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The Multidimensional Concept of Constitutional Sovereignty in the European Union

1. Introduction

The concept of sovereignty that will be introduced in the following is based on the assertion that the architecture of political authority in Europe can be understood in both constitutional and sovereignty terms. That means, the working assumption here is that constitutionalism as a concept indeed has explanatory value for the configuration of political authority in the European Union. In contrast to others,[1] it will not be argued that the constitution as the framework for sovereignty has lost its hegemonic organisational force. Most scholars see related concepts, such as the state, challenged but not the concept of constitutionalism itself. Yet 'constitutionalist rethoric has itself become part of the problem.' Loughlin criticises some scholars for they have 'too readily abandoned state theory in favour of adherence to a free-standing constitutionalism, and this has left them without anchorage in the open seas ahead. The contemporary challenges to constitutional doctrine require a return to state-based concepts.' Thus Loughlin argues in favour of re-invoking the science of the state.[2] Albeit, it can be held against this position that states have lost control over certain policy areas such as financial markets, environmental policies, trade, resources management, climate change, refugees, international crime and terrorism, digital media, information and communication technologies etc. That means the conditions for the preservation of security, welfare, peace and freedom are changed.[3] Accordingly, the state can no longer be the exclusive point of reference for constitutionalism but must be revised towards a framework beyond the nation state. Here, and similar to nation state-based approaches, constitutionalism as an analytical framework (for instance to evaluate whether a specific polity is constitutional or not) is not only a checklist approach whose boxes of constitutional features can be ticked and scholars can debate how many ticked boxes are the threshold level for the 'constitutional.' It is also a normative legitimising framework for political power – when deprived of this normative substance it seems questionable what its explanatory value for polities beyond the nation state framework could be. On the other hand, too demanding normative criteria (such as *demos* and statehood etc) could preclude the opportunity to gain explanatory value from the transfer of constitutionalism to supranational polities.

However, unlike other international organisations, such as the United Nations, the European Union can be reasonably described as constitutional since it establishes supranational legislative and administrative bodies whose acts are directly applicable to individuals. Respectively, an effective system of fundamental rights protection against these acts has been developed which is not to be found in other international human rights regimes which impose obligations only on the contracting parties in order to protect individuals against the actions of national authorities but not against actions of the regime itself. Accordingly, it does not seem justified to extend the term constitution or constitutionalism to international organisations or regimes that do not resemble differentiated patterns of legislative, executive and judicial powers and their allocation to separate institutions, nor a system of fundamental rights protection against these powers, nor any involvement of the people affected in any democratic form.[4] The European constitution is thus distinctive from international organisations or regimes since the European Union has autonomous political authority in many policy areas. Furthermore, the

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[1] D. CHALMERS, *Post-nationalism and the quest for constitutional substitutes,* in "Journal of Law and Society" 27(1/March 2000), p. 180.

[2] M. LOUGHLIN, *In defence of Staatslehre*, in "Der Staat" 48(1/2009), p. 2.

[3] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization,* in "WHI working paper" (9/2008), p. 3.

[4] Ivi, p. 8.

development of judicial remedies against its own legal acts distinguishes the European Union from classical international organisations.[5] The material EU constitution has initiated a constitutionalisation process by which an integrated legal order has been established within a specific territory. By this constitutionalisation (which itself was triggered by increased transnational activity, regulation and thus litigation), the European nation states have been transformed into Member States and had to re-define their sovereignty by sharing it both in the vertical and horizontal dimension. With regard to this process, especially since the ECJ has used the founding treaties to promote an integrated multilevel legal order in Europe, the EU can be described as a constitutionalised polity.[6]

However, considering the challenges emerging from European constitutionalism to the concept of constitutional sovereignty it is evident that careful conceptual adjustment is required in a way that 'the most useful way of assessing the prospects of post-national constitutionalism is to undertake a reciprocal readjustment of existing constitutional practices beyond the state on the one hand, and conventional constitutional expectations on the other.'[7] Pernice even more strongly suggests that 'constitutionalism is the correct and only possible answer to the present challenges of globalisation, provided that the concept of constitution is adjusted to the needs of the international multi-layered or multilevel system of governance.'[8] Although the challenges imposed by globalisation and transnationalisation on the classical understanding of sovereignty and constitutionalism have been well perceived in the scholarly debate, however, there has not been a true paradigm shift. Scholars tend to postulate lots of '*post-isms*' instead of establishing a conceptual framework that transcends the classical assumptions of indivisible and unitary sovereignty in European constitutionalism. Here it is asserted that the European constitution cannot be modelled as a zero-sum game between European and Member States sovereignty. It does not mean either a loss or a gain of sovereignty, but creates new forms and opportunities of sovereignty. It is therefore necessary to modify the classical assumptions of sovereignty and constitutionalism instead of denying the constitutional character of this new form of transnational constitutional law as this would mean to lose adequate analytical means to understand this new and unique type of legal and political order It is obvious that the Member States no longer possess 'full' sovereignty in the classical sense. The notion of 'pooled,' 'divided' or commonly exercised sovereignty is rather widely accepted and there already are a few new concepts to re-assess sovereignty in the European Union, such as open statehood (Hobe 1997), late sovereignty (Walker 2003), and governance beyond the state (MacCormick 1999). A re-interpretation of sovereignty is necessary and useful in order to understand the European constitutional order not as a vertically integrated, hierarchical system of independent and fully autonomous Member States and European legal orders. There is rather a need for a theoretical approach that accounts for national and European law constituting 'complementary sets of legal norms and values.'[9] That means in particular that when it comes to the question of applying the concept of sovereignty to the legal and political architecture of the EU, the question about the (in-) divisibility of sovereignty is the core question.[10]

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[5] F. C. MAYER, *Verfassungsstruktur und Verfassungskohärenz. Merkmale europäischen Verfassungsrechts?*, in "WHI working paper" (17/2003). Published in "Integration" 26(4/November 2003), p. 13.

[6] S. FABBRINI, *Contesting the Lisbon Treaty. Structure and implications of the constitutional divisions within the European Union*, in "European Journal of Law Reform" 10(4/20089, p. 460.

[7] T. ISIKSEL, *On Europe's functional constitutionalism. Towards a constitutional theory of specialized international regimes,* in "Constellations" 19(1/2012), p. 105.

[8] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization*, cit., p. 3.

[9] R. KWIECIEN, *The primacy of European Union law over national law under the Constitutional Treaty*, in "German Law Journal" 6(11/2005), p. 1484.

[10] P. NUERNBERGER, *Die Auferstehung der Souveränität. Rückkehr zur Monarchie oder Wandel eines staatsprägenden Konzepts im Zuge der Auflösung des Nationalstaats?*, in "WHI working paper" (3/2010), p. 17.

