention européenne des droits de l'homme. A propos de l'avis 2/94 de la Cour de justice des Communautés", *Cahiers de Droit Européen* 32 (1996), 556 et seq. (572), note 31: "Une constitution est [...] l'expression souveraine de la volonté d'un peuple de se constituer en Etat [...]" ("A constitution is [...] the sovereign expression of the will of a people to be constituted in a State [...]"). It is the German constitutional doctrine which insists the strongest on a state centered concept of constitution. Cf. C. Schmitt, *Verfassungslehre*, 1928, 3: "Das Wort "Verfassung" muss auf die Verfassung des Staates, d.h. der politischen Einheit eines Volkes beschränkt werden, wenn eine Verständigung möglich sein soll," (The term "constitution" has to refer to the constitution of the state, i.e. the political unity of the people, if communication shall be possible"). P. Kirchhof, in: J. Isensee/ P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. I, 1987, 776: "Die Verfassung ist das Fundamentalgesetz eines Staates, das die Organisation und die Ausübung der Staatsgewalt regelt, die Entwicklung des Staatswesens und seines Rechts anleitet und die Rechtsposition des Einzelnen im Staat bestimmt", ("The



tional law.<sup>60</sup> A number of international organizations explicitly depict their charters as ‘constitutions’, such as the ‘Constitution’ of FAO and UNESCO.<sup>61</sup> Others implicitly qualify basic instruments in constitutional terms. The European Court of Justice already depicted the founding treaties as the “constitutional Charter of a Community based on the rule of law”,<sup>62</sup> long before efforts to create a formal constitution of the EU were undertaken. In a similar vein, a decision of the European Commission of Human Rights considers the “Convention as a constitutional instrument of European public order in the field of human rights”.<sup>63</sup> In doctrine, *Alfred Verdross*<sup>64</sup> and *Georges Scelles*<sup>65</sup> were among the first scholars to develop a theory of international constitutional law. Other scholars refer to an “emerging global constitution”,<sup>66</sup> the “constitution of mankind”,<sup>67</sup> the “universal constitution of public international law”<sup>68</sup> and speak with regard to the WTO and the United Nations Charter of an “international economical constitution”<sup>69</sup> and a “constitution of the International Community”.<sup>70</sup>

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constitution is the fundamental charter of a state; it governs the organization and the exercise of state authority, guides the development of the state and its laws, and determines the legal position of the individuals in the state”).

<sup>60</sup> For a detailed description of the use of the term ‘constitution’ outside the context of the Nation State, see Biaggini, see note 25, 448 et seq.; Peters, see note 59, 46 et seq.

<sup>61</sup> Cf. Petersmann, see note 13, 11 et seq.

<sup>62</sup> Opinion 1/91, *Referring to the Draft Treaty on a European Economic Area*, ECR 1991 I, 6084; the terms “constitutional charter” and “Community based on the rule of law” have been first used in Case 294/83, *Parti écologiste ‘Les Verts’ v. European Parliament*, ECR 1986, 1339 et seq., 1365.

<sup>63</sup> Decision *Chrysostomos, Papachrysostomou and Loizidou v. Turkey* of March 4, 1991, Application Numbers 15299/89; 15300/89; 15318/89; see also the subsequent judgment in the same case of the European Court of Human Rights of May 23, 1995, Series A No. 310 § 75.

<sup>64</sup> A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, 1926.

<sup>65</sup> G. Scelles, “Le Droit constitutionnel international”, in: *Mélanges Carré de Malberg*, 1933, 503 et seq.

<sup>66</sup> Müller, see note 7, 63 (translated by the authors).

<sup>67</sup> C. Tomuschat, “International Law as the Constitution of Mankind”, in: United Nations (ed.), *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission*, 1997, 37 et seq.

<sup>68</sup> Müller, see note 7, 62 (translated by the authors).

<sup>69</sup> S. Langer, *Grundlagen einer internationalen Wirtschaftsverfassung: Strukturprinzipien, Typik und Perspektiven anhand von Europäischer Union und*

Should such extensive use of the term ‘constitution’ be approved of, or is it misleading, fraught with the risk of diluting the meaning and essence of the constitution?<sup>71</sup> This question has given rise to controversy, dividing legal scholars into two camps, which we will name, following *Biaggini*, the “statist” and the “internationalist” school.<sup>72</sup>

According to the statist strand of thinking, the constitution is inherently linked to the state. “Internationalist”<sup>73</sup> scholars, on the other side, defend the view that the concept of ‘constitution’ should be decoupled from the state, insisting that the notion of ‘the constitution’ has considerably evolved over time and has only been linked to the state for the last two hundred years.<sup>74</sup> According to the ‘statist’ point of view, however, this historical argument is not relevant as it fails to distinguish between a descriptive and a normative concept of ‘constitution’.<sup>75</sup>

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*Welthandelsorganisation*, 1995, 17 et seq.; T. Oppermann, “Die Europäische Gemeinschaft und Union und die Welthandelsorganisation (WTO)”, *RIW* 41 (1995), 920 et seq.; for a critical assessment, see Krajewski, see note 46, 208 et seq. (translated by the authors).

<sup>70</sup> B. Fassbender, “The United Nations Charter As Constitution of the International Community”, in: *Colum. J. Transnat’l L.* 36 (1998), 529 et seq.; see also P.M. Dupuy, “The Constitutional Dimension of the Charter Revisited”, in: *Max Planck UNYB* 1 (1997), 1 et seq.

<sup>71</sup> For an author warning against the risk that the meaning of the constitution may be diluted, cf. J.P. Müller, *Die demokratische Verfassung*, 2002, 91.

<sup>72</sup> Biaggini, see note 25, 455, (translated by the authors).

<sup>73</sup> Biaggini, see note 25, 455, (translated by the authors).

<sup>74</sup> Cf. Krajewski, see note 46, 123; C. Dorau/ P. Jacobi, “The Debate over a ‘European Constitution’: Is it Solely a German Concern”, *European Public Law* 6 (2000), 312 et seq. (417 et seq.); for the historical evolution of the term ‘constitution’, cf. H. Mohnhaupt/ D. Grimm, *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart*, 2002; J.F. Aubert, “La Constitution. Son contenu, son usage”, in: J.F. Aubert (ed.), *La Constitution. Son contenu, son usage*; K. Eichenberger, *Sinn und Bedeutung der Verfassung. Referate zum 125. Schweizerischen Juristentag 1991*, Schweizerischer Juristenverein No. 1/2, 1991, 1 et seq.; Peters, see note 59, 40 et seq.

<sup>75</sup> See also, D. Grimm, “Braucht Europa eine Verfassung?” *Juristen Zeitung* 50 (1995), 581 et seq. (582); id., “Does Europe Need a Constitution?”, *ELJ* 1(1995), 284 et seq.; the dichotomy ‘normative’ and ‘descriptive’ constitution is sometimes used in a different sense than thereafter. According to J.F. Aubert, for instance, the meaning of ‘constitution’ is normative as soon as it refers to a human collectivity, defining how it *should be* organized, whereas used in a descriptive manner, the constitution refers to an object or

## b. Descriptive versus Normative Concept of Constitution

Indeed, in a broad, descriptive sense, constitutions can be understood to depict simply any structure of governance. Any polity has a constitution in this sense, since power is at least *de facto* constituted. Power structures throughout history, on any level of governance, would live up to this factual and descriptive concept. Such a notion of constitution is not limited to the Nation State. It can apply as much to tribal, communal<sup>76</sup> and international structures of governance. From this perspective, all communities have had their constitution,<sup>77</sup> from the early beginnings of settlement, to Greek and other polities, to the Roman Empire,<sup>78</sup> to the city states prior to the advent of the Nation State in modern times. Understood as a factual concept, the constitution can thus be readily employed for any structures, independently of their qualities.

Such an extensive concept, however, reduces the role of the constitution to a mere set of organizational rules. It does not take into account the functions other than setting up an organizational framework that modern constitutions are expected to fulfil.<sup>79</sup> As a normative con-

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a human being, describing what its disposition is like, J.F. Aubert, "Notion et fonctions de la Constitution", in : D. Thürer/ J.F. Aubert/ J.P. Müller (eds), *Verfassungsrecht der Schweiz*, 2001, 3. For this distinction, see also Peters, see note 59, 40 et seq.

<sup>76</sup> See B. Marquardt, *Das Römisch-Deutsche Reich als Segmentäres Verfassungssystem (1348-1806/48): Versuch zu einer neuen Verfassungstheorie auf der Grundlage der Lokalen Herrschaften*, 1999.

<sup>77</sup> See R. Uerpman, "Internationales Verfassungsrecht", *Juristen Zeitung* 56 (2001), 565 et seq. (566): "Nicht jedes Gemeinwesen hat eine geschriebene Verfassung, aber jedes Gemeinwesen hat Verfassungsrecht. Dieses Verfassungsrecht muss mindestens die Hauptakteure konstituieren und gewisse Verfahrensregeln enthalten. Theoretisch könnte sich eine Verfassung damit begnügen, ein Organ der Rechtssetzung einzusetzen und zu regeln, wie dieses Gesetze beschliesst." ("Not every polity has a written constitution, but every polity has constitutional norms. These constitutional norms must at least constitute the main actors and comprise certain procedural rules. Theoretically, a constitution could content itself with establishing one legislative organ and with regulating how the latter is to adopt the laws").

<sup>78</sup> See the work of T. Mommsen, *Römisches Staatsrecht*, 1969.

<sup>79</sup> D. Castiglione, "The Political Theory of the Constitution", in: R. Bellamy/ D. Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives*, 1996, 5 et seq. (9), stresses the close link between the concept and the function of the "constitution": "Indeed, what a constitution is can hardly be distinguished from what a constitution does".

cept, the constitution has to meet certain requirements. Its basic and core function consists in both setting up and limiting the power of the polity, defining the fundamental boundaries between the private and the public, the state and the individual, mainly in terms of fundamental rights, and between the different branches of government. The concept of limited government entails the rule of law, the idea of “government by laws and not by men”. As ‘higher law’, binding both those subject to power and those in power, the constitution is meant to have a stabilizing effect.<sup>80</sup> It guarantees a degree of predictability of conduct and therefore also entertains legitimate expectations as to human behaviour. In addition, a constitution is expected to legitimize political authority, which implies, under a doctrine of modern constitutionalism, that all power is ultimately derived from the citizens.<sup>81</sup> Beyond that, additional qualifications exist in isolation or in combination. A *liberal* constitution emphasizes the defensive function of constitutionalism as a power-restricting device and human rights in the form of negative, individual-liberty rights,<sup>82</sup> while a *teleological* constitution stresses the integrative function<sup>83</sup> of a constitution by laying down common social and economic objectives and enshrining affirmative claims *vis-à-vis* the state.<sup>84</sup> A *federal* constitution has to draw the lines between the federal and sub-federal levels and define their interaction.

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Also Walter, see note 2, 2001, adopts a functionalist vision. He points out that the traditional constitution of the nation state “is characterized by a bundling of different functions in a single political unit and by means of a single text”, *ibid.*, 191.

- <sup>80</sup> Cf. N. Luhmann, “Verfassung als evolutionäre Errungenschaft”, *Rechtshistorisches Journal* 9 (1990), 176 et seq. (181 et seq.).
- <sup>81</sup> Aubert, see note 74, 20 et seq.
- <sup>82</sup> D.P. Kommers/ W.J.Thompson, “Fundamentals in the Liberal Constitutional Tradition”, in: J.J. Hesse/ V. Wright, *Constitutional Policy and Change in Europe*, 1995, 35.
- <sup>83</sup> The integrative function of the constitution is stressed by R. Smend, *Verfassung und Verfassungsrecht*, 1928; contra: Aubert, see note 75, 15 et seq.
- <sup>84</sup> For the concept of ‘teleological constitution’, see U.K. Preuss, “Patterns of Constitutional Evolution and Change in Eastern Europe”, in: Hesse/ Wright, see note 82, 95 et seq.; N. Johnson, “Constitutionalism: Procedural Limits and Political Ends”, in: Hesse/ Wright, see note 82, 46 et seq. (49, 54). For the distinction between a liberal and a teleological constitution, see also J.P. Müller, *Soziale Grundrechte in der Verfassung?*, 2nd edition, 1981, 55 et seq., who distinguishes between the constitution as “instrument of government” and the constitution as a “material fundamental order” of a polity (translated by the authors).

Overall, the normative standards and yardsticks for a Constitution (with a capital C) are fairly ambitious. Without distinguishing between liberal, teleological and federal constitutions, the normative concept of Western constitutionalism, as it was shaped in the 18th and 19th centuries, broadly entails in many variants, organizational functions, the concept of the rule of law, the protection of fundamental rights, checks and balances, and democratic legitimacy.<sup>85</sup>

A purely descriptive concept of the 'constitution' should, in our view, not be maintained, since 'everything goes' will not help in the process of building global governance. Indeed, the constitutionalization debate of the WTO, briefly summarized above,<sup>86</sup> shows how deeply the discourse is rooted in a normative understanding of the concept of 'Constitution', whatever its precise contours. The different visions of constitutionalization are for instance linked to the protection of fundamental rights, the rule of law and judicial review, or aspects of the democratic principle, such as transparency and participation. Devoid of any normative content, the debate on whether political entities or governance structures other than states should be apprehended in constitutional terms becomes a futile exercise.

At the same time, it is clear that recourse to the normative concept of the constitutional Nation State, containing democratic, liberal, social and often federal traits, is equally not helpful. It is evident that not all the attributes can realistically be achieved in fora other than the Nation State. For example, it would simply not be realistic or desirable to transpose the majoritarian principle 'one man, one vote' to polities lacking the necessary degree of integration which only renders majority decisions acceptable. Indeed, in polities with strong social cleavages, non-majoritarian decision making procedures are an important condition of political stability, since they help to avoid the problem of 'permanent minorities'.<sup>87</sup> Similarly, it may be neither useful nor inherently

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<sup>85</sup> For the normative concept and the functions of the constitution, cf. Müller, see note 71, 87 et seq.; Aubert, see note 75, 14; Grimm, see note 75, 584; id., see note 75, *ELJ*, 284 et seq.; Preuss, see note 84, 98.

<sup>86</sup> See under II. 2. a. bb.

<sup>87</sup> In the context of the EU, this point is stressed for example by J.F. Aubert, "Commentaire", *Swiss Papers on European Integration* 1 (1995), 48 et seq.; with regard to public international law, see S. Oeter, "Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer "Verfassung der Freiheit", in: H. Brunkhorst/ M. Kettner (eds), *Globalisierung und Demokratie, Wirtschaft, Recht, Medien*, 2000, 208 et seq. (215 et seq.).

necessary to provide human rights guarantees to the same extent on each level of governance.<sup>88</sup> The maximalist concept of ‘constitution’ is moreover fraught with the risk that the Nation State remains the only standard against which other governance structures are measured, which necessarily makes them seem underdeveloped and deficient.<sup>89</sup> Instead, a broader model is required. As *Tarullo* puts it, “it is neither likely nor even necessarily desirable that all constitutional arrangements evolve towards a single, ideal model”.<sup>90</sup> What therefore should be the key normative components of a constitution in a broad sense? What are the minimal standards of a normative constitutional order? To answer this question, scholars generally either generalize and re-conceptualize certain normative aspects of the constitution,<sup>91</sup> or consider that not all of them are inherent to the concept of constitution.<sup>92</sup>

## 2. The Quest for a Graduated Approach to Constitutionalism

From a methodological point of view, defining the core minimal standards of a normative constitutional order is extremely difficult, since it requires us to establish firm conceptual boundaries and to draw a clear line between polities with a constitution and those whose organizational structures do not qualify as such. In the end, this amounts to defining the minimal standards of legitimate governance in global law and, consequently, to enforcing such standards by the international community. This, we must leave to the future. At this stage, a more fruitful approach could be, as *Walker* suggests, to conceive constitutionalism “not in black-and-white, all-or-nothing terms, but as a question of nuance

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<sup>88</sup> On this issue, see under IV. 4.

<sup>89</sup> See also, Biaggini, see note 25, 465; Thürer, see note 8, 49; the problem of setting the adequate standard is highlighted by G. Majone, “Europe’s ‘Democratic Deficit’: the Question of Standards”, *ELJ* 4 (1998), 5 et seq.

<sup>90</sup> *Tarullo*, see note 51, 43.

<sup>91</sup> This approach is for example chosen by Biaggini, see note 25, 459 et seq., who considers that the requirement of democratic legitimacy can also be fulfilled in the case of international organizations, since their founding treaties are legitimized, indirectly, by the consent of the peoples of the Member States.

<sup>92</sup> For such an approach, cf. Peters, see note 59, 67 et seq., who argues, based on a functional analysis, that the democratic principle is not a necessary prerequisite of the concept of constitution but a question of its legitimacy.

and gradation”.<sup>93</sup> The idea of ‘constitutionalization’, which refers to an open-ended process,<sup>94</sup> reflects this concept: constitutionalism, as Walker puts it, can be viewed as a set of different factors which serve as “indices in terms of which degrees of constitutionalization can be measured”.<sup>95</sup> Such a graduated approach may sound strange to legal scholars, who are accustomed to translating facts and events into clear legal concepts.<sup>96</sup> In *Jacqué’s* words, “lawyers like clear situations and are used to analyzing situations in a static way, like a photographer, whose representation of reality immobilizes the latter”.<sup>97</sup> Life, however, is more complicated, and static thinking will not assist in solving practical problems of modern governance. The debate relating to the European Union is an example in point.

### a. The Immobilizing Effect of Statism

The reasoning of the ‘statist school’ with regard to the question as to whether the European Union has, or is capable of having<sup>98</sup> a constitution, illustrates the immobilizing effect of a ‘black and white’ conceptual approach. The ‘statist’ argument takes the classical distinction be-

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<sup>93</sup> N. Walker, “The EU and the WTO: Constitutionalism in a New Key”, in: G. de Búrca/ J. Scott (eds), *The EU and the WTO. Legal and Constitutional Issues*, 2001, 31 et seq. (33); Walker proposes seven criterias: (i) the development of an explicit constitutional discourse and constitutional self-consciousness; (ii) a claim to foundational legal authority, or sovereignty, whereas sovereignty is not viewed as absolute; (iii) the delineation of a sphere of competences; (iv) the existence of an organ internal to the polity with interpretative autonomy as regards the meaning and the scope of the competences; (v) the existence of an institutional structure to govern the polity; (vi) rights and obligations of citizenship, understood in a broad sense; (vii) specification of the terms of representation of the citizens in the polity.

<sup>94</sup> Cf. Biaggini, see note 25, 473; J. Trachtmann, “Summary”, in: R. Porter/ P. Sauvé/ A. Subramanian/ A.B. Zampetti (eds), *Efficiency, Equity, Legitimacy*, 2001, 353; In this sense also Walker, see note 93, 39.

<sup>95</sup> Walker, see note 93, 33; similarly, Walter, see note 2, 173, 193, views constitutionalism as the bundling of different functions.

<sup>96</sup> In this sense, G. Jellinek, *Allgemeine Staatslehre*, 1929, 282.

<sup>97</sup> J.P. Jacqué, “Cours general de droit communautaire”, in: Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, Vol. I, 1991, 247, free translation by the authors.

<sup>98</sup> Cf. D. König, *Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses*, 1998, 268 et seq.

tween a federal state and a confederation or international organization as a starting point:<sup>99</sup> constitutions are the fundamental charters of states, it is argued, whereas international organizations or confederations are based on treaties.<sup>100</sup> Contrary to a treaty, the constitution can be revised according to majority rule and does not require an unanimous decision. The majority principle implies ‘competence-competence’ and thus sovereignty, statehood, original legitimacy and the ultimate source of authority derived from the people/nation or, in Kelsenian terms, the *Grundnorm*. In contrast, since unanimity is required for the revision of a treaty, the Member States retain the ‘competence-competence’ and therefore remain ‘the sovereign masters of the treaty’.<sup>101</sup> The confed-

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<sup>99</sup> For an account of the ‘statist’ view, see the famous Maastricht decision by the German Constitutional Court, BVerfGE 89, 155, English translation in A. Oppenheimer, *The Relationship between European Community Law and National Law: The Cases*, 1994, 526 et seq.; Grimm, see note 75, 581 et seq.; id., see note 75, 282 et seq.; id., “Vertrag oder Verfassung: Die Rechtsgrundlage der Europäischen Union im Reformprozess Maastricht II”, *Staatswissenschaften und Staatspraxis* 6 (1995), 509 et seq. (528); König, see note 98, 286 et seq.; A. Randelzhofer, “Souveränität und Rechtsstaat: Anforderungen an eine Europäische Verfassung”, in: H. Noske (ed.), *Der Rechtsstaat am Ende?*, 1995, 123 et seq.; P. Kirchhof, “Kompetenzaufteilung zwischen den Mitgliedstaaten und der EU”, in: Vertretung der Europäischen Kommission in der Bundesrepublik Deutschland (ed.), *Europäische Gespräche 2/94, Europäisches Forum: Die künftige Verfassungsordnung der Europäischen Union*, 1994, 59. For a critique of the dichotomy between ‘treaty’ and ‘constitution’, see Peters, see note 59, 220 et seq.; Fassbender, see note 70, 560 et seq.

<sup>100</sup> Cf. Grimm, see note 75, 282: “Constitutions form the legal basis of States. Supranational institutions, by contrast, have their legal basis in international treaties”.

<sup>101</sup> The importance of sovereignty in the debate on whether the European Union is to be considered as a confederation or a federation is highlighted by J.H.H. Weiler, “European Democracy and Its Critics: Polity and System”, in: J.H.H. Weiler, *The Constitution of Europe*, 1999, 264 et seq. (271): “But more profoundly, the vocabulary of *Staat* and *Bund*, of federation and federacy and confederation, is a reflection of a preoccupation, even an obsession, mostly political and ideological, with sovereignty and its location in Europe. The so-called European “federalists” (often Jacobean in disguise) adore the symbolism in the word “federalism” which obviates the need to talk of a state. And likewise, the shrill voices defending national “identity” and Member State rights will look to a terminology and classification which will patent and trademark the ultimate sovereignty of the Member States”.



eration as such has no original, direct legitimacy, for it lacks a democratic subject, a people. Its democratic legitimacy is indirect, being exclusively derived from the peoples of the Member States.

Following that reasoning, amending the revision procedure of the EU Treaty would thus mark the conceptual threshold between ‘statehood’, ‘sovereignty’, ‘original legitimacy’, ‘constitution’, “intra-state constitutional law”,<sup>102</sup> on the one hand, and ‘confederation’, ‘treaty’, “inter-state international law”,<sup>103</sup> ‘lack of sovereignty and original legitimacy’ on the other hand, *tertium non datur*.<sup>104</sup> Since the conceptual threshold has not yet been passed, the European Union qualifies as a confederation. This category, however, cannot account for the dynamic evolution of the European integration, the doctrine of implied powers and the supranational features of the European Community, such as direct effect, and the largely undisputed supremacy of European Community law.<sup>105</sup> The ‘statist’ approach thus conveys a static, immobiliz-

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<sup>102</sup> Walker, see note 93, 36.

<sup>103</sup> Walker, see note 93, 36.

<sup>104</sup> For a critique, see G. Hirsch, “EG: Kein Staat, aber eine Verfassung?” *NJW* 53 (2000), 46 et seq. (46): “Es erscheint an der Zeit, von Stereotypen und definitorischem Schubladendenken (Staat = Verfassung; Staaten-[ver]bund = Vertrag) Abstand zu halten, die bipolaren Unterstände zu verlassen, und der politischen und rechtlichen Realität in Europa Rechnung zu tragen.” (“It is time to distance ourselves from stereotype thinking and conceptual pigeon-holing (State = constitution; confederation = treaty) and to leave bipolar stencils, taking into account the political and legal reality in Europe”).

<sup>105</sup> See Müller, see note 71, 92: “So stellt die EU, in der sich Staaten zu verbindlichen gemeinsamen Regelungen bestimmter Materien (Prinzip der Einzelermächtigung) geeinigt haben, nur einen Staatenverbund, noch nicht aber eine Verfassung dar, da ein entscheidendes Merkmal fehlt: die Zuständigkeit der Organisation, des Verbundes zur Änderung der Gemeinschaftsordnung [...] ohne neue völkerrechtliche Vereinbarung nach dem Einstimmigkeitsprinzip”. (“Hence the EU, in which the states have agreed on common compulsory regulations of certain determined policy fields (principle of enumerated powers) only represents a union of states, but not yet a constitution, because it lacks a fundamental attribute: the competence of the organization, or the federacy, to change the community order without a new international agreement concluded following the unanimity principle”).

The argument that the EC does not have legislative ‘competence competence’ is correct from a strictly legal perspective. Based on a political analysis, however, several authors have reached the conclusion that the attribu-

ing vision of the European Union.<sup>106</sup> It reduces the latter to the aggregate of the interests of the Member States, denying the very idea of a community, which “is meant to be more than the sum of its constituent parts”.<sup>107</sup> The substantial autonomy of the European Community legal order, its self-propelling dynamics, the role of the European parliament, the courts and of European Union citizenship, are not at all properly reflected in the confederate model. In *Weiler* and *Halter*’s words, at-

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tion of powers has “over the years, lost its ‘enumerative’ and limited character”; A.V. Bausili, “Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments”, *The Jean Monnet Working Paper* No. 9, 2002, 2 et seq.; see also Weiler, see note 41, 51 et seq. It is precisely the concern that the reach of EC law is limitless which incited the German Constitutional Court to insist in its Maastricht judgment, see note 99, on the principle of attributed powers:

“In so far as the Treaties establishing the European Community grant sovereign rights in relation to certain well-defined situations on the one hand, and lay down rules for amending the Treaties [...] on the other, that distinction also has significance for the future application of the specific attribution of powers. *Hitherto any dynamic extension of the existing Treaties has been based on a liberal application of Article 235 of the EEC Treaty, along the lines of a “competence to perfect the Treaty”, on the idea of the inherent competences of the European Communities (“implied powers”) and on a interpretation of the Treaty as implying the fullest possible utilization of Community powers (effet utile) [...].* In future, however, when Community institutions and bodies interpret rules conferring competence, it will have to be borne in mind that the Union Treaty draws a fundamental distinction between the exercise of a sovereign power granted on a limited basis and amendment of the Treaty. Any interpretation of that Treaty must not, therefore, amount in effect to an extension of it. Such an interpretation of rules conferring competence would not give rise to any binding effect for Germany”, quoted according to Oppenheimer, see note 99, 572, emphasis added.

Apart from its formal and legalistic approach, the ‘statist’ reasoning can also be criticized on the grounds that the ‘statist’ school does not object to federal entities (for example the Swiss cantons) having a ‘constitution’, although they do not have legislative ‘competence-competence’ and therefore cannot be considered as states, see P. Craig, “Constitutions, Constitutionalism, and the European Union”, *ELJ* 7 (2001), 125 et seq. (138).

<sup>106</sup> The inadequacy of a ‘statist’ vision of the EU is also stressed by P. Pierson, “The path to European integration: A historical institutional analysis”, *Comparative Political Studies* 29 (1996), 123 et seq. (127): “What one makes of the EU depends on whether one examines a photograph or a moving picture”.

<sup>107</sup> Fassbender, see note 70, 564.

tempts “to push the toothpaste back in the tube by asserting that the Community is nothing more than an International Organization”<sup>108</sup> do not help to understand and solve the real problems, such as the legitimacy of the European Community.

One of the main arguments advanced by the ‘statist’ school, the notorious ‘no demos’ thesis, deserves closer scrutiny in this context, since it is particularly illustrative of the conceptual, ‘black and white’ approach. Proponents of the ‘no demos’ thesis argue that the European Union lacks a democratic subject as it lacks a constitutional subject, i.e. a people/nation.<sup>109</sup> As a matter of constitutional law, the people/nation

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<sup>108</sup> J.H.H. Weiler/ U.R. Haltern, “The Autonomy of the Community Legal Order – Through the Looking Glass”, *Harv. Int’l L.J.* 37 (1996), 411 et seq. (423).

<sup>109</sup> The meaning and usage of the terms ‘nation’ and ‘people’ differ widely depending on the authors and the language. Whereas some authors use them interchangeably (see E.W. Böckenförde, “Die verfassungsgebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts”, in: E.W. Böckenförde, *Staat, Verfassung, Demokratie*, 1991, 90 et seq.; J. Marko, *Autonomie und Integration. Rechtsinstitute des Nationalitätenrechts im funktionalen Vergleich*, 1995, 115, 37 et seq.), other schools differentiate between both concepts. According to French constitutional theory, for example, the concept ‘people’ (peuple) refers to the sum of all citizens, whereas the nation is an indivisible collectivity which cannot be reduced to a simple aggregate of citizens. Since the nation transcends the citizens, it can only express its will through its representatives, which justifies a system of representative government. In contrast, the ‘people’, understood as the sum of the citizens, can express their will directly, which leads to a system of direct democracy, see D.G. Lavroff, *Le droit constitutionnel de la Ve République*, 2nd edition, 1997, 241 et seq.

German authors often refer to the nation as “the people (Volk) which has become aware of its existence through the state”, “people and state having merged into a unity”, M. Brems, *Die politische Integration ethnischer Minderheiten*, 1995, 8. A state in turn can consist of different peoples. According to German scholars, the nation thus describes a political entity, composed of the citizens, whereas the people is a ethno-cultural community, see Brems, above, 8 and M. Kriele, *Einführung in die Staatslehre. Die geschichtliche Legitimitätsgrundlage des demokratischen Verfassungsstaates*, 1994, 91. It is however important to stress that the nation is not only a political, but also an ethno-national concept, the essential difference between ‘Nation’ and ‘Volk’ being that only the former has reached statehood.