2. Plural or global constitutionalism in Europe?

When developing a new concept of sovereignty that incorporates revised assumptions about indivisible and unitary sovereignty, we have to ascertain where it is located within the overall debate about constitutionalism and sovereignty beyond the nation state. Many of the classical approaches – which argue in favour either of absolute European constitutional supremacy or absolute national constitutional supremacy – in order to re-assess sovereignty beyond the nation state suffer from a 'condition of studied indeterminacy' leading to a notion of the European constitution as two opposing 'sets of interlocking and interacting legal systems that have the potential to answer the same question in mutually contradictory ways.'[11] Other perspectives, especially in the German debate, suggest to distinguish between 'sovereign rights' and 'sovereignty,' where the first are the form in which the latter is exercised and can, unlike sovereignty, be attributed to international organizations likewise.[12] However, this point of view seems to resemble the pre-Westphalian, feudal structure of political authority that by no means is similar to the architecture of political authority in the European Union. In the literature, especially two approaches seem to offer alternative accounts for constitutional sovereignty in Europe that leave behind the classical Westphalian assumptions of constitutionalism and sovereignty. Firstly, there is a remarkable number of 'pluralist' accounts that re-frame the relationship between legal orders in a non-hierarchical way, such as 'legal pluralism' (Buchanan 2009, Barber 2006), 'constitutional pluralism' (Walker 2002), 'Constitutionalism Beyond the State' (Kumm 2005), and 'multi-level constitutionalism' (Pernice 2002), just to mention the most prominent. These pluralist approaches are the antithesis to, secondly, 'global' or 'world' constitutionalism (Peters 2009; Peters/ Armingeon 2009) that follow a rather monist Kelsenian model.[13] Due to reasons of space these approaches cannot be elaborated in detail here, however, the basic characteristics of plural and global constitutionalist approaches will be outlined in the following in order to illustrate where and for what reasons the revised concept of multidimensional sovereignty can be located in the overall debate.

3. Legal pluralism and constitutional pluralism

Legal pluralists observe a plurality of legal regimes which means that in a specific jurisdiction there are more than one sources of law; thus fragmentation is the core thesis of legal pluralists. Fragmentation means that policy areas are no longer governed by 'general' law but by specialist systems, each of which has its own principles and institutions. Those systems are characterised by functional specialisation or functional differentiation.[14] However, legal pluralists often suggest to regard legal pluralism not as a well-adopted legal theory but as a suggestion for a 'metaphoric shift' towards imagining legal forms not in constitutionalist but pluralist terms and to reflect about the implications of such paradigmatic shift.[15] Furthermore, the concept of legal pluralism is also designed as an antithesis to constitutionalist approaches that base the idea of law on a founding act of a political community whose existence is presumed and called into presence at the same time through the constitution. Such founding act of a community (be it a nation state or an international community) as the point of reference for law causes a paradox that is extended from the nation state to international constitutionalism by constitutionalist approaches.[16] Buchanan (2009) criticises that (only) constitutionalist approaches are based on the

[11] K. SCHIEMAN, *Europe and the loss of sovereignty*, in "International and Comparative Law Quarterly" 56(3/July 2007), p. 486.

[12] B. DE WITTE, *Sovereignty and European integration: The weight of legal tradition*, in "Maastricht Journal of European and Comparative Law" 2(1995), p. 172.

[13] H. KELSEN, *Reine Rechtslehre*. 1st edition, Leipzig und Wien 1934 (2nd edition, Wien 1960).

[14] L. VIELLECHNER, *Constitutionalism as a cipher. On the convergence of constitutionalist and pluralist approaches to the globalization of law*, in "Goettingen Journal of International Law" 4(2/2012), p. 609f.

[15] R. BUCHANAN, *Reconceptualizing law and politics in the transnational: constitutional and legal pluralist approaches*, in "Socio-Legal Review" 5(2009), p. 34.

[16] Ivi, pp. 28 e ss.

paradox that the sovereign subject of law is presumed to exist prior to the moment when it is constituted by law, and that this moment of constitution also causes a moment of exclusion (of others from this constituted political community). However, this paradox and moment of exclusion seem not only inherent in constitutionalist but all political communities. The establishment of a community is necessarily leading to the exclusion of others, otherwise the EU's jurisdiction would be universal and thus not legitimate or legal. Furthermore, the paradox is only problematic if constitutionalism is *necessarily* associated with an act of foundation, which does not seem historically nor conceptually sound but a mere fiction. Law and politics are always in a mutually constitutive relation that is always paradoxical in a way that both presuppose the other before they are constituted.[17] Nevertheless, when addressing this paradox constitutionalist approaches were often caught in a normative trap in a way that explaining transnational polities in terms of constitutionalism often alludes to a deficient nature of transnational constitutionalism when the normative standards of the nation state framework are applied.[18] Furthermore, due to their concern about hierarchy constitutionalist approaches could also not really account for plurality. Although Buchanan acknowledges that constitutional pluralism seeks to accommodate plurality within a constitutionalist framework,[19] she criticises the way in which constitutionalist approaches often imply

> «both a hierarchy and a trajectory of transnational legalities, in which some emerging legal forms are imagined as amore complete (constitution-like) than others. This trajectory, which might be said to parallel to the developmental hierarchy of states in the Westphalian order, has the effect of privileging certain legal forms, such as judicial norm generation, over others».[20]

However, it seems perfectly appropriate to privilege juridical forms as this is required by the very idea of law: to provide for collectively binding force, utmost clarity and democratic legitimacy. If other forms of norm production would be included then law would be equalised to other social norms and thus would lose its distinctive status as both a technique of and a limit to government since now any norm could be a legal norm. Only by privileging legal forms it is possible to distinguish highly integrated polities, such as the EU, as constitutional and insofar distinctive from less integrated (international) regimes such as the WTO.

Legal pluralism as opposed to constitutionalism includes a few 'points of departure' from traditional constitutionalist thought: first, law is no longer thought to be necessarily formal and identified with state action; second, it does not identify law with 'posited rules, distinct and territorially defined'; and third, it does not construe law and politics or society as dichotomously.[21] Problematic herby is that it dilutes the idea of law as 'clearly delineated and identifiable' and envisages a 'plethora of often competing normative frameworks' wherein law is only one of many and equally valid type of norms. It recognises other forms of 'law' that are 'less legal' and includes 'a much wider range of formal and informal, institutional and discursive mechanisms.'[22] This undermines the idea of law as the only collectively binding normative force that has been authorised by legitimate political authority and thus takes primacy over competing normative frameworks such as religious and moral norms that are not authoritatively binding on the subjects within a political community. In more drastic terms: If everything is law then nothing is law – hence it can be questioned whether legal pluralism is after all 'legal' since it actually does not have an idea of law whatsoever distinctive from other social norms. However, so far law is the only known technique or form to realise and communicate the outcomes of the political process in a collectively binding form. As there seems no alternative in near sight, law continues

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[17] Ivi, p. 29.
[18] Ivi, pp. 30 e ss.
[19] Ivi, p. 32.
[20] Ivi, p. 39.
[21] Ivi, p. 35.
[22] Ivi, p. 35.

to be the dominant form to manifest legitimate and legal political authority and therefore maintains its privileged and elevated status.

A pluralist model of legal systems requires multiple sources of law and the possibility of inconsistency between legal rules to resolve norm conflicts. The overlap and interlocking between the European and Member States legal orders can be described as pluralist as each legal order remains distinct but will be faced with inconsistent rules of validity.[23] However, in contrast to the argument made by legal pluralists that this inconsistency and ambiguity should be welcomed, here it is argued that while inconsistency might be systemic, for normative reasons inherent in the very idea of law – clarity, predictability and even application of law – it is necessary to provide for a consistent rule of conflict resolution. Regardless of the political perks of inconsistency – be it an expression of the political 'tacit agreement to disagree' or 'constitutional self-defence' of the legal actors involved – it has dangerous implications for the very idea of law that cannot be left unresolved but must be addressed. Although it may be impossible to reconcile the competing claims about validity by sound legal theorizing, however, they can be addressed by legal reasoning based on normative assertions. These are about the functions and requirements of law and go beyond mere pragmatic reasoning in a way that they are based on genuinely legal accounts. In other words: they may not originate in dogmatic legal theorizing but in normative and functional reasoning inherent in the idea of law and are therefore of genuine *legal* character instead of merely pragmatic nature. That means, the contradictory rules of validity and supremacy *must* be accommodated for the sake of law and its normative principles. Also for practical jurisprudential reasons and related claims about rule of law it seems preferable that a consistent rule for conflict resolution is in operation (for instance a supremacy rule as functional rule instead of a validity rule).