Anglo Saxon authors frequently use ‘nation’ as a political, ‘people’ as an ethno-cultural concept, see for instance J. Elster, “Constitutionalism in Eastern Europe: An Introduction”, *U. Chi. L. Rev.* 58 (1991), 447 et seq.

is a legal concept, a “juridical presupposition”.<sup>110</sup> As both the constitution and the nation/people are, according to the ‘statist’ school, a state bound notion, the nation as a concept of constitutional law is necessarily defined with reference to the state: “Where there is no state, there is no constitution, and where there is no state nation, there is no state”.<sup>111</sup> As expressed in the German term ‘state nation’ (*Staatsvolk*), the people/nation and the state are necessarily congruous.<sup>112</sup> Based on the conceptual and ideological link<sup>113</sup> between nation/people and state, statistes argue that democracy, defined as the ‘rule of the people’, can only be achieved within the state.<sup>114</sup> The reason why the state boundaries also

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(450), who defines the nation as a “political entity that is recognized by other countries and by international organizations” and the people “as a community with common traditions, common language, common religion [...]”. In Slavonic languages, in contrast, the notion of ‘narod’, which etymologically corresponds to the English concept of ‘nation’, refers to an ethnic community, see V. Dimitrijevic, “The Absolute Nation State: Post-Communist Constitutions”, in: D. Gomien (ed.), *Broadening the Frontiers of Human Rights*, Essays in Honour of Asbjorn Eide, 1993, 257 et seq. (257).

We will use the terms ‘nation’ and ‘people’ interchangeably and specify whether we refer to a legal or to a sociological concept.

<sup>110</sup> J.H.H. Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg”, *The Jean Monnet Working Paper* No. 10, 2000, 3; the relationship between the constituent power and the constitution is best described as dialectical, meaning that it is impossible to decide which comes first, the constituent power or the constitution, both terms supposing the existence of the other. The same holds true for the question as to whether the nation is prior to the state or the opposite, see Marko, see note 109, 38. French legal doctrine illustrates well the circularity between the terms ‘constitution’, ‘state’ and ‘nation’: Whereas the nation as ‘pouvoir constituant’ is deemed to be prior to the state and the constitution, “a population only forms a nation if the collectivity of individuals which it is composed of is subject to the same legal order of a state” [i.e. the same constitutional order], G. Burdeau/ F. Hamon/ M. Troper, *Droit constitutionnel*, 25th edition, 1997, 30, translated by the authors; see also the references supra, note 59.

<sup>111</sup> Kirchhof, see note 99, 59: “Wo kein Staat, da keine Verfassung, und wo kein Staatsvolk, da kein Staat”.

<sup>112</sup> As pointed out above, note 59 and 110, French legal theory also assumes the identity of the nation and the state.

<sup>113</sup> See Marko, see note 109, 44.

<sup>114</sup> For a critical account of this link, see U. Volkman, “Setzt Demokratie den Staat voraus?” *Archiv des öffentlichen Rechts* 127 (2002), 575 et seq. (582 et seq.).

constitute the boundaries of democratic governance is justified with an understanding of nation/people as a sociological concept, depicting a relatively homogeneous social entity. In its strongest terms, and inspired by the German tradition, the nation is defined in ethno-cultural terms and represents an organic community with a common history, language and culture.<sup>115</sup> This leads to the ethno-national ideology according to which each nation exists prior to the state<sup>116</sup> and is entitled to its own state.<sup>117</sup> The state in turn belongs to the nation, which justifies the eradication of difference and social homogenization, as was successfully propagated by *Carl Schmitt*.<sup>118</sup> A more moderate understanding of this tradition places the emphasis not on the ethno-cultural conditions of nationhood but holds that collective identity can be based on other factors, such as the existence of a common public space, a developed civil society, shared political values and common political parties.<sup>119</sup>

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<sup>115</sup> The German constitutional Court, for instance, has defined the nation as a “cultural and linguistic entity rooted in the consciousness of the population”, BVerfGE 36, 1, 19, translated by the authors. For a description of the German concept of nationhood, see for instance R. Brubaker, *Citizenship in France and Germany*, 1992, 51 et seq., N. Töpferwien, *Nation-State and Normative Diversity*, 2001, 139 et seq.; M. Hertig, *Die Auflösung der Tschechoslowakei, Analyse einer friedlichen Staatsteilung*, 2001, 14 et seq.

<sup>116</sup> For a critical account of this vision, see Marko, see note 109, 44.

<sup>117</sup> See for instance J.K. Bluntschli, *Allgemeine Staatslehre*, 1965 (first published in 1996), 107: “Jede Nation ist berufen und berechtigt, einen Staat zu bilden. Wie die Menschheit in eine Anzahl von Nationen geteilt ist, so soll die Welt in ebenso viele Staaten zerlegt werden. Jede Nation ein Staat. Jeder Staat ein nationales Wesen”. (Each nation has the vocation and is entitled to form a state. In the same way as humanity is divided in a number of nations, the world should be divided in as many states. Each nation a state. Each state a national being”.)

<sup>118</sup> C. Schmitt, *Der Begriff des Politischen*, 1932, 14, who holds that democracy necessarily requires “firstly homogeneity and secondly – if necessary – the elimination and destruction of heterogeneity” (translated by the authors).

<sup>119</sup> Grimm, see note 75, 587 et seq.; although this author distances himself from the Schmittian theory of a homogenous nation, he considers a common language an important prerequisite of collective identity, thus adopting one of the main criterions of the German ethno-cultural concept of nation. Grimm acknowledges, however, that in the case of other multilingual polities, such as Switzerland, a democratic system has been formed, but estimates that the same would not be possible in the case of the EU, since the linguistic diversity is superior to Switzerland. This argument, however, ne-

Even if one accepts the thesis according to which democracy is dependent on a pre-existing collective identity, understood in the moderate and not the ethno-national sense,<sup>120</sup> we take issue with, and object to, the methodological approach of many scholars of implicitly equating *Staatsvolk* as a legal, and necessarily state bound concept with the sociological concept of a collective identity. This approach fails to reflect processes of integration, change and the complexities of life. It does not even stand up to historical experience of nation and state building.<sup>121</sup> This view necessarily leads to the categorical and static affirmation that in contrast to states, the European Union cannot have a 'people'. Indeed, contrary to the question as to whether a *Staatsvolk* exists as a legal concept, the sociological concept of a 'people' can hardly be apprehended in 'black and white' terms, nor is it necessarily dependent on statehood, nor can it simply be assumed that a collective identity necessarily exists in every state.<sup>122</sup> Multinational states such as

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glects the fact that multilingual polities, such as India, exist, whose linguistic diversity is largely superior to the 11 official languages spoken within the EU.

<sup>120</sup> For a critical account, see J. Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?' *ELJ* 1 (1995), 303 et seq. (306 et seq.); Craig, see note 105, 139. Both authors point out that a collective identity is not a prerequisite to a democratic process but is formed through the democratic and constitutional process itself.

<sup>121</sup> See on this issue under, note 122 and 136.

<sup>122</sup> This point is stressed by Weiler, see note 110, 3: "One of the great fallacies in the art of 'federation building', as in nation building, is to confuse the juridical presupposition of a constitutional demos with political and social reality. In many instances, constitutional doctrine presupposes the existence of that which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps towards a thicker social and political notion of constitutional demos". The confusion between the conceptual link between state and nation, understood as a legal concept, which implies a reflexivity of both terms, and the relationship between the state and the nation, understood as a sociological concept, is also criticized by Marko, see note 109, 44: According to this author, building on the logical question whether the egg or the chicken came first a historical-evolutionary model results in the ideology of nationalism. Under those circumstances, "[t]he nation is, as postulated by the national principle of the ideology of German Romanticism – the "awakening" of the people, the people which has become politically aware of its own existence, and politically and collectively organized as a state". ("Die Nation ist dann – wie dies schon das Nationalitätsprinzip der Ideologie der deutschen Romantik postulierte –

Canada and Belgium are examples in point.<sup>123</sup> Indeed, as pointed out by *Anne Peters*,<sup>124</sup> the assertion that a certain social homogeneity exists, necessarily involves a certain level of abstraction, in as much that certain ‘common’ features are selected and considered relevant, whereas factors which could justify heterogeneity are ignored. The level of abstraction in turn depends on the observer: from an Asian point of view, Europe may seem relatively homogeneous. From a Spanish perspective, little difference may be perceived between the Scottish and the English, or between the French speaking and the German speaking Swiss. From the

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das “Erwachen” des Volkes, das sich politisch seiner selbst bewusst gewordene Volk, das politisch-verbandlich als Staat organisiert ist”).

<sup>123</sup> The examples of Canada and Belgium moreover show that the main criterion advanced by the ‘statist’ school to distinguish between a constitution and a treaty, i.e. the capacity to amend the founding document on the basis of a majority decision, does not always offer a useful criterion to distinguish between a federation and a confederation. Indeed, the province of Quebec refused to sign the Constitution Act of 1982 and views constitution making as a bilateral process, aiming at the conclusion of a constitutional contract between Quebec and the rest of Canada. This theory implies that Quebec has a veto right in constitutional matters. Subsequent efforts directed at obtaining Quebec’s consent to the federal constitution have failed so far, see J.E. Fossum, “The Transformation of the Nation-state: Why Compare the EU and Canada?”, *Francisco Lucas Pires Working Papers Series on European Constitutionalism*. Working Paper No. 1, 2003, 26 et seq. The distinction between confederate and federal arrangements is thus less clear than commonly assumed. Constitutions can for example confer to ethnic communities a veto right limited to the amendment of certain constitutional provisions, thus combining elements of unanimity with majority decision making procedures. In Belgium, for example, the borders of the linguistic communities and the division of competences between the federal state on the one hand and the regions and communities on the other hand is subject to the approval of each linguistic group in the federal parliament, see arts 4 and 35 of the Belgian Constitution. Moreover, the material scope of unanimity revision can vary greatly depending on the material reach of the constitution. In the European Union, for example, the constitution-making process may well result in the adoption of a “constitutional treaty” whose content would be limited to fundamental principles, whereas a large number of the provisions currently enshrined in the founding treaties would be incorporated into secondary law. This would substantially limit the application of the unanimity principle. To conclude, the criterion as to whether the revision of the basic charter of a polity is subject to unanimity or majority procedure is less clear-cut than generally assumed.

<sup>124</sup> Peters, see note 59, 704.

point of view of a Swiss German, the populations of the cantons of Vaud and Geneva are quite similar, as French is the official language in both cantons, an opinion which would hardly be approved of by the respective populations. Therefore, collective identity and social homogeneity are more accurately conceived of as graduated, and non exclusive concepts, which is reflected in the idea of multiple identities and loyalties. Those identities are neither static nor simply given, as primordialist or essentialist scholars assume.<sup>125</sup> They are shaped and reshaped over time in social processes and can gain or decrease in importance.<sup>126</sup> Although for a long time, the identification and feeling of belongingness may have been much stronger with regard to classical Nation States than other political entities, this may change over time. The recent revival of regional identities, which gave rise to regionalization and devolution tendencies in Western Europe, are a proof thereof. Rather than relying on pre-existing social homogeneity, managing diversity and integrating different groups within one polity is an essential task of modern constitutionalism. The static and ethnocentric model of the nation state, which aims at homogenisation either through assimilation<sup>127</sup> or exclusion and not at integration,<sup>128</sup> is also unable to offer a viable model for multi-ethnic societies, both in the West and in many developing countries, the boundaries of which paradoxically were often shaped at the times, and under the doctrines, of the emerging Nation State in the 19th century. As history has shown, the doctrine of the Nation State and nationalism<sup>129</sup> has had an enormously destabilizing effect

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<sup>125</sup> For a summary of the primordialist and essentialist school, see C. Emminghaus, *Äthopiens ethnoregionaler Föderalismus. Modell der Konfliktbewältigung für afrikanische Staaten?*, 1997, 21.

<sup>126</sup> This aspect is mainly stressed by the constructivist school, which considers nations not as given entities but as social constructions. For an account of the constructivist school, see Hertig, see note 115, 18 et seq.

<sup>127</sup> For a definition of assimilation, see A. Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities", *Notre Dame L. Rev.* 67 (1992), 615 et seq. (619 et seq.): "To assimilate means to mold, to the extent possible, the minority in the image of the dominant group [...]"

<sup>128</sup> Integration is generally defined as building a new entity based on different constituent elements. The new entity has to represent more than the sum of the parts, but contrary to assimilation, it recognizes the specificities of the constituent parts, see Brems, see note 109, 5.

<sup>129</sup> See Gellner's famous definition of nationalism as "primarily a principle which holds that the political and national unit should be congruent", E. Gellner, *Nations and Nationalism*, 1993, 1.



in many quarters of the globe. This is not a constitutional model upon which the future can build.

### b. The Need for Peaceful Constitutional Transitions

The statist school's focus on the nation as the collective and exclusive constitutional subject also raises difficult questions with regard to the legitimate genesis of a constitution, since it is linked to the theory of the *pouvoir constituant*, as developed by *Abbé Sieyès*:<sup>130</sup> the nation, in its quality of *pouvoir constituant*, is prior to the constitution and not subject to any legal rules.<sup>131</sup> As stressed by positivist scholars,<sup>132</sup> the adoption of a constitution is thus always a revolutionary act, which founds a new legal order.<sup>133</sup> Revolutionary constitution making, however, raises difficult questions of procedure and agency, since it requires, prior to a consensus on the content of the constitution, an agreement on the identity and composition of a constitutional assembly and the voting procedure according to which the constitution should be adopted. Such a consensus is particularly difficult to reach in societies with important minorities.<sup>134</sup> In general, the history of constitution-making shows that

<sup>130</sup> See E. Sieyès, *Qu'est-ce que le Tiers état?*, 1970; for an overview of Sieyès theory, see J. Isensee, *Das Volk als Grund der Verfassung – Mythos und Relevanz der Lehre von der verfassungsgebenden Gewalt*, 1995, 26 et seq.

<sup>131</sup> See Sieyès, see above, 180: "La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-même. Avant elle et au-dessus d'elle il n'y a que le droit naturel" (The nation exists prior to everything, it is the origin of everything. Its will is always legal, it is the law itself. Prior and superior to the nation, only natural law exists).

<sup>132</sup> See H. Kelsen, *Allgemeine Staatslehre*, 1925, 249 et seq.; see also A. Auer, "L'adoption et la révision des constitutions: de quelques vérités malmenées par les faits", in: R. Bieber/ P. Widmer (eds), *Der europäische Verfassungsraum*, 1995, 267 et seq. (271): "Etant nécessairement en rupture avec l'ordre constitutionnel qui la précède, la constitution fonde, au moment de son entrée en vigueur, un nouvel ordre constitutionnel auquel elle ne peut par définition pas se conformer" ("Being necessarily in breach with the previous constitutional order, the constitution founds, at the moment of its entry into force, a new constitutional order to which it can by definition not conform").

<sup>133</sup> The theory of revolutionary constitution making was also supported by Carl Schmitt, see note 59. For an analysis of Schmitt's theory of constitution making, see A. Arato, "Forms of Constitution Making and Theories of Democracy", *Cardozo L. Rev.* 17 (1995), 202 et seq.

<sup>134</sup> See Hertig, see note 115, 118 et seq.

many constitutions were established by force or adopted after a period of crisis (revolution or civil or international war), at a time when a group with a common social and political vision came to prevail. Where this “window of opportunity”<sup>135</sup> is missed, political minorities will often not voluntarily agree to a common constitutional framework. Therefore, revolutionary constitution-making frequently fails to satisfy the requirements of both efficiency and legitimacy. The emphasis on legitimacy may result in a stalemate, whereas privileging efficiency adversely affects the legitimacy of the constitution. In Weiler’s words, “the empirical legitimacy of the constitution may lag behind its formal authority — and it may take generations and civil wars to be fully internalized — as the history of the US testifies”.<sup>136</sup> A regression to the state of nature, entailing the risk of a birth in turmoil or a permanent stalemate, is hardly a model suitable in our search of structures suitable for regional and global governance.<sup>137</sup>

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<sup>135</sup> See B. Ackerman, *The Future of Liberal Revolution*, 1992, 46 et seq.; instead of ‘window of opportunity’, the same author also uses the term “constitutional moment”, *ibid.* 48.

<sup>136</sup> Weiler, see note 110, 3; see also Stein, see note 55, 526, who points out that in many examples generally considered as traditional nation states (France, Spain, Portugal), the state and the constitution were established before people considered themselves as belonging to one community. As regards France, this is also stressed by A.D. Smith, *National Identity*, 1991, 76: “The nationalist ideal of Unity (La République une et indivisible) has had profound consequences. For one thing, it has encouraged the idea of the indivisibility of the nation and justified the eradication, often by force, of all intermediate bodies and local differences in the interests of cultural and political homogeneity. This has spawned mass-mobilizing policies of social and political integration in which the state becomes the agent of the “nation-to-be” and the creator of a “political community” and “political culture” that must replace the various ethnic cultures of a heterogeneous population”.

<sup>137</sup> Even limited to the Nation State, the recourse to the sovereign and legally unbound nation as ‘pouvoir constituant’ was plausible in a context of secularisation and democratization, when the God Given sovereignty of the monarch was replaced by the sovereignty of the nation; see on this subject, H. Kelsen, “Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft”, in: H. Klecatsky et al. (eds), *Die Wiener rechtstheoretische Schule*, 1968, 37 et seq. (142): “Auf einer gewissen Stufe der religiösen und politischen Entwicklung fallen die Vorstellungen von Gott und Staat geradezu zusammen: Der National-Gott ist einfach die in der Personifikation vergöttlichte Nation”. (“At a certain stage of religious and political development, the idea of god and state have coincided: The national-god is sim-

Modern constitutionalism must therefore be able to cope with difficult transitions. It cannot afford to be immobilized. To this effect, the theory of revolutionary and momentous constitution-making by a single collective actor, the nation, needs to be abandoned in favour of revising the existing institutional framework,<sup>138</sup> as is currently envisaged

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ply the personified and deified nation".) In our time, and particularly in a plural context, revolutionary constitution making and setting aside existing institutional structures in the name of an omnipotent constituent power is more difficult to defend.

<sup>138</sup> This solution, which emphasizes the principle of legal continuity and legality, has been adopted in Central Europe after the revolutions of 1989. For Poland, see W. Osiatynski, "A Brief History of the constitution", *East European Constitutional Law Review* 6 (1997), 66 et seq.; for Hungary, see A. Arato, "The Constitution-Making Endgame in Hungary", *East European Constitutional Law Review* 5 (1996), 31 et seq.; for Czechoslovakia, see Hertig, see note 115, 108. After decades of homogenizing totalitarianism, the new political elites deliberately "renounced revolutionary constitution making legitimacy, which would have involved a claim of complete identity with the people in whose name and future interest a total rupture with the past would have been announced. This option, equivalent to a claim of full sovereign constituent power was unacceptable [...]"; A. Arato, "Dilemmas Arising From the Power To Create Constitutions in Eastern Europe", in: M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy*, 1994, 165 et seq. (177). Instead, the political elites chose to adopt the new post-communist constitutions following the revision procedure of the socialist constitutions in force at that time. The break-down of communism did thus not lead to a return into the state of nature but to a constitutionally channelled transition process, commonly described as "self-limiting" or "legal and constitutional" revolutions, Arato *ibid.*, 179, footnote 40; J.L. Cohen/ A. Arato, *Civil Society and Political Theory*, 1992, 31. A Czech author describes the emphasis on pluralism and diversity rather than unity and social homogeneity, in terms of the "absence of the people", see J. Priban, *Legitimacy and Legality after the Velvet Revolution*, in: J. Priban/ J. Young (eds), *Rules of Law in Central Europe*, 1999, 29 et seq. (38 et seq.). As he puts it, "[o]n streets and squares there was not the People, rather there were different people with their demands and ideals [...]", Priban, *ibid.* 40.

The Czech constitution, which was adopted on 16 December 1992, a few weeks before the break-up of the Czechoslovak federation, is an interesting example that constitution-making does not necessarily require recourse to a collective actor, a nation. After the adverse experience with nationalism, a reference to the Czech nation in the preamble was deliberately renounced in favour of the more plural and individualistic concept of citizenship: "We,

in the context of the European Union, or evolutionary constitution-making. The latter may be better understood in terms of an ongoing discourse of many voices,<sup>139</sup> as a process, such as described by the term ‘constitutionalization’. Limiting the concept of ‘constitution’ to a “big bang”,<sup>140</sup> the creation ‘*ex nihilo*’ of a new legal order,<sup>141</sup> in our view focuses too narrowly on the French model of revolutionary constitution-making.<sup>142</sup> Following such a view, one would, for example, have to conclude that the United Kingdom does not have a constitution. Moreover, the model of revolutionary constitution making is ill suited for plural polities, be they states or not, in which a consensus has to be formed in a process of constitutional politics rather than a constitutional big bang.<sup>143</sup>

### c. Constitutionalism as a Process

The imperative need to assure constitutional peaceful change in an interdependent world inherently leads to a conception which stresses process as an essential ingredient of constitutionalism. As *Fossum* puts it, constitution-making needs to be reconceptualized:

“[I]t is essential to think through the legitimacy implications of process. [...] less focus must be placed on the results of single instances

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the citizens of the Czech Republic in Bohemia, Moravia and Silesia [...] adopt this Constitution of the Czech Republic”.

<sup>139</sup> This will be exemplified below IV. 4., using the protection of human rights as an example.

<sup>140</sup> T. Schilling, “The Autonomy of the Community Legal Order: An Analysis of Possible Foundations”, *Harv. Int’l L. J.* 37 (1996), 389 et seq. (390).

<sup>141</sup> For such a view, see Schilling, see above, who argues that the European Union does not have a constitution because the ratification of the founding treaties did not amount to a legal revolution and the creation of a legal order with original autonomy.

<sup>142</sup> For different models of constitution making, see Arato, see note 133, 197 et seq.

<sup>143</sup> This aspect is stressed by a Canadian author, who points out that Canada “has undergone the longest and most comprehensive constitutional debate experienced anywhere”, Fossum, see note 123, 3, a process he calls “mega-constitutional politics”, *ibid.*, 23. Mega-constitutional politics refers to a process which, from a substantive point of view, is more appropriately described as constitution-making than constitutional revision, but takes place within the established constitutional framework, *ibid.*, 23.

such as the Constitutional Convention and more onus must be placed on what types of agreements can be obtained over time".<sup>144</sup>

In conclusion, the state centred concept of constitutionalism may have been appropriate, if at all, in the state-centred, dualistic Westphalian system. It fails, however, to offer a useful analytical tool in a world where the boundaries between domestic and international law have been progressively blurred, and where new polities have emerged which challenge the states' exclusive legal and political authority. As *George Scelle* put it as early as in 1933, "between states and other political societies, there is only a difference in degree, in integration and disintegration".<sup>145</sup> To the varying degrees of integration correspond different degrees of constitutionalization, which can be measured and critically assessed based on a graduated theory of constitutionalism.

Constitutionalism is, in *Weiler's* words, not only about observing "out there", a constitutional landscape",<sup>146</sup> but also

"a prism through which one can observe a landscape in a certain way, an academic artefact with which one can organize the milestones and landmarks within the landscape (indeed, determine what is a landmark or milestone), an intellectual construct by which one can assign meaning to, or even constitute, that which is observed".<sup>147</sup>

It is "no mere reflection of a prior political order, but [...] recursively implicated in the elaboration of that order",<sup>148</sup> a "discourse of conceptualization and imagination,"<sup>149</sup> an "intensely reflexive process".<sup>150</sup> To help us create and re-imagine a new order, constitutionalism of the 21st century needs to break "the statist frame"<sup>151</sup> and to escape 'all or nothing' propositions. Such a process is not a vain intellectual exercise, but in our view a necessary step to secure the values of constitutionalism in an era of globalization and interdependence: in the same way as the constitutionalism of the 18th, 19th and 20th centuries provided a re-

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<sup>144</sup> Fossum, see note 123, 37.

<sup>145</sup> Scelles, see note 65, 510: "Entre l'Etat et les autres sociétés politiques, il n'existe que des différences de degré, d'intégration ou de désintégration".

<sup>146</sup> J.H.H. Weiler, "Introduction: The Reformation of European Constitutionalism", in: id., *The Constitution of Europe*, 1999, 221 et seq. (223).

<sup>147</sup> Weiler, see above, 223.

<sup>148</sup> Walker, see note 93, 39.

<sup>149</sup> Weiler, see note 146, 223.

<sup>150</sup> Walker, see note 93, 39.

<sup>151</sup> Walker, see note 93, 33.

sponse to the growing power of the Nation State,<sup>152</sup> it needs to discipline the power of the emerging non-state polities by law, if it is to respond adequately to the increasing ‘denationalization’ of legal and political functions. It also needs to eliminate inconsistencies stemming from the traditional separation of domestic and international law, which, for example, are strongly felt in badly coordinated and paradoxical roles of the judiciary branch on the domestic and international levels.<sup>153</sup>

Constitutionalism, moreover, has to address the relationship between the state and the other emerging, and to varying degrees constitutionalized, levels of governance and the issue of adequate allocation of competences so as to establish legitimacy and coherence of what we would like to call the whole ‘constitutional system’. In our vision of constitutionalism, the focus should not be on whether a certain entity has passed the conceptual normative threshold and therefore is worthy of having, or being, a Constitution with a capital C.<sup>154</sup> It should foremost be on how the functions and values associated with constitutionalism can be secured considering the constitutional system as a whole.<sup>155</sup> Our analysis will thus look at the different layers of governance as an overall constitutional structure.

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<sup>152</sup> Castiglione, see note 79, 21.

<sup>153</sup> See under IV. 6.

<sup>154</sup> See also C. Schreuer, “The Waning of the Sovereign State: Towards a New Paradigm for International Law?”, *EJIL* 4 (1993), 447 et seq. (453): “Rather than grope for the seat of sovereignty, we should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures. Under this functionalist approach what matters is not the formal status of a participant (province, state, international organization) but its actual or preferable exercise of functions. For instance, it is not meaningful to attempt to isolate the point at which the European Community will be transformed from an international organization into a European State. Rather, we will have to examine in detail exactly what functions and powers it has assumed from its Member States”.

<sup>155</sup> A theory of global constitutionalism which considers all levels of governance is also supported by Rosas, see note 8, 172.

## IV. Towards a Five Storey House

### 1. Multilevel Governance

The basic thesis submitted here is that 21st century constitutionalism can no longer be limited to Constitutions with a capital C and thus to the Nation State.<sup>156</sup> With governance expanding into international law, constitutionalism has to reach beyond the boundaries of the nation state in order to secure overall coherence of governance. In our view, constitutionalism needs to encompass different layers, entailing the idea of multi-layered governance, whether or not the different levels amount to having 'Capital C Constitutions' or not.

This idea, of course, is not new. It is inherent to the concept of federalism as a constitutional system, interfacing the layers of sub-federal and federal government, and expressing the doctrines of vertical separation of powers, by allocating explicit and enumerative, but also implied or inherent powers, to different levels of governance. Interestingly, neither the level of the communes, nor the levels of regional, for example European governance, have, however, been included in this scheme. With regard to the global level of governance, it is clearly defined in terms of international, not constitutional law. The relationship of national law and international law is not conceived as a problem of interfacing different constitutional levels of governance, as we observe in relations between federal and provincial or cantonal law. Correspondingly, the relationship between international and domestic law is mainly defined by the national constitution.

Conceiving constitutionalism as an overall system changes these relationships. It depicts the concept of a system with different layers. Some authors have used the notion of "multilevel constitutionalism",<sup>157</sup> "constitutional compound",<sup>158</sup> or "multilevel system".<sup>159</sup> One author of

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<sup>156</sup> The following draws from T. Cottier, "Reforming the Swiss Federal Constitution: An International Lawyer's Perspective", in: M. Butler/ M. Pender/ J. Chalrey (eds), *The Making of Modern Switzerland, 1948-1998*, 2000, 75 et seq.

<sup>157</sup> I. Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", *CML Rev.* 36 (1999), 703 et seq.

<sup>158</sup> I. Pernice, "Die Dritte Gewalt im europäischen Verfassungsverbund", *Europarecht* 31 (1996), 29 et seq., (translated by the authors).

this article has suggested using, in the case of Switzerland, the image of a five storey house as a framework of analysis.<sup>160</sup>

While we have been familiar with the first, second and third storeys, the constitutional levels of the communes,<sup>161</sup> the cantons or sub-federal entities, and of the federal structure, a fourth and fifth level are currently being added. The fourth one amounts to the framework of regional integration, in particular the European Union and its treaties. This level exists whether or not the country is a member of the Union, as it is obliged to adopt laws and regulations in conformity with European law in order to minimize trade barriers and transaction costs.<sup>162</sup> A fifth and emerging level is global. We are thinking here for example of emerging structures of global integration in the field of trade regulation, in particular within the WTO and the Bretton Woods institutions. While they are still embryonic, the rule of global law, effective dispute settlement and enforcement of rights are likely to gradually develop constitutional and supranational structures binding upon both states

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<sup>159</sup> H.J. Blanke, "Der Unionsvertrag von Maastricht", *Die öffentliche Verwaltung* 46 (1993), 412 et seq. (422) (translated by the authors); see also Hobe, see note 31, 392, 422; König, see note 98, 274 et seq., 662; Schreuer, see note 154, 453.