Constitutional pluralism as the most prominent pluralist concept mainly opposes the monistic idea that there can be only one claim to political authority:

«Constitutional pluralism, in contrast, recognises that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of international law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical – heterarchical rather than hierarchical».[24]

Or in other words:

«Constitutional pluralism refers to a plurality of constitutional sources of authority and competing claims to jurisdictional supremacy by autonomous, interacting, and overlapping public (state and supranational) legal orders, whose relationship must be also characterized as heterarchical and which creates a potential for constitutional conflicts that have to be solved in a non-hierarchical manner.»[25]

Constitutional pluralism takes a stance on constitutionalism that is different from legal pluralism. Instead of regarding constitutionalism as a quest for hierarchy it is seen as a variable position of how different types of polities establish political authority and how they interact with each other. Therefore constitutionalism is not only a property of polities but also a medium of interconnection between different claims of authority.[26] The criteria to identify constitutionalism (beyond the nation state) are two basic constitutive criteria: the development of an explicit constitutional discourse and the claim for authority and sovereignty. There are also three governance criteria: jurisdictional scope, interpretive autonomy and an institutional structure to

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[23] N. W. BARBER, *Legal pluralism and the European Union*, in "European Law Journal" 12(3/May 2006), p. 308, 327.

[24] N. WALKER, *The idea of constitutional pluralism*, in "The Modern Law Review" 65(3/2002), p. 337.

[25] J. L. COHEN, *Globalization and sovereignty. Rethinking legality, legitimacy, and constitutionalism.* Cambridge UP, Cambridge 2012, p. 70.

[26] N. WALKER, *The idea of constitutional pluralism*, cit., p. 340.

govern the polity. Lastly, there are two societal criteria: the specification of criteria of membership in the polity and the procedures of articulating membership within the polity.[27]

However, even constitutional pluralists themselves admit that there are structural weakpoints in the concept of constitutional pluralism: First, pluralism may mutate into a new form of constitutional singularity or monism, driven by its tendency towards hierarchy and unity in the constitutional logic. Second, constitutional pluralism turns out to be constitutional plurality in a way that is not distinct from the classical Westphalian model but a variety of norms that are constitutional and belonging to the same hierarchical legal system. In this classical sense, 'there is simply no conceptual scope for any heterarchical legal relations, that operate between distinct constitutional singularities, to possess their own properly and distinctly constitutional character.'[28] If constitutional pluralism should be substantially more than constitutional plurality, a constitutional code needs to be provided that operates the heterarchical relationships between the constitutional orders and that does not necessarily emanate from one singular order. Third, the possibility of imagining constitutional pluralism constituted by heterarchical relationships between various legal orders may be due to the fact that these legal entities do not claim to have constitutional character.[29]

Despite its weaknesses, the idea of (constitutional and legal) pluralism seems appealing at first sight, since it gives maximum effect to different legal systems as they are not brought into a hierarchical order by subordinating one to another based on systemic or case-by-case rules of conflict. The resolution of conflicts between inconsistent rules of validity is not something that is of particular focus in these concepts at all. However, such conflict rules seem crucial for making constitutional plurality operational and effective and thus are essential in order to turn plurality into real pluralism. Both theoretical accounts, legal and constitutional pluralism, leave such cases of conflict essentially irreconcilable which undermines a fundamental normative idea of law: that it provides for consistent, predictable and uniformly applied rules (of conflict resolution). With regard to European law that means that in case of a conflict between a legal provision of a Member State and a European norm a rule of conflict solution is required that is the same in every Member State and that produces the same result in every Member State, regardless of which judge or which court or which legal tradition is involved. Normative values of law, such as rule of law or 'Rechtsstaat', require law to be evenly applied throughout its jurisdiction and to produce predictable results of conflict resolution – otherwise law might as well lose its character as law. Accordingly, within the jurisdiction of European law there cannot be principal plurality of legal norms in a way that there is no consistent rule available for conflict resolution, but which is left only to case-by-case reasoning based on mere circumstances and the discretion of the ruling judge. A plurality of equally valid legal norms that cannot be coherently nor consistently accommodated with each other implies the impossibility of conflict resolution. That is why concepts of legal or constitutional pluralism are problematic and impractical as they do not account for the necessity of a rule of conflict. Such rule of conflict remains impossible in strictly pluralist approaches as they cannot provide for systemic rules but merely arbitrary accounts for conflict resolution – which is ultimately incompatible with the very idea of law requiring even application, clarity, consistency and predictability. Additionally, in the European Union there seems no true plurality of several constitutional orders but rather one, multilevel constitutional order that consists of several interlocking and 'geared' layers - European and Member State legal orders - that constitute an overall and coherent European legal order. Instead of isolated plurality we rather find institutional 'bridging mechanisms' which ensure constitutional connection so that 'there is close structural linkage between national and supranational sites of authority.'[30] Consequently, there is no strict plurality of singular legal orders in Europe but mutual

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[27] Ivi, pp. 342 e ss.
[28] Ivi, p. 19.
[29] Ivi, pp. 18e ss.
[30] Ivi, p. 22.

correspondence between several legal layers that make up the overarching, multilevel European constitutional legal order.

4. 'World' or 'global' constitutionalism

The antithesis to plural legal regimes is the concept of global or world constitutionalism that seeks to explain the European constitution and its configuration of political authority in terms of a global and monistic development of constitutionalism. Here, global constitutionalism is not only a descriptive account but a normative theory suggesting a specific solution to the absence of clear order and relationships between different legal systems.[31] Global constitutionalism therefore can also be an academic or political agenda that advocates and applies constitutionalist principles in the international legal sphere[32] – while there is a considerable degree of 'conceptual confusion' in the field.[33] Broadly speaking, global constitutionalism is a framework to understand in constitutional terms the proliferation, overlapping and interconnection of diverse legal orders at subnational, supranational, international and transnational levels. Unlike societal constitutionalism leading to a world society, global constitutionalism emphazises the capability to shape global governance in legal-political, especially constitutionalist, though not internationalist terms.[34] As a concept global constitutionalism incorporates the following features: first, it is a concept of association, though not just association with a constitution as a document but with constitutionalism as a prism or scholarly lens through which the outer world is observed. Second, it is a concept of assimilation – assimilating constitutionalism into and adapting it to new contexts beyond the nation state as its historical point of reference; third, it is a concept of compensation as global constitutional structures increasingly compensate for the loss of regulatory capacity on the national level. Fourth, it is a concept of condensation for in the process of translation (domestic constitutionalism into beyond nation states) the normative essence of constitutionalism, democracy and rule of law, is kept despite of changing circumstances.[35] With regard to international relations and organisations, constitutionalization in this perspective means the institutionalisation of international norms – that is the process of emergence, creation and identification of constitution-like elements. The constitutional elements in this process are the following three: first, global constitutionalisation is a continuous and lasting process, not an ad-hoc event; second, there must be some formal dimension outlining procedural and institutional norms to serve the rule of law; third, there must be a substantive dimension ensuring fairness and security. This approach seems to identify global constitutionalism or constitutionalisation wherever there is formal constitutionalisation, understood as the institutionalisation of procedures for inter-state relations, substantive constitutionalisation, understood as the institutionalisation of human rights provisions, and the institutionalisation of formal and substantial norms.[36] However, this only refers to the institutionalisation of certain norms – which could also be described in terms that are already well-captured in international relations theory such as 'regime' etc. Therefore the concept of global constitutionalism is blurring the conceptual lines between regimes etc. and equalises those with constitutionalism – although the latter actually requires a certain intensity of political integration. Constitutionalism and constitutionalisation require some intensity and density of political integration, not just a process of institutionalisation. What distinguishes

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[31] C. VOLK, *Why global constitutionalism does not live up to its promises*, in "Goettingen Journal of International Law" 4(2/2012), p. 553.

[32] A. PETERS, *The merits of global constitutionalism*, in "Indiana Journal of Global Legal Studies" 16(2/summer 2009), p. 397.

[33] A. PETERS/ K. ARMINGEON, *Introduction. Global constitutionalism from an intderdisciplinary perspective*, cit., p. 386.

[34] C. VOLK, *Why global constitutionalism does not live up to its promises*, in "Goettingen Journal of International Law" 4(2/2012), p. 554.

[35] L. VIELLECHNER, *Constitutionalism as a cipher. On the convergence of constitutionalist and pluralist approaches to the globalization of law*, in "Goettingen Journal of International Law" 4(2/2012), pp. 603 e ss.

[36] K. MILEWICZ, *Emerging patterns of global constitutionalisation. Towards a conceptual framework*, in "Indiana Journal of Global Legal Studies" 16(2/Summer 2009), pp. 416 e 434.

constitutionalisation is the intensity and scope of its process of institutionalisation which might not be present yet at the international level. So there cannot be an international constitution identified just by 'scaling down' a state constitution to functional equivalents, especially of organisational nature, that we can find plenty in the international arena. However, the argument can also be reversed as 'an international or global constitution cannot be gained by simply scaling up a typical state constitution. We must be aware of the problems of translation.'[37]

World constitutionalism claims that it is not based on the traditional concept of international law as law between states only, and that it does not simply equate the community of states with the community of citizens. It also does not imply that all the conditions for actual constitutionalism on a global level are met. However, it acknowledges that international law is capable of innovation beyond the mere regulation of inter-state affairs in a way that both states and their citizens are accounted for as subjects in the concept. The acknowledgment of such innovative potential of international law is in principle to be appreciated. However, today's international community is not one of people or citizens but one of states and classical international law instruments and organisations. Accordingly, the term constitutionalism does not (yet) apply to the global level.[38] Consequently, it does not seem appropriate to employ a concept whose conditions are not yet established or evidently met in this specific context. As argued before, constitutionalism does not only mean that certain legal norms (of national or international law) provide for constitutive and organisational functions. It also and necessarily means that constitutional norms reflect a fundamental normative basis or values of the community ruled by this legal order. This is precisely what distinguishes constitutional orders from mere functional equivalents. So far international legal orders seem not capable of providing for such normative basis shared by all the contracting parties. That eventually means that the concept of world constitutionalism waters down the concept of constitutionalism in a way that it equates constitutionalism with its functional equivalents and therefore could potentially apply constitutionalism to all sorts of legal or regulatory regimes. Finally, it can even be questioned whether international organisations that are alleged subjects of global constitutionalism even display the merely functional requirements of the constitutional terminology. For instance, the WTO does not at all establish any political authority entitled to make political decisions binding on all its members.[39] It can rather be argued that the global, international legal order is not anywhere near transforming into a world constitution. There certainly has been a move from international norms that have been regulating only bi-lateral state-to-state relationships towards multi-lateral cooperation. However, the intensity of this cannot be ranked as constitutionalisation on a global level – only regionally or sectorally there are constitutional regimes to be found. In other words: '(e)nhancing the effectiveness of international law alone does not transform it into an international constitution but rather into an effective international legal order.'[40]

Additionally, global constitutionalists assign international courts and tribunals with a key role in the constitutionalisation process; thus such approaches promote a legal and judicial version of constitutionalism. Accordingly, global constitutionalism embraces a liberal paradigm (or bias) of law and politics and is in danger to bias constitutions to be administered only by a few transnational judicial and legal elites and thus the juridification and de-politicisation of politics.[41] It can be questioned whether such juridification of international politics, including new normative standards, actually means the same as constitutionalisation.[42] That is why it seems

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[37] A. PETERS/ K. ARMINGEON, *Introduction. Global constitutionalism from an intderdisciplinary perspective*, cit., p. 387.

[38] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization,* cit., p. 12, 20.

[39] T. GIEGERICH, *The Is and the Ought of international constitutionalism. How far have we come on Habermas's road to a "well-considered constitutionalisation of international law?"* In: "German Law Journal" 10(1/2009), p. 43.

[40] C. VOLK, *Why global constitutionalism does not live up to its promises*, cit., p. 559.

[41] Ivi, pp. 559 e ss.

[42] T. GIEGERICH, *The Is and the Ought of international constitutionalism. How far have we come on Habermas's road to a "well-considered constitutionalisation of international law?"* cit., p. 42.

reasonable to conclude that 'there is no international constitutionalism in the normative sense today.'[43]

Taking all the above into consideration, it can be concluded that world constitutionalism seeks to apply concepts that have developed in a domestic context to levels beyond the state and thus seeks to identify a hierarchically structured legal order beyond the nation state. Legal pluralism, however, breaks with the domestic tradition and purports a disorder of legal orders that are in a heterarchical, un-connected relationship. However, there is a significant convergence of both approaches, most ostensibly in approaches of 'constitutional pluralism.'[44] This article rejects both legal pluralism, since it undermines the principles of legal clarity and predictability that are most essential for the idea of law itself, and world constitutionalism as it is neither empirically evident nor analytically adequate. So the concept developed in this thesis tends more to the constitutional pluralist side. However, it regards a consistent rule of conflict resolution as something inherently necessary in such concept – unfortunately this has not been sufficiently nor systematically considered by most concepts of constitutional pluralism. Constitutional pluralism conceptually neglects rules for resolving conflicts between contradictory norms and their validity, probably because such rules may smell like a 'quest for hierarchy' which seems not desirable in the debate. However, here such rule for conflict resolution is considered as a conceptual essential, that is required by normative and functional accounts inherent in the very idea of law, in order to make constitutional pluralism work in constitutional practice within the Europe.

5. Multidimensional sovereignty: a complementary structure of political authority in Europe

«Constitutional complexity is indebted to some scholarly views on the European Union, namely multilevel constitutionalism and constitutional pluralism».[45]

The challenges to the sovereignty concept that have emerged from European transnationalisation and constitutionalization have provoked a debate among scholars and practitioners about the question whether the concept of sovereignty is still meaningful and has explanatory value for the architecture of political authority in Europe. Some authors regard constitutional sovereignty to be lost and therefore a 'post-sovereign' (MacCormick 1996) or 'post-constitutional' (Somek, 2007) era. It is often argued that European law was neither international nor constitutional law but a 'mixture of the absence of both' and thus somehow 'post-constitutional.'[46] Furthermore, classical accounts of indivisible and unitary sovereignty are invoked and diagnose its demise in the European context. For example, according to Loughlin (2009) sovereignty was an 'absolutist concept, expressing the autonomy of the political sphere. It cannot be divided without being destroyed.'[47] Others see the risk of falling behind medieval times in a way that a concept of divisible sovereignty risks to reduce sovereignty to sovereignty rights or a set of sovereignty rights and thus to draw back on a diffuse and feudal concept of sovereignty.[48] In more dramatic terms:

«What we see in the Union is a process whereby Member States have each agreed not to act on their own in some fields but rather to act together. This is often called a 'pooling' of

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[43] Ivi, p. 59.