<sup>160</sup> Cottier, see note 156; T. Cottier, "Einleitung und Synthesen", in: T. Cottier/ A. Achermann/ D. Wüger/ V. Zellweger, *Der Staatsvertrag im schweizerischen Verfassungsrecht. Beiträge zum Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht*, 2001, 1 et seq.; T. Cottier, "The Impact from Without: International Law and the Structure of Federal Government in Switzerland", in: P. Knoepfel/ W. Linder (eds), *Verwaltung, Regierung und Verfassung im Wandel. Gedächtnisschrift für Raimund E. Germann*, 2000, 195 et seq. (227 et seq.).

<sup>161</sup> In a country like Switzerland, where the communes enjoy a substantial degree of constitutionally protected autonomy (see article 50 of the Swiss Federal Constitution), it is in our view justified to consider them as an independent level of governance, although this has not been a traditional way of looking at the matter. The expansion of constitutional notions beyond the traditional levels of the Canton and the Federal Government towards regional and global structures also suggests refining domestic levels, so as to give a complete picture of the entire building.

<sup>162</sup> See Cottier, "The Impact from Without", see note 160; R. Mallepell, "Der Einfluss des Gemeinschaftsrechts auf die schweizerische Gesetzgebung", *Swiss Papers on European Integration* No. 21 (1999); W. Wiegand/ M. Brühlhart, "Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft", *Swiss Papers on European Integration* No. 23 (1999).



and organizations of regional integration. Other international fora, perhaps the United Nations, may re-emerge in response to global regulatory needs, and call for adjustment both on the regional, national and cantonal level.<sup>163</sup>

At a minimum, the constitutional system entails two storeys: the Nation State and the international level. Most countries will have three or more layers, up to five, perhaps even more. In federal states, the power of federal entities to cooperate with each other<sup>164</sup> or with other states<sup>165</sup> based on treaties, can give rise to an additional layer, which is situated between the second and the third storey.

The five storey house does not normatively suggest that all layers are of an equal nature or impact. It does not mean that higher levels of regional and international law are more powerful than Constitutions. It simply implies that all these layers should be considered, as a whole, as a constitutional system. Different layers form different parts of a whole. The idea of layers allows us to define, in constitutional terms and applying comparable principles, the allocation of powers among different levels, exceeding traditional levels of federalism. It enables us to understand the structure in terms of regional and global federalism and to ask a new classical question of vertical checks and balances. It permits us to define concepts which are suitable to the operation of all levels and thereby design coherent legal thinking.

It will be objected from the statist point of view that this image and construction are naive and unrealistic. While the centre of powers lies within national Constitutions, all other levels are derived from, and

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<sup>163</sup> The interaction and relationship of different international regimes raises itself difficult constitutional questions of how to establish coherence between those segments of international law. An example in point is the discussion on the relationship between international trade law and human rights law (see Cottier, see note 19; Petersmann, see note 50; Alston, see note 51, Howse, see note 51). Those issues are beyond the scope of this article. But as we will see below (IV. 4), the interaction between 'lower' and 'higher' levels of governance also contributes to further developing a material hierarchy within international law, based on general principles of law and human rights norms.

<sup>164</sup> See article 48 of the Swiss Federal Constitution, which confers on the cantons the power to conclude inter-cantonal treaties and to set up common organizations or institutions.

<sup>165</sup> See article 56 of the Swiss Federal Constitution, empowering the cantons to conclude treaties with other states within the scope of their powers.

subject to, these foundations and powers.<sup>166</sup> The Constitution thus inherently dominates all the other layers. Domestically, cantonal or provincial powers are subject to federal powers. Internationally, regional law and international law are derived from the national Constitutions. It is impossible, the argument will go, to compare these levels and create the impression that they are of any comparable standing and importance. The idea of a five storey house is unrealistic in suggesting that levels above the Constitution can ultimately command. The concept is at odds with the idea of state sovereignty.

We should address these concerns first from a practical and factual angle. It is true and appropriate that the Constitution is and remains at the heart of constitutionalism and the allocation of powers in a state centred system. Yet, as we have seen, its powers have been increasingly made subject to other influences. In domestic law, there is no linear decline of local powers. While federal government has, over time, grown in all federal states, there is also evidence that local powers have been strengthened in a process of devolution or federalization, exploding “the myth of the homogeneity of European nation-states”.<sup>167</sup> The United Kingdom, Spain, Italy and Belgium are examples in point. Likewise, as pointed out in Section II. 2 of this article, powers are increasingly shifted from the national level to international and supranational governance structures. Due to the high degree of interdependence between the different levels of governance, the same problem will often be dealt with in different fora, implying a dialogue and interaction between the different layers. The disputes with regard to the European Community’s preferential treatment of bananas stemming from the former colonies in the African, Caribbean and Pacific area (ACP countries), frequently referred to as the “Banana-saga” is an example. The validity, respectively the constitutionality of this import regime occupied the European Court of Justice,<sup>168</sup> the German Constitutional

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<sup>166</sup> For such an approach, see for instance the ‘Maastricht judgment’ of the German Constitutional Court, see note 99.

<sup>167</sup> J. Shaw, “Citizenship of the Union: Towards Post-National Membership”, in: European University Institute (ed.), *Collected Courses of the Academy of European Law*, Vol. VI, No.1 (1995), 245 et seq. (271).

<sup>168</sup> The banana regulations have triggered over 30 cases in the EC; for the main cases, which in substance upheld the validity of the EC banana regime, see Case 280/93 R, *Germany v. Council*, ECR 1993, 483; Case 466/93, *Atlanta*, ECR 1995, 836; Case C-122/95, *Federal Republic of Germany v. Council*, ECR 1998, I 973 and Joint Cases C-364/95 and C-365/95, *T. Port GmbH III v. Hauptzollamt Hamburg-Jonas*, ECR 1998, I 1023.

Court<sup>169</sup> and the GATT/WTO<sup>170</sup> for over a decade.<sup>171</sup> Drawing a factual picture shows a system of different layers interacting in a complex, not in a neat manner: there are many rough edges, but the picture shows nevertheless different layers which do interact and allocate powers on different levels of the overall system.

The factual analysis also reveals a position of the state rather as *pouvoir intermédiaire* between different layers of governance than a 'supreme authority' from which all other governance structures are derived.<sup>172</sup> The Constitution itself can no longer pretend anymore to provide a comprehensive regulatory framework of the state on its own. Of course, there are differences among states, essentially based upon power and might, and graduations exist in different regulatory areas. But conceptually, due to the increasing 'outsourcing of constitutional func-

<sup>169</sup> See the case 2 BVL1/97. The Constitutional Court declared the complaint for violation of the constitutional rights of property, free exercise of a profession and equal treatment inadmissible, reverting to its "Solange II" jurisprudence (BVerfGE 73, 339), according to which complaints are only admissible if the mandatory fundamental-rights standard is *generally* not observed in the EC, as opposed to allegations of a breach of human rights *in an individual case*.

<sup>170</sup> The first two dispute settlement procedures were brought against the EC under the GATT'47 and concluded that the EC regime was incompatible with the GATT; the panel reports were however vetoed by the EC (see Unadopted Panel Report on European Economic Community Member States' Import Regimes for Bananas, 1993 GATTPD Lexis 11 2, DS32/R of 3 June 1993 and Unadopted Panel Report on the European Economic Community 'Import Regime for Bananas', 181 DS38/R of 18 January 1994, *ILM* 34 (1995), 177 et seq.; under the negative consensus rule of the WTO 1995, the EC was prevented from blocking the adoption of the subsequent panel report, which found the EC in breach of its obligations under the GATT (see Report of the Panel, WT/DS27/R/USA of 22 Mai 1997).

<sup>171</sup> For an analysis of the banana dispute, see for example J.H. Jackson/ M. Salas, "Procedural Overview of the WTO EC-Banana Dispute", *JIEL* 3 (2000) 145 et seq.; U. Schmid, "All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'", *ELJ* 7 (2002), 95 et seq.; J.C. Cascaente/ G.G. Sander, *Der Streit um die EG-Bananenmarktordnung*, 1999; E. Everling, "Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts", *CML Rev.* 33 (1996), 401 et seq.

<sup>172</sup> Pernthaler, see note 20, 79; P. Saladin, *Wozu noch Staaten*, 1995, 237 et seq.; Hobe, see note 8, 663; Scelles, see note 65, 509; König, see note 98, 274; Snyder, see note 138, critically calls the idea that the state is the sole source of law the "myth of the state".

tions',<sup>173</sup> the national Constitution today and in the future is to be considered a "partial constitution,"<sup>174</sup> which is completed by the other levels of governance. Reflecting the intermediary position of the state and the 'incomplete' nature of the national constitutions, the constitutional system is based not on a concept of absolute sovereignty defined as 'competence-competence'<sup>175</sup> but on the idea of sovereignty being shared between the different levels of governance.<sup>176</sup>

## 2. Shared Sovereignty

The concept of divided sovereignty can be traced back to the Federalist Papers and reflects the idea of federalism as a system allocating competences to different layers, as opposed to unitary states:

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and

<sup>173</sup> Cf. under II. 2. a.

<sup>174</sup> Peters, see note 59, 208 et seq.; Walter, see note 2, 194.

<sup>175</sup> For a critique of the concept of absolute sovereignty in an interdependent world, cf. Saladin, see note 172, 28 et seq.; C. Gusy, "Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigung der Europäischen Union", in: H. Brunkhorst/ M. Kettner (eds), *Globalisierung und Demokratie, Wirtschaft, Recht, Medien*, 2000, 131 et seq. (142 et seq.); N. Walker, "Sovereignty and Differentiated Integration in the European Union", *ELJ* 4 (1998), 356 et seq. (358); K. Jayasuriya, "Symposium: The Rule of Law in the Era of Globalization: Globalization, Law, and the Transformation of Sovereignty: Emergence of Global Regulatory Governance", *Ind. J. Global Legal Stud.* 6 (1999), 425 et seq. (426); T. Fleiner-Gerster, "Problèmes de la souveraineté intérieure et extérieure", in: T. Fleiner/ S. Hutter (eds), *Federalism and Decentralisation*, 1987, 63; T. Fleiner/ L.R. Basta, "Federalism, Federal States and Decentralization", in: L.R. Basta/ T. Fleiner (eds), *Federalism and Multiethnic States, The Case of Switzerland*, 1996, 27; N. MacCormick, "Beyond the Sovereign State", *Modern Law Review* 56 (1993) 1 et seq. (12 et seq., 16); id., "Liberalism, Nationalism and the Post-sovereign State", in: R. Bellamy/ D. Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives*, 1996, 143 et seq.; id., "The Maastricht-Urteil: Sovereignty Now", *ELJ* 1 (1995), 259 et seq. (265 et seq.); J.A. Frowein, "Verfassungsperspektiven der Europäischen Gemeinschaft", *Europarecht Beiheft* No. 1, 1992, 63 et seq. (67 et seq.); Schreuer, see note 154, 453; see also III. 2. a.

<sup>176</sup> Cf. Gusy, see above, 142 et seq.; Pernice, see note 157, 706; Fleiner/ Basta, see note above, 27.

whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, *the State governments would clearly retain all the rights of sovereignty which they clearly before had, and which were not, by that act, exclusively delegated to the United States*".<sup>177</sup>

"The necessity of concurrent jurisdiction in certain cases results from the *division of the sovereign power*; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution".<sup>178</sup>

The notion of shared sovereignty, as it was conceived at the time in the Federalist Papers, referred to the division of powers between the federation and sub-federal entities. Yet, today, there is no reason why it could not be conceptually extended to international or supranational governance structures.<sup>179</sup>

Contrary to the absolute concept of sovereignty, the idea of shared sovereignty offers the advantage that it does not conceive of sovereignty as a "zero sum game — i.e. you either have it or you do not".<sup>180</sup> Given the considerable symbolic value of sovereignty, the mindset the 'winner takes all' is one of the main obstacles to successful diversity accommodation, not only between states and international or supranational regimes but also within multinational states. It furthers extremist positions, such as secessionist demands of ethnic minorities, or, as regards the European Union, calls for a European state, on the one hand, and the denial of any autonomy to the Community legal order on the other hand.

To overcome such conflicts, it is not sufficient to abandon the idea of indivisible sovereignty. We also need to give up the "search for this Kelsenian holy grail",<sup>181</sup> i.e. the idea of a *Grundnorm*, a single power

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<sup>177</sup> Hamilton/ Madison/ Jay, see note 12, Paper No. 33 (Hamilton), 198 (emphasis added).

<sup>178</sup> Hamilton/ Madison/ Jay, see note 12, Paper No. 33 (Hamilton), 201 (emphasis added).

<sup>179</sup> See Gusy, see note 175, 143.

<sup>180</sup> Jayasuriya, see note 175, 427.

<sup>181</sup> Weiler, see note 110, 6.

source from which all law originates.<sup>182</sup> The different levels of governance all derive from different sources of law, reflect different circles of political identities<sup>183</sup> and have their own *raison d'être*. But they are interlocked and intertwined. Indeed, 'higher' levels of governance fulfil an important function of checks and balances. As *Lindseth* pointed out in the context of European law, the European Community legal order "seeks to constrain, and in some sense to overcome, the propensity of Nation States to parochialism and self-interest, and therefore represents an autonomous regulatory interest of its own".<sup>184</sup> Contrary to traditional intergovernmental politics, higher levels of governance do not reflect the simple aggregate of Member States' interests, since states in-

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<sup>182</sup> Cf. MacCormick, see note 175, 147 et seq. who discusses the monistic theories on whether the 'Grundnorm' is located on the international, European or national level and advocates a pluralistic point of view; see also Frowein, see note 175, 67 et seq.

<sup>183</sup> On the idea of multiple loyalties, see also III. 2. a and IV. 3. a. The idea of multiple identities is well known to the theory of federalism, understood as a principle of organizing unity in diversity, cf. P. Pernthaler, *Allgemeine Staatslehre und Verfassungslehre*, 1996, 289; H. Kilper/ R. Lhotta, *Föderalismus in der Bundesrepublik Deutschland*, 1996, 30. Without overarching loyalties, federal systems tend to be inherently unstable. As regards the regional and the global level, it is obvious that the corresponding identities are much 'weaker' than on the national or local levels. This should however not lead to the conclusion that transnational identities are impossible to achieve. An interesting theory to conceive of identity formation beyond the Nation State has been advanced by Breton, who uses the term 'pragmatic solidarities', referring to the identification with systems resulting from institutionalized factual interdependencies, cf. R. Breton, "Identification in Transnational Political Communities", in: K. Knop/ S. Ostry/ R. Simeon/ K. Swinton (eds), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*, 1995, 41 et seq.; for a summary of Breton's theory, see Shaw, see note 167, 266 et seq. The identification with the system depends on the efficiency of the institutions, the "participation in collective achievements, and on the perceived fairness of the distribution of costs and benefits". The increased interest of non-state actors in global issues, coupled with the demands for greater transparency and participation rights can be viewed as signs that transnational identities are gradually emerging.