[44] L. VIELLECHNER, *Constitutionalism as a cipher. On the convergence of constitutionalist and pluralist approaches to the globalization of law*, cit., pp. 601 e ss.

[45] G. MARTINICO, *Born to be together. The constitutional complexity of the EU*, in "Review of Constitutional Studies" 16(1/2011), p. 90.

[46] A. SOMEK, *Postconstitutional Treaty*, in "German Law Journal" 8(12/2007), p. 1131.

[47] M. LOUGHLIN, *In defence of Staatslehre*, cit., p. 23.

[48] P. NUERNBERGER, *Die Auferstehung der Souveränität. Rückkehr zur Monarchie oder Wandel eines staatsprägenden Konzepts im Zuge der Auflösung des Nationalstaats?* cit., p. 22.

sovereignty. I don't like the phrase. It is a politician's trick for pouring new wine into old bottles and appearing to reconcile the irreconcilable».[49]

However, as argued before, it does not seem convincing to entirely abandon the concept of constitutional sovereignty merely because one of its classical elements has been under challenge. Most authors agree that sovereignty is not entirely lost but continues to exist in a different form. First of all, it can be argued against abandoning the concept of sovereignty that this concept has been used and developed for several centuries, hence it seems be capable to explain and analyse political and legal authority even in changing circumstances. Sovereignty has always been a 'fluid concept, adapting over the course of history to a changing social context and new modes of governance, from the absolute sovereignty of a monarch to the idea that sovereignty is vested in the people.'[50] Sovereignty is a concept by which we try to understand the configuration of political authority, nothing more and nothing less. Only very strong evidence of sovereignty being outdated could justify the denial of the concept at all. Furthermore, the concept keeps being used by practitioners whose assertions should not be entirely ignored by political and constitutional theory. So it could be held that the reason to maintain a theoretical concept is not the fact whether it provides an explanation, but rather how adequate this explanation is in order to understand political reality surrounding us.[51]

> «Thus, sovereignty cannot simply be wished away, since it has been foundational to the differentiation of modern political life into a domestic and international sphere. Without the concept of sovereignty, the way in which modern politics is conducted would become hard to comprehend, let alone justify».[52]

That means although traditionally the concept of sovereignty was used to understand a one-dimensional and monolithic structure of nation-state political authority, it has yet sufficient analytical scope to grasp more complex and multi-dimensional configurations of political authority such as the European Union. However, to unpack sovereignty especially with regard to its European dimension is a challenging and difficult quest.[53] Consequently, within the European Union constitution, sovereignty as a concept is not to be abandoned but its assumptions of indivisible and unitary sovereignty are to be revised. Especially the *Maastricht* decision of the German FCC and the following wave of literature have shown the need for a conceptual revision. Hereby the FCC has been particularly criticised for drawing on 19th century notions of sovereignty and applying them to the supranational EU. Here, many policy areas have been internationalised, policy-making has shifted from the national to the transnational level and supreme authority is dispersed between various entities on the international, supranational and national level. Territorial boundaries have been overlaid by functional distributions of competences between such entities.[54] That is why the efforts to re-think sovereignty beyond the

[49] K. SCHIEMAN, *Europe and the loss of sovereignty*, in "International and Comparative Law Quarterly" 56(3/July 2007), p. 485.

[50] A. ALBI/ P. VAN ELSUWEGE, *The EU constitution, national constitutions and sovereignty: an assessment of a "European constitutional order"*, in "European Law Review" 29(6/2004), p. 755f.

[51] P. NUERNBERGER, *Die Auferstehung der Souveränität. Rückkehr zur Monarchie oder Wandel eines staatsprägenden Konzepts im Zuge der Auflösung des Nationalstaats?* cit., p. 7 e ss; F. HALLIDAY, *Rethinking international relations*. Macmillian, Houndmills 1994, p. 78.

[52] J. BARTELSON, *On the indivisibility of sovereignty*, in "Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts" 2(2/June 2011), p. 86.

[53] N. WALKER *Sovereignty and differentiated integration in the European Union*, in "European Law Journal" 4(4/December 1998), p. 356; P. D. MARQUARDT, *Subsidiarity and sovereignty in the European Union*, in "Fordham International Law Journal" 18(2/1994), p. 631.

[54] I. PERNICE, *The Treaty of Lisbon: multilevel constitutionalism in action*, in "Columbia Journal of European Law" 15(2009), pp. 375 e ss.; A. ALBI/ P. VAN ELSUWEGE, *The EU constitution, national constitutions and sovereignty: an assessment of a "European constitutional order"*, cit., pp. 743 e 756.

nation-state have opened the 'Pandora's box of questions regarding the very nature of law, the sources of law's legitimacy, and the relationship between legal and political authority.'[55]

From this follows that the conceptual problem of sovereignty is not beyond conceptual and theoretical solution as suggested by Walker (1998). According to him, conflicting claims to ultimate legal sovereignty are merely social facts whose validity and realisation depends on their articulation by actors in the system – accordingly it can be argued that if it was not in the interest of these actors to enforce these claims, then there could be a basis for accommodating conflicting claims for sovereign authority. Regarding the conflicting, though equally plausible claims as 'sociological rather than logical, and so (...) amenable to solution'[56] seems to fall short of the conceptual capacities of the sovereignty concept. Sovereignty is more than a social fact and has both constitutive and normative impacts for the establishment and exercise of political power. To argue that sovereignty and thus the question about the final arbiter are diffused somewhere in the multilevel architecture of the EU is not acceptable as the consistent exertion of a final arbiter is a prerequisite for resolving cases of conflict and is further required by principles of rule of law and legal certainty.[57] It is rather the form of the constitution and exertion of this authority, and thus sovereignty, that has changed. It means that the sovereignty problem is difficult to address for the well-known paths of legal and constitutional thought can no longer be followed alone. It can be argued that 'the very notion of indivisibility is a main obstacle to redefinitions of sovereignty that hopefully could make better sense of those numerous instances in which sovereignty has been de facto divided within or between polities.'[58] Thus sovereignty in the European constitution is still constitutional, but yet to be understood in multi-source, complementary and multi-level instead of indivisible and unitary terms. The EU is a qualitatively new form of political community and polity. Here, co-operation and argumentative dialogues are essential to political authority and authoritative decision-making is exerted as collective action that is not deriving from a single, unitary political authority.[59] Accordingly, 'absolute or unitary sovereignty is entirely absent from the legal and political setting of the European Community. Neither politically nor legally is any Member State in possession of ultimate power over its own internal affairs.'[60] However, sovereignty is far from being lost since the potential of collective action within the framework of the European Union is much higher than of individual action. Sovereignty has not been lost, but divided and (re-) combined internally and thus enhanced externally. The first step towards a satisfactory theory of law and politics is therefore to leave behind the dominant paradigm of the classical sovereign state and (constitutional) law paradigmatically tied to it.[61] The EU has indeed transcended the Westphalian state other than simply replicating it in some super-state as a new resort of unitary and indivisible sovereignty. It has rather created new ways of imagining and realising political order, based on a pluralistic rather than monolithic architecture of political power and authority.[62] It is consequently the conceptual assumptions of indivisible and unitary sovereignty that must be revised. An accurate terminological concept for the character of the European Union does not deny its international law features but entails a more specific concept of its innovative and distinct features. It comprises both its international and constitutional character[63]. In the following such concept will

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[55] R. BUCHANAN, *Reconceptualizing law and politics in the transnational: constitutional and legal pluralist approaches*, cit., p. 22.