<sup>184</sup> P.L. Lindseth, "'Weak' constitutionalism? Reflections on Comitology and Transnational Governance in the European Union," *Oxford Journal of Legal Studies* 21 (2001), 145 et seq. (148); see also J.H.H. Weiler/ U. Haltern/ F. Mayer, "European Democracy and Its Critics – Five Uneasy Pieces", *Swiss Papers on European Integration* No.1 (1995), 22 et seq.

creasingly have to justify their position considering the aims and interests of the community of states represented in the international regime in question as a whole. “In this sense, transnational governance [...] operates independently of any single government and thus represents an emergent [...] political community with regulatory interests separate and apart from — indeed superior to — the interests of the particular national political communities which comprise it”.<sup>185</sup>

### 3. The Relationship Between the Different Levels of Governance

#### a. The Principle of Supremacy

Considering each level of governance as being autonomous raises the question of how to resolve conflicts between norms originating from different legal sources.<sup>186</sup> Indeed, adopting a pluralist point of view, one has to “conclude that there is no objective basis — no Archimedean point — from which one claim can be viewed as more authentic than the other or superior to the other within a single hierarchy of norms. Rather, the claims [...] to ultimate authority [...] are equally plausible in their own terms and from their own perspective”.<sup>187</sup>

While this view offers the advantage of “sociological realism”,<sup>188</sup> there are nevertheless good reasons to support the principle of supremacy of the ‘higher’ levels of governance in case of conflict. The *first* is a factual reason: even under traditional precepts, the logic of supremacy of higher levels of governance is generally recognised, given its important roles of co-ordination and coherence. The principle of supremacy of federal law *vis-à-vis* state, provincial or cantonal law is accepted. Similarly, international law is recognized to be of a higher order as expressed by the principle of *pacta sunt servanda*, which fully applies in international relations and triggers, if violated, state responsibility. In European law, the doctrine of supremacy of Community law developed

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<sup>185</sup> Lindseth, see above, 148.

<sup>186</sup> Pernice, see note 157, 713 et seq.

<sup>187</sup> Walker, see note 175, 361 et seq.

<sup>188</sup> MacCormick, see note 175, 264; sociological realism refers to the fact that the institutions of a given legal system look to this legal order to assess their competences and the validity of their actions and do not regard those issues as being dependent on another legal order.

by the European Court of Justice has in practice and principle been complied with by all Member States, despite some vociferous resistance from several constitutional courts.<sup>189</sup>

The *second* reason in favour of supremacy of higher levels is a functionalist one: a basic hierarchy between the different constitutional levels is necessary to ensure the functioning of the higher levels of governance. The founding fathers of the American Constitution expressed this point as follows:

“[...] we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor. [...]

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster in which the head was under the direction of the members”.<sup>190</sup>

A similar view, as regards the supremacy of the European Community and public international law, was for example expressed by *Pierre Pescatore*:

“It is by virtue of its specific nature that Community law — and the same holds true for public international law — pretends to supremacy; the reason is that it is the law of the whole and the whole cannot exist unless the constitutive parts subordinate their interests to those of the whole”.<sup>191</sup>

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<sup>189</sup> See for example the decisions “Solange I” (BVerfGE 37, 271); “Solange II” (BVerfGE 73, 339), “Maastricht”, see note 99, the decision referring to the ‘Banana dispute’ (2 BVL1/97) of the German Constitutional Court, and the decisions ‘Frontini’ (Foro italiano 1974, Vol. I, 314), ‘Granital’ (Giurisprudenza costituzionale 1984, Vol. I, 1098), und ‘Fragd’ (Giurisprudenza costituzionale 1989, Vol. I, 1001) of the Italian Constitutional Court; for a summary of the case law, including decisions of other Member States, see Oppenheimer, see note 99; T. De Berranger, *Constitutions nationales et construction communautaire*, 1995.

<sup>190</sup> Hamilton/ Madison/ Jay, see note 12, Paper No. 44 (Madison), 286 et seq.

<sup>191</sup> G. Pescatore, “Aspects judiciaires de l’acquis communautaire”, *RTDE* 17 (1981), 617 et seq. (632), “C’est en vertu de sa nature propre que le droit communautaire — et la même chose est d’ailleurs vraie du droit international — affirme sa supériorité; c’est parce qu’il est le droit du tout et que



Without a basic hierarchy, the different levels cannot assume their proper co-ordinating functions. The regulation of market access rights and conditions of competition is a good example in point. We can observe that the higher level of governance provides the necessary disciplines and guarantees. This is the case for example in the United States with the interstate commerce clause. The economic liberty, which is guaranteed as a fundamental right in the German and Swiss Federal Constitutions, ensures the same function *vis-à-vis* the Länder and the Cantons, respectively. On the regional and global level, the Four Basic Freedoms guaranteed by European Community law and the market access rights enshrined in WTO law fulfil the same role with regard to the states. All these guarantees, ultimately, show comparable structures which, each on its level, exercise comparable checks and balances over the lower level of governance.

A *third* reason in favour of the principle of supremacy of the higher level of governance can be derived from participation and consent and the binding nature of consent,<sup>192</sup> as expressed in the principle of *pacta sunt servanda*: indeed, supremacy viewed as a system of chains of command, of simply taking orders from above, would be illegitimate. The five storey house does not, however, represent such a system, since higher floors of the building are essentially constituted by lower levels and defined by their input. The way a ‘lower’ level participates in the ‘higher’ level therefore is of key importance in order to define as to whether that level and its claim to supremacy is legitimate.<sup>193</sup>

It will not be possible to ensure democratic legitimacy of international rules only by extending participatory rights on the national level. To the extent that the regulatory scope and enforcement mechanisms on supra- and international levels of governance are enhanced, they need to

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l'ensemble ne peut exister qu'à la condition que les parties intégrantes subordonnent leurs intérêts à ceux de l'ensemble”.

<sup>192</sup> The two reasons justifying the supremacy of ‘higher’ levels of governance are also implicit in Pernice’s reasoning: “[...] primacy of European law in the multilevel constitutional system of the European Union is founded on the *common decision* of the peoples of the Member States to achieve a *functioning* structure of political action above the State level”, Pernice, see note 157, 719, (emphasis added).

<sup>193</sup> On the issue of participation in the higher level of governance, see T. Cottier/ C. Germann, “Die Partizipation bei der Aushandlung neuer völkerrechtlicher Bindungen: verfassungsrechtliche Grundlagen und Perspektiven”, in: D. Thürer/ J.F. Aubert/ J.P. Müller (eds), *Verfassungsrecht der Schweiz*, 2001, 77 et seq. (94 et seq.).

be accompanied by increasing participatory rights on that layer.<sup>194</sup> The growing powers of the European Parliament are an example in point. Democratic legitimacy through elected bodies on the regional or global level and the legitimacy, resulting from the national level participating in the 'higher' levels through parliamentary or popular consent, should not be viewed as competing and antagonistic principles. They both aim at representing the citizens, by reflecting a different circle of human identity and loyalty. Such an approach takes into account that individuals are not only simultaneously members of the commune, the canton, the state, but are increasingly also being affected by transnational issues, and therefore want to be heard directly, as members of regional or global polities. In Müller's words, the "segmentation of the subject calls for a more differentiated system of representation".<sup>195</sup>

#### b. Exceptions to Supremacy

Both reasons justifying the principle of supremacy — participation and consent on the one hand, and functionalism, on the other hand — have their limits. Therefore, we regard the principle of supremacy as an ordering principle, which does not apply in an absolute manner. It is therefore important to design criteria under which lower levels and storeys may prevail over higher ones. Today, many Constitutions claim to do so in a general manner. The United States, for example, do not recognize international law as being superior to Constitutional law. The European Community, in effect, does not accept the supremacy of international treaties over primary law. Under a doctrine of multi-layered governance, these traditional doctrines are over-broad. They need to be limited to constellations where primacy of national law can be justified. The doctrine of preserving the core of human rights, as defended by the German Constitutional Court,<sup>196</sup> is appropriate from this perspective. Higher norms cannot prevail to the extent that they infringe inalienable rights of citizens. This is an important safeguard which provides confi-

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<sup>194</sup> Cottier, "The Impact from Without", see note 160, 219; Saladin, see note 172, 246 et seq.

<sup>195</sup> J.P. Müller, "Kants Entwurf globaler Gerechtigkeit und das Problem der republikanischen Repräsentation im Staats- und Völkerrecht", in: P. Zen-Ruffinen/ A. Auer (eds), *De la Constitution. Etudes en l'honneur de Jean-François Aubert*, 1996, 133 et seq. (151).

<sup>196</sup> See the decisions 'Solange I', 'Solange II', 'Maastricht' and the decision referring to the 'Banana dispute', see note 189.

dence and allows citizens to embark on multi-layered governance in the first place.<sup>197</sup>

Similarly, direct effect of higher law may be denied to the extent that it does not correspond to procedures allowing for appropriate democratic participation, and similar legitimacy as comparable ones under national law.<sup>198</sup> To the extent the national Constitution prescribes that certain issues have to be regulated in statutes adopted by the national parliament, or, in the case of Switzerland, have to be subject to a popular vote, the principle of legality requires similar modes of participation when the same issue is regulated by treaty law. This is to avoid democratic procedures being undermined by an excessive transfer of treaty-making powers to the executive branch. If the requirements of the principle of legality are not met, it is necessary to seek transformation and formal adoption on the appropriate level. Direct effect should be excluded in such constellations, and the Courts should be given the power to instruct legislators to properly implement the agreement within a certain period of time. Failing such implementation, they would return to direct effect in order to honour the agreement. Moreover, the principles of good faith and *pacta sunt servanda*, entail in our view, the duty of states to adapt their domestic constitutional law so as to provide for adequate participation mechanisms before the ratification of a treaty.<sup>199</sup> The constellations in which direct effect of international law can be justifiably denied should thus be rather limited. Again, this is a safeguard

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<sup>197</sup> See Cottier/ Hertig, see note 12, 25.

<sup>198</sup> On this issue, see Cottier, "Einleitung und Synthesen", see note 160, 9 et seq. and D. Wüger, "Die direkte Anwendbarkeit staatsvertraglichen Rechts", in: T. Cottier/ A. Achermann/ D. Wüger/ V. Zellweger, *Der Staatsvertrag im schweizerischen Verfassungsrecht. Beiträge zum Verhältnis und methodischer Angleichung von Völkerrecht und Bundesrecht*, 2001, 95-253; a very concise summary can be found in Cottier/ Hertig, see note 12, 25 et seq.

<sup>199</sup> In Switzerland, an amendment of the federal Constitution, accepted on 9 February 2003, extends the facultative referendum to all state treaties which contain important legislative provisions or the implementation of which require the adoption of a federal statute (see the new article 141a § 1 of the Federal Constitution). So as to secure the effective legislative implementation of ratified treaties, the Federal Constitution enables the Parliament to include the implementing legislation in the vote on the state treaty itself (new article 141a § 2). This solution avoids the contradictory situation where an international treaty is ratified but cannot be complied with because the implementing legislation is challenged in a subsequent referendum.

assuring that the fundamental role of law and legislation is maintained even if exercised in the form of international agreements. It combines monism and dualism from a perspective of legitimate multi-layered governance.

Further exceptions to the principle of supremacy may be justified taking into account other fundamental values of a polity, such as, in the case of Switzerland, the institutions of direct democracy.<sup>200</sup> In effect, under the Swiss federal Constitution, a popular initiative aiming at the revision of the Constitution is admissible to the extent that it does not violate the peremptory norms of public international law.<sup>201</sup> *A contrario*, the validity of an initiative contrary to other norms of international law would be upheld. Such a conflict of norms seems unsatisfactory from a legalistic point of view which emphasizes the need for coherence and clear rules of conflict. However, from a sociological point of view, limited exceptions to the principle of supremacy may be necessary to further the acceptance of higher levels of governance in a dynamic process of interfacing different layers. Indeed, absolute supremacy of 'higher law' may overstrain a system whose level of integration is, compared with classical nation states, relatively low, and, in the end, be counter-productive. It does, for example, not come as a surprise that the principle of supremacy, which is recognized in many federal states,<sup>202</sup> is not unconditionally accepted in less integrated polities such as multinational federations.<sup>203</sup> In those cases, precedence of 'higher'

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<sup>200</sup> On this issue, see Cottier/ Hertig, see note 12, 18 et seq.

<sup>201</sup> Arts 194 § 2 and 129 § 3 of the Swiss Federal Constitution.

<sup>202</sup> Cf. article 49 of the Swiss Federal Constitution; article 6 of the Constitution of the United States; article 31 of the German Constitution; article 109 of the Australian Constitution.

<sup>203</sup> In Canada, for example, the Canadian Charter of fundamental rights contains, as a concession to Quebec, the so called 'notwithstanding clause', which enables a province to derogate from a provision of the Charter for a limited period of time. Quebec has used this derogation so as to uphold the validity of its famous 'French only' legislation, see M. Nemni, "Ethnic Nationalism and the Destabilization of the Canadian Federation", in: B. de Villiers (ed.), *Evaluating Federal Systems*, 1994, 148 et seq. In Belgium, no supremacy clause was introduced into the federal constitution, which was explained by the centrifugal character of the Belgium federation. The relationship between federal law and the law of the regions is viewed not in terms of a hierarchy but as two distinct coordinated legal orders, which operate in their respective spheres of competencies, see A. Alen, *Der Föderalstaat Belgien: Nationalismus-Föderalismus-Demokratie*, 1995, 35; F. Ler-

law will only be tolerated if the 'higher' level of governance shows a high degree of sensitivity for the core values of 'lower' levels.

It is submitted that the principles set out above also apply domestically. From this perspective, it is perfectly conceivable to deny the implementation of federal law if it violates core freedoms protected under a provincial constitution. In the end, it is a matter of looking at law from the point of view of the individual. The system as a whole must protect its rights. These rights may be found on different levels and interact and sometimes compete with other levels, the different layers establishing safeguards with regard to both 'higher' and 'lower' layers.

To sum it up, the doctrine of the five storey house entails the idea of communication between different levels. It starts from the presumption of hierarchy, but may allow for derogations to the extent that it is required by the protection of rights.

#### 4. The Normative Interaction Between the Different Layers of Governance

The idea of process, communication and interaction, rather than mechanical precedence of 'higher' levels over 'lower' levels of governance, is important to understand how the constitutional system is evolving towards greater coherence, ensuring that adequate safeguards are established at the appropriate level of governance and that the system as a whole responds to the precepts of traditional constitutionalism. It is important to protect life, liberty and property, and to pursue the goals of human welfare and development in non-discriminatory economic law. But these guarantees and goals need not be present on all levels of governance alike. The evolution of human rights protection is an example in point to analyse the interaction of different layers of governance.

Domestically, human rights are not explicitly guaranteed in communal constitutions, sometimes not even on the provincial level. They are protected by the Federal Constitution, but take effect on all domestic levels of governance. Likewise, these guarantees need not necessarily be

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quin-De Vischer, "Les règles de droit", in: F. Delpérée (ed.), *La Belgique fédérale*, 1994, 210 et seq. (210). The constitutional courts of some Member States of the European Union have adopted a similar view with regard to the relationship between the EC legal order and the national legal order (see for example the decision 'Granital' of the Italian Constitutional Court, *Giurisprudenza costituzionale* 1984, Vol. I, 1098).

protected on the fourth or fifth level and apply to international or regional organizations. It suffices in principle that these rights are effectively protected by one of the layers, prevailing over others in this respect. The protection of fundamental rights within international and supranational institutions may, however, become necessary to the extent that these organizations themselves represent a threat to human rights and to the extent that the protection by other layers of governance bears the risk of disruption and legal uncertainty.

The advent of human rights protection in European Community law is an important illustration of this process.<sup>204</sup> Conceived as an instrument of economic integration, the Treaty of Rome was limited to the Four Basic Freedoms, aimed at securing market access within the area of the European Community. This functional approach did not require a bill of rights on that level of governance. However, it soon became obvious that European Community legislation, although at the beginning mainly limited to the economic sphere, could conflict with fundamental rights protected by the national constitutions of the Member States and the European Convention on Human Rights. As a consequence, some national constitutional courts made it clear that they were not willing to accept the supremacy of European Community law if fundamental rights were not effectively guaranteed.<sup>205</sup> The risk that national courts would subject Community law to national constitutional law, at the price of piercing the doctrine of supremacy in some cases, was an important incentive for the European Court of Justice to recognize fundamental rights as general principles of European Com-

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<sup>204</sup> Among the vast literature on this issue, see for a succinct summary, P. Craig/ G. De Búrca, *EU Law, Text, Cases, and Materials*, 2003, 317 et seq.; for a comprehensive study on the EU's human rights policy, see P. Alston (ed.), *The EU and Human Rights*, 1999.

The development of the protection of fundamental rights within the EC resembles the advent of human rights protection in Switzerland, in as much that the Swiss Federal Constitution of 1848/1874 did not comprise a comprehensive catalogue of fundamental rights. Similarly to the fundamental freedoms enshrined in the Treaties of Rome, the fundamental rights protected by the Swiss Federal Constitution, in particular the freedom of establishment and the economic freedom, were mainly rights aimed at eliminating trade barriers between the cantons, see T. Cottier/ B. Merkt, "La fonction fédérative de la liberté du commerce et de l'industrie et la loi sur le marché intérieur Suisse: l'influence du droit européen et du droit international économique," in: P. Zen-Ruffinen/ A. Auer (eds), *De la Constitution. Etudes en l'honneur de Jean-François Aubert*, 1996, 449 et seq.

<sup>205</sup> See note 189.

munity law,<sup>206</sup> which are derived from the constitutional traditions common to the Member States<sup>207</sup> and the “international treaties for the protection of Human Rights on which the member states have collaborated or of which they are signatories”,<sup>208</sup> the European Convention on Human Rights being of particular significance in this respect.<sup>209</sup>

Apart from national constitutional courts, the European Court of Human Rights has also given an important impetus in securing the protection of fundamental rights in the European Community legal order. Indeed, the Court has made it clear that the delegation of sovereign powers to international organizations does not free the Member States from their obligations under the European Convention on Human Rights. On this basis, the Court has declared actions brought against the Member States collectively for breach of the European Convention on Human Rights by an act of another international organization admissible.<sup>210</sup> In doing so, the European Court of Human Rights can indirectly check the compatibility of European Community acts with the European Convention on Human Rights, although the European Community has not adhered to the Convention, which amounts to establishing a material hierarchy between regimes of human rights protection and other international regimes.

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<sup>206</sup> Case 29/69, *Stauder v. City of Ulm*, ECR 1969, 41. See also *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, 1125 : “Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. [...] Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure. [...] However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice”.

<sup>207</sup> Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, 1125 at § 4.

<sup>208</sup> Case 4/73, *Nold v. Commission*, ECR 1974, 491 § 13.

<sup>209</sup> See for example Case 222/84, *Johnston v. Royal Ulster Constabulary*, ECR 1986, 1651, § 18; Case C-260/89, *Ellinki Radiophina Tiléorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and others*, ECR 1991, I 2925, § 41.

<sup>210</sup> See the judgment *Matthews v. UK*, of 18 February § 34-35.

The fundamental rights doctrine of the European Court of Justice was thus — and still is — being shaped interactively, in a dialogue with national Constitutional law and the European Court of Human Rights, with fundamental rights being defined with input from both national and international law, i.e. the constitutional traditions common to the Member States and international human rights treaties, respectively.

Tendencies of national constitutional law “to transport values from the domestic order to the supra-national and international legal orders”<sup>211</sup> can also be observed with regard to general principles of law, such as equity, transparency, non-retroactivity, proportionality, the protection of good faith and the doctrine of abuse of rights, which provide important corner stones of an overall constitutional system and make essential contributions to the constitutionalizing processes occurring within higher levels of governance.

Conversely, due to the constitutionalization of European and international law, precepts of constitutionalism are increasingly secured on ‘higher’ levels and reflect upon national Constitutional law. To take up the same example — the protection of fundamental rights within the European Union legal order — the European Court of Justice did not only recognize human rights as binding on the European Community institutions. It also held in subsequent case law that the Member States were subject to the same rights within the field of European Community law, namely when they implement European Community rules or derogate from the Four Basic Freedoms. More generally, European Union law explicitly subjects accession and membership of states to the respect of the principles of liberty, democracy, fundamental rights and freedoms and the rule of law.<sup>212</sup> It also establishes an enforcement procedure to ensure compliance with these principles.<sup>213</sup> These provisions are in line with the idea, underlying the international human rights in-

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<sup>211</sup> Hobe, see note 8, 663; an interesting example in this respect is article 23 of the German Constitution, which subordinates the delegation of powers to the EU to the respect of core principles: “To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers”.

<sup>212</sup> Article 6 in relation with article 7 and 49 of the EU Treaty.

<sup>213</sup> Article 7 of the EU Treaty.



struments and the establishment of the ICC, that the protection of these essential guarantees should not be left to states alone.

The overall picture thus already shows a dialectical relationship between the different levels of governance, a communicative constitutional process which slowly brings about a continuing rapprochement of the different levels of governance.<sup>214</sup> It may help to gradually define minimal constitutional standards which all layers have to meet.

Twenty-first century constitutionalism therefore is characterised by establishing effective safeguards on different levels. While the Constitution remains centre stage, additional levels increasingly act to bring about coherence among different constitutional layers, to interface them. Moreover, they increasingly serve to monitor them. *Custodis custodiae!*

## 5. The Allocation of Powers

In a multilayered system, defining the relationship and the boundaries between the different levels of governance are essential constitutional functions. To this effect, we cannot limit our analysis to the question of supremacy discussed above. We also need to address the issue of delimitation of jurisdiction or competence between different layers.<sup>215</sup> Following the traditional model of power allocation in federal states, such as Switzerland, powers of the federal government need in principle<sup>216</sup> explicit enumeration, while the federal entities otherwise remain uninhibited or sovereign.<sup>217</sup> In decentralized polities, such as the United Kingdom, the opposite approach generally prevails: competences which are not explicitly attributed to regional governments stay with the central government. Both approaches adopt a pattern of allocation which follows the ideal of assuming the responsibilities for separate tasks and walks of life.

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<sup>214</sup> Peters, see note 59, 213; Frowein, see note 175, 66, who talks about the “dialectical homogenizing effect of the EC” (translated by the authors).

<sup>215</sup> The following passage draws on Cottier, see note 156.

<sup>216</sup> Most federal systems know the category of implied powers, which are however rarely used in Switzerland.

<sup>217</sup> See article 3 of the Swiss Federal Constitution.

### a. The Limits of Traditional Pattern of Power Allocation

The traditional model fits a two or three storey house, contained in the nation state, and a system where the scope of regulatory powers and functions of public authorities is relatively limited. It is however bound to run into problems in a five storey house with law-making on the regional and global levels, and regulatory needs in general, increasing. This is so for the following reasons. Firstly, the gradual shift from the liberal to the welfare state and the important changes in the field of science and technology have substantially enhanced regulatory needs. Public powers have increased dramatically and become more complex, which makes it more difficult to clearly define competence allocation. Instead, realities have produced over time a wide entanglement of mixed and joint competences. Secondly, more and more fields are addressed by rules of European and international law. Looking at regulatory approaches both in the European Union and on the global level of the WTO and other international fora, it is important to note that these regulations are generally not of a comprehensive nature. They address key issues and points necessary to bring about the degree of harmonization required with a view to overcoming, for example, excessive trade barriers. International and regional regulation, therefore, is piece-meal and needs to be complemented, if not implemented, by rules of the first three floors of the constitutional building.<sup>218</sup>

More importantly in the present context, international rules do not respect and follow allocations of powers in a given federal or devolved structure. Agreements, regulations and directives of the European Community or international treaties may partly affect the jurisdiction of the federal or central government, and partly of the sub-national, federal or regional entities. As a matter of international or European law, the central or federal government is responsible for implementation and compliance although it often does not have explicit jurisdiction to compel the sub-national entities to implement and comply with rules falling under their jurisdiction.<sup>219</sup>

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<sup>218</sup> On this point and related matters see Cottier, see note 31, 217 et seq.

<sup>219</sup> A good and telling example in this context is the regulation of government procurement in Switzerland. Overall rights and obligations are defined by the WTO Agreement on Government Procurement. Since the Federal Government has very limited powers to regulate the matter for the Cantons, it only enacted a comprehensive bill on government procurement for the federal entities. Limited rules on non-discrimination are contained in

The same problem can be observed in the European Union, which has itself become an important actor on the international scene. Since the external treaty making power of the European Community does not correspond to the internal constitutional division of powers between the European Community and the Member States, the European Community is liable for compliance with international law without having any means of enforcement.<sup>220</sup>

The increase of international and supranational rules thus bears the potential of considerably shifting and upsetting the balance of traditional constitutional patterns. From the point of view of the 'higher' levels of governance, this situation is unsatisfactory since they do not have the powers to implement and enforce obligations on the 'lower' levels, yet have to assume international responsibility. From the perspective of the 'lower' levels (namely the second or third storey), the situation is equally disturbing: the internal division of competences with respect to the immediately superior level of governance (the third, respectively the fourth storey) is being eroded by another 'higher' layer, namely the fourth, respectively the fifth storey.

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the internal market bill, partly with differing rules (in social standards) from the Federal Procurement Act. The Cantons undertook to harmonize the matter in an interstate compound, partly inconsistent with the internal market bill, and further legislation exists within the Cantons on the matter, see T. Cottier/ B. Merkt, "Die Auswirkungen des Welthandelsrechts der WTO und des Bundesgesetzes über den Binnenmarkt auf das Submissionsrecht der Schweiz", in: R. von Büren/ T. Cottier (eds), *Die neue schweizerische Wettbewerbsordnung im internationalen Umfeld*, 1996, 35 et seq., with an Annex containing the WTO Agreement on Government Procurement in English, 163 et seq. Since the entry into force of the bilateral agreements between Switzerland and the European Union on 1 June 2002, public procurement has also been governed by a specific agreement on this issue, which builds on and complements the WTO agreement on public procurement, see T. Cottier/ E. Evtimov, "Die sektoriellen Abkommen der Schweiz mit der EG: Anwendung und Rechtsschutz", *Zeitschrift des Berner Juristenvereins* 139 (2003), 84 et seq.

<sup>220</sup> A good example is the Agreement on Trade Related Intellectual Property Rights, which also contains a substantial portion on civil and administrative procedures, for which the EC does not have any internal jurisdiction to regulate. These provisions enlarge responsibilities of the EC in external relations, but leave the matter to Member States domestically, the EC having no jurisdiction to enforce these rules contained in a so-called mixed agreement.

## b. Reallocation of Powers

Although it is often perceived as such, the allocation of powers is not a one way street, leading inexorably to the demise of the Nation State and the erosion of sub-national layers: instead of transferring regulatory powers to the fourth and fifth floor of the building, regional and global liberalization and market integration lead to new constitutional problems on the first, second and third floors. They bring about new tasks which, in the past, have not existed to the same extent. Take the example of social and economic integration of foreign residents and their families with a different cultural background. With the globalization of the economy and communications and decreasing costs for transportation, traditional communities have to cope with an increasing number of foreigners. Like most European countries, Switzerland, for instance, has become a destination of immigration, not so much for Europeans, but from cultures overseas.<sup>221</sup> Rights and obligations of this segment of the population — amounting to some 20 per cent in Switzerland — need to be addressed and better defined in constitutional law. The Constitution should not remain silent with respect to one fifth of the population. It ought to recognize the core functions of integrating foreign nationals and residents, to establish principles, rights and obligations, to provide for programs and set forth the interaction of the national and sub-national responsibilities in the field. The Constitution has to be a factor of integration not only for the nationals, but for all humans living under its umbrella in a given society.

## c. Shared and Interlocked Powers

Globalization and regionalization thus lead to allocation of powers both from 'lower' to 'higher' and from 'higher' to 'lower' levels of governance. Nevertheless, it is the former aspect which is commonly perceived by the citizens, resulting in demands of 'renationalization',<sup>222</sup>

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<sup>221</sup> See T. Straubhaar, "Auswirkungen des freien Personenverkehrs auf die Migration in Westeuropa", *Swiss Papers on European Integration*, No. 4 (1996), 13 et seq.; and D. Chambovey, "L'impact potentiel de la libre circulation des personnes avec les pays de l'Espace économique européen sur les flux migratoires en Suisse", *Swiss Papers on European Integration* No. 4 (1996), 37 et seq.

<sup>222</sup> See Dicke et al., see note 20, 27 et seq.

calls for subsidiarity,<sup>223</sup> and efforts to re-establish a more clear-cut division of competences.<sup>224</sup> To the extent that many problems cannot be efficiently addressed on the national level, 'renationalization' does not offer a practicable solution. What would be gained in terms of decision-making autonomy would be lost in terms of efficiency and substantive, output oriented, legitimacy. Adopting a pattern of allocation which follows the ideal of assuming the responsibilities for separate tasks and walks of life reflects the wish to establish an intangible core of sovereignty safe from any intrusion from outside. Although such desire is understandable from a psychological point of view, the allocation of exclusive competences often fails to provide workable solutions.<sup>225</sup> Moreover, we argue that it may conflict with the idea, expressed in the principle of subsidiarity, that governance should be carried out as close to the citizens as possible.<sup>226</sup>

Some examples may illustrate the difficulties in dividing policy fields into exclusive spheres of competences: most people will intuitively

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<sup>223</sup> The principle of subsidiarity, which plays an important role in the European Union, is increasingly also referred to with a view to limiting competences of the global level. See R. Howse, "Symposium: The Boundaries of the WTO: From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime", *AJIL* 96 (2002), 94 et seq. (112); J. Bourgeois, "Subsidiarity" in the WTO Context from a Legal Perspective", in: M. Bronckers/ R. Quick (eds), *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, 2000, 35 et seq.; R.O. Keohane/ J.S. Nye Jr., "Introduction", in: J.S. Nye Jr./ J.D. Donahue (eds), *Governance in a Globalizing World*, 2000, 37 et seq.