[56] N. WALKER *Sovereigtny and differentiated integration in the European Union*, cit., p. 383.

[57] P. NUERNBERGER, *Die Auferstehung der Souveränität. Rückkehr zur Monarchie oder Wandel eines staatsprägenden Konzepts im Zuge der Auflösung des Nationalstaats?* cit., p. 23.

[58] J. BARTELSON, *On the indivisibility of sovereignty*, cit., p. 85.

[59] J. NEYER, *Politische Herrschaft in nicht-hierarchischen Mehrebenensystemen*. In: "Zeitschrift für Internationale Beziehungen" 9(1/2002), p. 13.

[60] N. MACCORMICK, *Sovereignty, democracy and subsidiarity*. In: Bellamy, Richard/ Bufacchi, Vittorio/ Castiglione, Dario (eds), Democracy and constitutional culture in the union of Europe. Lothian Foundation Press: London 1995, p. 101.

[61] Ivi, pp. 101 e ss.

[62] K. SCHIEMAN, *Europe and the loss of sovereignty*. In: "International and Comparative Law Quarterly" 56(3/July 2007), p. 487.

[63] B. DE WITTE, *The European Union as an international legal experiment*. In: De Burca, G./ Weiler, J. H. H., The worlds

be developed. It is a concept of multidimensional constitutional sovereignty in the European legal-political order; hereby 'multidimensional' means firstly, that multiple sources of authority constitute a complementary (non-indivisible) structure of political authority, and secondly, that multiple levels of authority constitute a multilevel (non-unitary) structure of constitutional authority in Europe.

Multiple sources of authority in Europe account for European sovereignty to be multidimensional in a way that the European constitution is a complementary structure consisting of national and European constitution(s).[64] That means both the European and the national constitutions can only be fully comprehended by understanding them as a European constitutional system composed of complementary constitutional layers.[65] This idea of a complementary structure of constitutional authority is borrowed from Pernice's concept of the 'post-national' constitution. Pernice (2004) suggests a 'post-national concept of the constitution' that transcends the traditional nation state-based concept of the constitution. Here, the point of reference for the constitution is no longer the state but also polities beyond the (nation) state. This does not necessarily mean that statehood is on its demise but that it is open for other sources of political authority. Linking the concept of the constitution with statehood does not only seem a historical coincidence in Western Europe but seemingly a very German, state-centred approach that is neither necessarily found in other EU Member States nor conceptually presupposed by the functions of a constitution. The function of modern constitutions is to constitute public power, the institutions through which it is exercised, their competences and limits, and the criteria for the legitimicy of political power. Understood this way the constitution establishes a state – inasmuch as it could establish a political authority beyond the state. Therefore in a functional sense there is no substantial difference between the constitution establishing and legitimising public power on a state or non-state level. Consequently, the concept of the constitution is open for complementary, multilevel structures of political authority and integration beyond the capacities of nation states and thus a 'post-national' concept.[66] In this way post-nationalism describes a situation where the framework for law and politics is no longer the territorial borders of the nation state.[67] The post-national concept of the constitution refers to the legal foundation of government in general, including supranational authority that may be complementary to national constitutions. Understood this way, the European constitution has been in the making since the 1950s and has been a process rather than a static foundational act.[68] However, the 'post-national' element seems problematic in some ways, in particular because it is a functional concept. As such the 'post-national' constitution is about the constitution of public power – through the constitutional process a polity, with its institutions and citizens, is created. This concept allows for an understanding of a constitution without statehood.[69] However, this is problematic as ticking the boxes for constitutional functions alone is not sufficient for a 'constitution' since constitutionalism requires more than merely constitutive and organisational equivalents for political power exercise. It is furthermore problematic because of its misleading normative assertions. According to Pernice, the post-national concept of the constitution is based on the European citizens as the subjects of the constitution. That means it was not the states transferring sovereign powers to the Union nor the national constitutions validating European

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of European constitutionalism. Cambridge UP, Cambridge 2012, p. 51.

[64] F. C. MAYER, *Multilevel constitutional jurisdiction,* in Von Bogdandy, Armin/ Bast, Jürgen, Principles of European constitutional law, Oxford 2010, second revised edition, pp. 428 e ss.

[65] I. PERNICE, *Die Europäische Verfassung*, in "WHI working paper" (12/2001), p. 7.

[66] I. PERNICE, *Europäisches und nationales Verfassungsrecht*, in "WHI working paper" (13/2004), p. 9f.; I. PERNICE, *Die Europäische Verfassung.* In: "WHI working paper" (12/2001), pp. 6 e ss.

[67] D. CHALMERS, *Post-nationalism and the quest for constitutional substitutes*, in "Journal of Law and Society" 27(1/March 2000), p. 178.

[68] I. PERNICE, *Elements and structures of the European constitution*, in "WHI working paper" (4/2002), p. 3.

[69] I. PERNICE, *Theorie und Praxis des Europäischen Verfassungsverbundes,* in "WHI working paper" (8/2008). Published in Ch. Calliess (ed), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht*, Göttingen 2007, p. 5.

law, but the European citizens constituting public power on the European level through the means of treaty law. The validity of European law would emanate from the treaty that was concluded according to the provisions of national constitutional law by national institutions representing the citizens of Europe.[70] According to Pernice, the concept of multilevel constitutionalism therefore provides for a different perspective that was not focussing on an institutional analysis of the process but on the perspective of the individual where national institutions act as European agents of the people.[71] Pernice regards the constitutional layers

«each one established by, and with the sole aim to serve the interest of those who are at the source of each level's respective legitimacy: The individual citizens, with their double identity – national and European (...) it results in a new kind of separation of powers, more precisely, in a vertical system of checks and balances between national and European authorities stabilising the composed constitutional system to the benefit of the freedoms and interests of the citizens».[72]

From such individual perspective would rise awareness that citizens were responsible for both national and European policies and their basis of legitimacy as well as that the European constitution had a direct impact on national constitutions and that the new European role of domestic actors needs special consideration.[73] However, the allegation of citizens of the European Member States as the sovereign authority in the European constitution seems a bit idealistic and originating in normative ideas that neither reflect the current state of affairs in the EU nor are based on sound empirical evidence. They may not even appear to be desirable from a normative point of view as this would require standards of liberal democracy as found in nation states but neither functionally nor logically compelling on the European level.

The complementary structure of political authority in Europe is also reflected in the relationship between the authority 'layers'. Here, the European constitutional framework is exercising competences that have been transferred by the Member States, however, by doing so it has attained a considerable degree of autonomy so that now it can assert some policies even against the will of the Member States. That means it is the autonomy of the EU legal order that is mainly accounting for its ability to develop own policies, not the transfer of powers from the Member States.[74] However, the EU is neither usurping nation state functions nor can it be expected to. It rather complements the nation state as they are no longer able to achieve policy goals beyond the reach of domestic policy-making. That is why several levels of action are required. The implementation of European law through different layers, European and national agencies, is a feature of the complementary structure of the constitutional compound in Europe.[75] Within this multilevel constitutional structure, the idea of complexity comes into play as it draws on the idea that the European constitution is a product of the dialectic or dynamics between the national and supranational legal levels and whose configuration depends on the exchange between the two systems. Unlike constitutional pluralism complexity does not suggest a normative proposal for neutralising constitutional conflicts or reducing complexity as such.[76] However, when a constitutional conflict is at stake there must be a rule of conflict that is capable of providing a consistent solution, thus complexity needs to be reduced for the sake of rule of law. Since in the European complementary legal order legal sources are shared by both the national and supranational levels, autonomy or independence of one legal level is hard to extract.

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[70] Ivi, pp. 6 e ss.

[71] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization,* in "WHI working paper" (9/2008), p. 14.

[72] I. PERNICE, *The EU system of legislation and its modernization*, in "WHI working paper" (12/2008), p. 4.

[73] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization,* cit., p. 15.

[74] E. CANNIZZARO, *The European constitutional framework. Re-reading Eric Stein's Thoughts from a Bridge on the 50th anniversary of the Treaty of Rome*, in "The American Journal of Comparative Law" 55(2007), p. 776, 780.

[75] I. PERNICE, *Theorie und Praxis des Europäischen Verfassungsverbundes,* cit., pp. 24 e ss.; I. PERNICE, *The EU system of legislation and its modernization,* cit., p. 4.

[76] G. MARTINICO, *Born to be together. The constitutional complexity of the EU,* in "Review of Constitutional Studies" 16(1/2011), pp. 90 e ss.

The greatest challenge therefore seems to grasp and frame this intertwined and interdependent structural complexity.[77] Instead of being *sui generis* and thus beyond conceptual grasp

> «(t)he European Constitution is thus conceived as a monstrum compositum, composed of constitutional principles developed at the European level and complemented by (common) national constitutional principles. In this sense, one could conclude that in such a context national laws as well as European law partake in defining the European constitutional law».[78]

The interlocking of cross-level constitutional authorities is indicated by direct effect and direct applicability of regulations; compulsory transposition of directives and its judicial enforcement; unmediated implementation of supranational administration; and the preliminary reference procedure.[79] Especially the two pillars of the European constitutional framework, the principles of supremacy and direct effect, are the basis of a legal order that lacks means of coercive force, but achieves compliance through the active involvement of judicial and administrative authorities in the Member States. The establishment of these doctrines meant a transition from an international law organisation into an 'entity acting in its own right.'[80] Consequently, the authority of ultimate and final decision in the European Union architecture has been dispersed. According to the principle of conferral, policy areas that have not been transferred to the EU remain subject to the authority of Member States; in areas of exclusive EU competences and shared competences where the EU has taken action and thus obstructs Member State action, ultimate authority has been transferred to the European level. Thus it can be argued that neither the EU nor the Member States have ultimate and final authority, but political and legal authority (and thus competence-competence) are dispersed across multiple levels.[81] From this follows that the Member States of the EU no longer possess Westphalian-like but multidimensional constitutional sovereignty. The states are now characterised by transnationally integrated, globalised economies, by multilevel governance and by identities no longer exclusively tied to the nation state.[82] In the literature, the labels that are widely used to characterise this new configuration of sovereignty in a multilevel polity seem inaccurate as they fail to address the transformed character of sovereignty. They range from 'post-modern' to 'late modern' - meaning simply that states in Europe depend on common action to achieve their policy goals.[83] Others are rather pessimistic and regard sovereignty as totally ceased. According to this point of view, the sovereignty challenge mainly affects the states' capacity to act and thus undermines the autonomy of the political. Any new paradigms of governance without government would lead to the 'destruction' of the autonomy of the political and thus the end of sovereignty.[84] However, this somehow fatalistic approach does not seem convincing as it neglects the authority dimension of sovereignty and focuses merely on aspects of actual control. Albeit, sovereignty necessarily entails authority. Accordingly, a total loss of sovereignty would mean that within a polity's territory authority and jurisdiction would be exercised by an entity other than the competent authorities. This is clearly not the case in Europe. Here, the new challenges – as well as past challenges – will not abolish constitutional sovereignty. Rather new forms of authority structures and new forms of exercising sovereignty and achieving policy goals have evolved and will continue to evolve. However, they will not undermine sovereignty itself but change it in both

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[77] Ivi, p. 74.

[78] Ivi, p. 75.

[79] J. L. COHEN, *Globalization and sovereignty. Rethinking legality, legitimacy, and constitutionalism.* Cambridge UP, Cambridge 2012, p. 72.

[80] E. CANNIZZARO, *The European constitutional framework. Re-reading Eric Stein's Thoughts from a Bridge on the 50th anniversary of the Treaty of Rome*, cit., p. 776.

[81] P. NUERNBERGER, *Die Auferstehung der Souveränität. Rückkehr zur Monarchie oder Wandel eines staatsprägenden Konzepts im Zuge der Auflösung des Nationalstaats?*, cit., p. 14.

[82] G. SORENSEN, *Sovereignty: change and continuity in a fundamental institution,* in "Political Studies" 47(3/1999), p. 602.

[83] Ivi, p. 602; W. WALLACE, *The sharing of sovereignty: the European paradox*, in "Political Studies" 47(3/1999), p. 506.

[84] M. LOUGHLIN, *Ten tenets of sovereignty,* in N. Walker (ed), *Sovereignty in transition*, Hart Publishing: Oxford and Portland 2003, pp. 83 e ss.

form and substance – that is why the assumptions of indivisible and unitary sovereignty have to be revised instead of abandoning the sovereignty concept at all. Quite the contrary: '(s)overeignty's resilience is, if nothing else, a reflection of its tolerance for alternatives.'[85] That is why the concept of multidimensional European constitutional sovereignty allows for divisible and non-unitary sovereignty – meaning that there is a plurality of sources and institutions of political authority. The multi-dimensional configuration of authority in the European Union corresponds with the idea of a plurality of legal orders and thus a plurality of claims to legal sovereignty. The pluralist point of view does not consider one claim (for European constitutional supremacy or national constitutional supremacy) more authentic than the other but equally plausible in their own terms. This element of constitutional pluralism seems adequate as it implies multiple levels of constitutional authority (no longer only one) both as an explanatory and normative framework.[86]

Consequently, autonomy and independence are not preconditions for a transnational legal order to possess constitutional sovereignty. Although the notion of European law being separate has been promoted by the ECJ and is somehow a condition for EU law supremacy, European law has ceased to be separate from national legal orders as a result of the ECJ's jurisprudence.[87] The supranational character of EU law (supremacy, direct effect, qualified majority voting etc.) has established a certain degree of independence of the European legal order. However, European law is not fully autonomous from national law – it cannot be since it draws on national legal orders in both its effect and validity. Thus national law is an integral constitutive part of the multi-level European legal order. The EU is a highly integrated supranational organisation and its membership entails far-reaching effects on sovereignty. Being 'geared' with national law is therefore one of the constitutive features of European law, not a sovereignty 'insufficiency.' It is a new form of sovereignty, a new multi-level architecture of a legal order where classical assumptions of indivisible and unitary sovereignty no longer apply.[88] European constitutionalism is a transformative additional layer that overlays the original public international law foundation[89] as well as the national constitutional law foundation. Therefore, 'it does not seem plausible to maintain independence, that means possessing indivisible and unitary political authority, of a legal order as a conceptual feature of sovereignty as this legal order essentially depends on basic functions of another legal order.'[90]