<sup>224</sup> See the Declaration 23 of the Treaty of Nice (Declaration on the Future of the European Union), which enumerates, among the issues to be addressed, "how to establish and monitor a more precise delimitation of powers between the EU and the Member States, reflecting the principle of subsidiarity".

<sup>225</sup> See G. De Búrca, "Reappraising Subsidiarity's Significance after Amsterdam", *The Jean Monnet Working Paper* No. 7 (1999), 4 et seq.; id., "Setting Constitutional Limits to EU Competence?", *Francisco Lucas Pires Working Papers Series on European Constitutionalism*, Working Paper No. 2 (2001), 15 et seq. and R. Dehousse, "Réflexions sur la naissance et l'évolution du principe de subsidiarité", in: F. Delpérée (ed.), *Le principe de subsidiarité*, 2002, 361 et seq. (364 et seq.).

<sup>226</sup> See also N. MacCormick, "A Comment on the Governance Paper", *The Jean Monnet Working Paper* No. 6 (2001), 172; Lerquin-De Vischer, "Existe-t-il un principe de subsidiarité", in: F. Delpérée (ed.), *Le principe de subsidiarité*, 2002, 21 et seq.

agree that cultural matters should not be governed on the European but on the national or local level, whereas market liberalization requires concerted action on the supra- or international level. The free movement of goods and services, however, will necessarily touch upon cultural issues, such as film, broadcasting, music, the import and export of art objects.

In contrast, people will generally view environmental protection as a global concern. Whereas it is true that problems such as global warming cannot be efficiently resolved without international cooperation, other problems pertaining to the protection of the environment, such as urban planning, need in turn to be addressed on 'lower' levels of governance. Moreover, transboundary environmental problems do not need to be regulated comprehensively on the global level. To take the example of global warming, international law may prescribe the goal to be reached in terms of CO<sub>2</sub> reduction, while it is up to 'lower' levels of governance to choose the means to reach that aim and to implement them.

As these examples show, it would thus not be feasible to attribute an exclusive competence in the field of environmental protection or culture to one level of governance. Critics may object that it would be possible to either subdivide these policy fields, by distinguishing, for example, global warming, urban planning, protection of forests and moors, or laying down exceptions in competence clauses, for example by attributing an exclusive competence for cultural issues to local governance, with the exception of measures pertaining to market liberalization. Both approaches have their limits. Constitutions cannot address all the relevant issues and exceptions in a given policy field without losing their character of fundamental charters of a political order and becoming highly technical texts, inaccessible to most citizens. Too detailed regulations would also contradict the requirements of both stability and flexibility: constitutions should be open and flexible enough to evolve with the political community without requiring too frequent amendments.

In *Dehousse's* words, the main obstacle to a pattern of exclusive power allocation is that reality cannot be cut in neat slices and distributed to different authorities.<sup>227</sup> If the concept of exclusive competences is to be rejected, what other options may help to define the substantive powers of the different levels of governance? An efficient solution should in our view combine both substantive and procedural remedies.

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<sup>227</sup> Dehousse, see note 225, 364, translated by the authors.

#### d. Substantive Remedies

Substantive remedies mainly rely on the principle of subsidiarity to act as a corrective device against centralizing tendencies of ‘higher’ levels of governance and the correlated erosion of national and local competences. In general terms, the principle of subsidiarity implies that a certain issue should only be governed on a ‘higher’ level of governance if it cannot be appropriately addressed on a ‘lower’ level. As is frequently pointed out, the criterion of ‘appropriateness’ is itself a fluid concept which can be defined in different terms.<sup>228</sup> Should, for instance, the ‘higher’ level of governance address an issue only if it cannot be resolved at all on the lower level or as soon as a more efficient solution may be obtained on the ‘higher’ level?<sup>229</sup> The first approach focuses mainly on process, i.e. the concern to ensure adequate participation of the people affected by the decision. It takes into account that citizens identify more strongly with ‘lower’ than with ‘higher’ levels of governance.<sup>230</sup> The second approach emphasizes the outcome, stressing the capacity of a particular level of governance to effectively deal with a certain issue.<sup>231</sup> Similarly to the principle of proportionality, the principle of subsidiarity thus requires balancing different interests. This implies, in our view, that both aspects — process and outcome — should be taken into account.<sup>232</sup> Instead of attributing a policy field to one level of governance, the principle of subsidiarity will in many cases call for regulatory powers being spread over different levels of governance. Whereas it may be necessary for ‘higher’ levels to set some common standards in a policy field, by enacting framework regulations (*Rahmengesetze*),<sup>233</sup> or opting for some ‘softer’ instruments, such as recommendations, further elaboration should and can often be left to the

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<sup>228</sup> See for instance De Búrca, “Reappraising Subsidiarity’s Significance”, see note 225, 9.

<sup>229</sup> See A. Dubach, “Integration und Subsidiarität”, *Swiss Papers on European Integration* No. 8 (1996), 1 et seq. (18).

<sup>230</sup> De Búrca, see note 225, 12.

<sup>231</sup> For the distinction of ‘process’ and ‘outcome’, see De Búrca, “Reappraising Subsidiarity’s Significance”, see note 225, 4.

<sup>232</sup> For a definition of the subsidiarity principle taking into account both the democratic principle of governance as close to the citizens as possible and efficiency, see MacCormick, see note 226, 172: “governmental tasks should be carried out at a level as close to the citizens affected as is consistent with equity and with efficiency in the pursuit of common goods.”

<sup>233</sup> See Cottier, see note 156, 88.

'lower' levels of governance. As the experience of the European Community has shown, a flood of detailed regulations delegitimizes European governance. Anecdotes frequently related by sceptical European Union citizens mock the bureaucratic European Community regulating issues of such great importance as the labelling of shoes.<sup>234</sup> Limiting the action of 'higher' levels of governance mainly to framework regulations implies that an issue can rarely be attributed to one level of governance alone<sup>235</sup> and that we are "fated to live with multiple levels of government".<sup>236</sup> Many, if not most policy fields, need to be shared between the second, third, fourth, and increasingly also the fifth floor of the constitutional building, which makes attempts to identify exclusive spheres of jurisdiction an ineffective tool of power allocation. A more flexible solution, consisting for example in listing the policy fields which should be *predominantly* exercised on a certain level of governance,<sup>237</sup> without categorically excluding the intervention of other levels, would combine the advantages of transparency and a necessary amount of flexibility. Such an approach will however only be politically acceptable if it is accompanied by effective procedural safeguards.

#### e. Procedural Remedies

Procedural remedies to compensate for the loss of powers due to the internationalization of law-making consist in reinforcing both direct<sup>238</sup> and indirect<sup>239</sup> participatory rights of 'lower' levels of governance in the decision-making processes on 'higher' levels. The relationship between different levels is thus revealed by the notions of *symbiosis and consociation*, rather than strict separation of regulatory domains and tasks.<sup>240</sup> The more lower levels of governance have a say in the decisions taken

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<sup>234</sup> The example of shoe labelling was mentioned in the first report of the Commission on subsidiarity as an example in which EC legislation was abandoned, cf. Dehousse, see note 225, 363.

<sup>235</sup> See De Búrca, "Reappraising Subsidiarity's Significance", see note 225, 4.

<sup>236</sup> MacCormick, see note 226, 172.

<sup>237</sup> Dehousse, see note 225, 365.

<sup>238</sup> By direct participation, we refer for example to the Council of Ministers, which enables the Member States to take part in the law-making procedure on the EC level.

<sup>239</sup> By indirect participation, we mean for example procedures allowing sub-national entities to influence the position national authorities will defend on the regional and international level.

<sup>240</sup> P. Taylor, *The European Union in the 1990s*, 1996, 181.



on 'higher' levels, the less important clear cut allocations of powers are. The rising popularity of the principle of subsidiarity in the European Community is a good example in point: it was only with the advent of majority ruling in the Council and the increasing impact of the European Parliament and the correlated diminished influence of the Member States in the decision-making procedures on the regional level that the idea of subsidiarity arose and then became a household name.<sup>241</sup> Job allocation therefore is inherently linked to *decisional processes within the respective constitutional level*, and it is here, in our view, that remedies should be sought in the first place.

Procedural solutions should not be limited to compensating the lack of exclusive jurisdiction to prescribe by appropriate representation on higher echelons of the constitutional order. They should also entail the duty of law and decision-making institutions to consult with national and regional institutions before initiating new legislative acts and to justify why the envisaged action cannot be appropriately dealt with by a 'lower' level of governance.<sup>242</sup> As the experience of most federal states and the European Union has shown, constitutional courts, or the European Court of Justice, respectively, often uphold centripetal tendencies of the legislative and executive branch based on a teleological interpretation of federal or European Community law.<sup>243</sup> Effective po-

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<sup>241</sup> Cottier, see note 156, 88 et seq.; Dehousse, see note 225, 362.

<sup>242</sup> See Bausili, see note 105, 8; De Búrca, "Reappraising Subsidiarity's Significance", see note 225, 33 et seq.

<sup>243</sup> See Weiler/ Haltern, see note 108, 443; So far, the ECJ annulled acts of Community institutions for breach of the principle of proportionality or legality, but never for violation of the principle of subsidiarity, cf. Bausili, see note 105, 10, footnote 24.

The teleological interpretation of EC law by the ECJ, expressed in the '*ef-fet utile*' doctrine, has, as pointed out above, met with resistance from national constitutional courts. See on this subject the Maastricht decision by the German Constitutional Court, see note 105.

On the global level, in the framework of the WTO, the concern of the Member States to prevent a dynamic interpretation of WTO law by the panels resulted in the adoption of article 3 § 2 of the Dispute Settlement Understanding (DSU). This provision reads as follows: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. *Recommendations and rulings of the DSB cannot add to or*

licing of boundary disputes may thus require that a different tribunal, consisting of representatives of both levels of governance affected by the controversy would settle such disputes.<sup>244</sup> On the European Community level, representatives of the regions or cantons should also be granted standing before such a tribunal, so as to avoid national governments eroding the internal division of competences by legislating a certain issue on the Community level.<sup>245</sup>

## 6. The Role of the Judiciary

Twenty first century Constitutionalism will also allow developing more coherent views on the role of the judicial branch in international economic law. The current situation is marked by a dichotomy between domestic review and international review. The current paradoxes may be assuaged:<sup>246</sup> while international judges today in the WTO tend to apply a relatively intrusive standard of review, scrutinizing *de novo* national legislation or administrative action for compliance with WTO law, the review of their colleagues on regional or national levels is characterized by relative restraint, they often limit judicial review to the extent that all decisions not considered capricious and arbitrary will escape judicial protection. International review reflects the functionalist tradition of GATT whose focus is on trade liberalization, whereas the attitude of the domestic courts is marked by the traditional perception of constitutionalism being limited to the domestic sphere: foreign relations, including external economic relations, are still considered the prerogative of an unrestrained executive branch.<sup>247</sup> This paradox cannot be overcome on the basis of current precepts of administrative and inter-

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*diminish the rights and obligations provided in the covered agreements*". (emphasis added). The same obligation is also laid down in art. 19 § 2 DSU.

<sup>244</sup> Such proposals have been made by Weiler/ Haltern, see note 108, 447; MacCormick, see note 226, 181; the need for external control is also stressed by Bausili, see note 105, 5 et seq.

<sup>245</sup> MacCormick, see note 226, 181; Bausili, see note 105, 6.

<sup>246</sup> The following section is drawn on T. Cottier/ M. Oesch, "The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework", in: T. Cottier/ P.C. Mavroidis (eds), P. Blatter (associated editor), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO*, The World Trade Forum Vol. 4 (forthcoming).

<sup>247</sup> See under II. 1.

national law looked upon as belonging to very different walks of life and systems. More coherent standards of review and a more appropriate role of the judiciary can only be created if we regard all levels as forming part of one system operating under the idea of constitutionalism: national courts would generally be required to adopt a stricter standard of review on the basis that the principle of separation of powers and the rule of law apply both to domestic and international law alike. WTO panels' attitude would in turn need to shift from a functionalist to a constitutional approach, which would allow for a more nuanced balancing between market access rights and other legitimate policy concerns. We suggest that standards of review should be determined on all levels based on the criteria of justiciability, i.e. the question as to whether a court is suitable to decide a particular issue, or whether the matter should be left to the political process. Again, there will be differences, as courts enjoy different roles and positions in different constitutional systems. These differences can be taken into account, as the matter of justiciability cannot be isolated from the constitutional situation of a court in a given system. But it will allow an assessment of the position of the court based on common criteria and an identification of minimal standards of judicial review, which the higher level of governance will need to apply in order to fulfil its role of providing checks and balances and defend the rights of those who are not represented in a particular polity.

## **V. Conclusion**

The attempt to sketch a doctrine of 21st century Constitutionalism roots in practical problems encountered in constitutional, regional and international law in coping with the challenges of regionalization and globalization. It is not an effort to please theory, but to assist in developing tools which allow legislators, executive and judicial branches of government to cope with the complex interaction of different regulatory issues. We do not believe that current disputes relating to the concept of 'constitution' are an ample basis to address these practical problems. Attempts to determine whether the European Union, or the WTO, for instance, already have a constitution or should and are able to have one tend to polarize the debate by apprehending complex political and social realities in black and white terms and focus too narrowly on a single level of governance. We submit that a limitation of constitutionalism to the Nation State clearly is no longer suitable to

structure the interaction of different layers of governance in a fruitful manner. Globalization and regionalization have resulted in the transfer of many regulatory issues from the national to the regional and global level. Due to this process of de-nationalization, new levels of governance have emerged on the regional and global level which need to be interfaced with the national and subnational levels: defining the relationship and interaction between the different levels of governance is an important task that modern constitutionalism has to achieve.

The different levels of governance represent themselves, or consist of, more or less constitutionalized regimes which are not static and can evolve along with the regulatory tasks ascribed to them. The more complex, the more intrusive a level of governance is, the more it will be necessary to develop its constitutional qualities. To reflect and critically assess this reality, we have supported a graduated concept of constitutionalism which puts more emphasis on process and interaction than on strict conceptual boundaries and momentous events of constitution-making, focusing on how the constitutional functions can be secured, considering the different levels of governance as forming part of an overall constitutional system. For this purpose, we have suggested, as a framework of analysis, taking recourse to a multi-storey house, which needs to be coordinated in a practical way. Indeed, issues like allocation of powers and the definition of coherent standards of review, which we have addressed in this paper, necessarily imply an interplay of different levels and cannot be solved by focusing on one layer in a isolated manner. With regard to the relationship between the different levels of governance, we have argued that the supremacy of 'higher' levels is necessary for the sake of overall coherence, but not in absolute terms. Essential guarantees, to be found on any of these layers, may prevail to the extent that they protect core values and rights of individuals and mankind. It is thus a relation of mutual communication, not subordination, which characterizes the prospects of 21st century Constitutionalism.