6. Multidimensional sovereignty: a multilevel structure of constitutional authority

The second aspect of multidimensional sovereignty concerns the multilevel architecture of political authority in the European constitution. That means, there are not only multiple sources of authority, but they are also dispersed across different constitutional levels: the Member States and the European Union. Sovereignty in Europe is thus distributed among various levels. This internal dispersal over several levels, however, does not affect the external legal or political sovereignty of Member States in a way that it was lost or diminished. In the European Union we are rather facing politics beyond the sovereign state: 'Old conceptions of state sovereignty and of the absolutism of the nation state are now radically challengeable. This does not abolish either

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[85] S. D. KRASNER, *Abiding sovereignty,* in "International Political Science Review" 22(3/2001), p. 248

[86] J. BOLI, *Sovereignty from a world polity perspective*, in S. D. KRASNER (ED), *Problematic sovereignty. Contested rules and political possibilities,* Columbia UP, New York 2001, p. 70; S. D. KRASNER, *Abiding sovereignty*, cit., pp. 245 e ss.; N. WALKER *Sovereigtny and differentiated integration in the European Union*, in "European Law Journal" 4(4/December 1998), p. 361f.; N. WALKER, *Late sovereignty in the European Union*, in N. Walker (ed), *Sovereignty in transition*, cit., p. 4.

[87] I. HARDEN, *The constitution of the European Union*, in "Public Law" (Winter 1994), p. 611.

[88] A. ALBI/ P. VAN ELSUWEGE, *The EU constitution, national constitutions and sovereignty: an assessment of a "European constitutional order"*, cit., pp. 742 e 750.

[89] J. H. H. WEILER/ J. P. TRACHTMAN, *European constitutionalism and its discontents*, in "Northwestern Journal of International Law and Business" 354(17/1997, 1996-1997), p. 357.

[90] I. WEYLAND, *The application of Kelsen's theory of the legal system to European Community law – the supremacy puzzle resolved*, in "Law and Philosophy" 21(1/January 2002), p. 35.

states or nations as political and cultural communities.'[91] Europe's constitutional order is both complementary and multilevel. And because it complements the constitutions of the Member States it is not self-sufficient. Therefore, in order to get a complete picture of the European multilevel system not only the European institutions and procedures must be taken into account but also the national authorities and the role they play in European decision-making.[92] This architecture is best understood in terms of a 'compound of constitutions' ('*Verfassungsverbund*'). This concept has been most prominently introduced by Ingolf Pernice and suggests that '(f)rom the perspective of 'multilevel constitutionalism' the EU and its Member States can be conceptualised as one consistent system, composed of two complementary levels of government.'[93] Here the European constitution is a complementary structure comprising of both national and European constitutions that establish political authority at several levels of constitutional law. Multilevel constitutionalism understood this way refers to the constitution as a 'process of progressive allocation, division, organisation of powers at different levels of competence and action, a process finally driven by the citizens concerned and through the procedures more or less clearly defined by the national constitutions involved.'[94] In this sense the European legal architecture is very much different from the dual and hierarchical constitutional model in federal states. Furthermore, the establishment of the system of European governance has evolved by 'natural growth' over the decades and due to different incentives, needs and events embedded in a certain historical-political context. It has not followed a prescribed model of finality. Therefore it would be difficult to describe it as a coherent constitutional system in classical terms. It can be rather described as a 'hybrid form of 'postnational constitutionalism' without parallel or precedent in the modern world; a unique mix of intergovernmental and supranational institutions and actors that is more than an international legal order but does not quite fit any accepted category of governance.'[95] Or in Pernice's words:

> «In the light of multilevel constitutionalism, national constitutions and the European primary law which (...) can already be considered as a constitution today, together form one material legal entity: Its national and European components are complemeantary, closely interwoven and interdependent, and so are the actors of the EU legislative system».[96]

Assuming such constitutional compound structure where national and European legal provisions are complementary, the European constitution exists through the intertwined levels of national and European constitutional law. The two levels constitute a substantial, functional and institutional unity of the European constitution.[97] This concept of the constitution is based on a notion of a constitution in a broader, more functional sense. Thus the EU constitution is much more fragmented and heterogeneous than a nation state constitution since the EU is not a polity just beyond the Member States but incorporating them as one level of the polity. The European states are characterised by ceded constitutional independence/ Westphalian sovereignty, modified sovereign equality, compromised economic autonomy, security managed through alliance, open internal borders, external borders managed by a common regime, and yielded monetary sovereignty due to a single currency. Individual rights and freedoms are the base of the

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[91] N. MACCORMICK, *Liberalism, nationalism and the post-sovereign state*, in "Political Studies" XLIV(1996), pp. 561 e ss.

[92] I. PERNICE, *The EU system of legislation and its modernization*, in "WHI working paper" (12/2008), p. 24.

[93] Ivi, p. 4.

[94] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization*, cit., p. 14.

[95] C. SHORE, *'Government without statehood?' Anthropological perspectives on governance and sovereignty in the European Union*. In: "European Law Journal" 12(6/November 2006), p. 716.

[96] I. PERNICE, *The EU system of legislation and its modernization*, cit., p. 31.

[97] F. C. MAYER, *Wer soll Hüter der europäischen Verfassung sein?*, in "WHI working paper" (20/2004). Published in: "Archiv des öffentlichen Rechts"129(3/2004), pp. 411-435. and Beaud, Olivier/ Pernice, Ingolf (eds), Die Zukunft der Europäischen Union. Eine kritische Bilanz des Konvents. Brüssel 2004, p. 9; I. PERNICE, *Europäisches und nationales Verfassungsrecht*, in "WHI working paper" (13/2004), p. 5, 19f.; I. PERNICE, *Theorie und Praxis des Europäischen Verfassungsverbundes*, cit., p. 3; I. PERNICE/ R. KANITZ, *Fundamental rights and multilevel constitutionalism in Europe*, in "WHI working paper" (7/2004), p. 19.

transnational constitutional legal order of the European Union. These rights are acknowledged to derive from the constitutional traditions of the Member States, international obligations common to the Member States, especially the ECHR and the jurisprudence of the ECHR, and the case law of the ECJ. Consequently, any constitutional transformation of Europe always means a constitutional transformation of the Member States. The European polity is something new and has not been designed as a preservation or reflection of the accomplishments of nation states and their constitutions, but has multiple levels and sources and cannot be grasped by a traditional state- and territoriality-based concept of a single-level constitution.[98]

According to Pernice (2008), the main feature of the European multilevel constitutional system is that the citizens of the Member States are the source of legitimacy of both the national and the European level. Here again, any revision of the treaties means also an implicit revision of the national constitutions. However, the first assertion seems disputable as has been outlined previously. Nevertheless, the second is accurate because in an interlocking 'geared' structure of multiple levels each revision of one level affects the other. Furthermore, there are two autonomous legal systems in operation that substantially form a unity – the European legal order is thus a composed but yet coherent legal system. This requires a unity of law (as opposed to constitutional pluralism) within the system which is ensured by a rule of conflict and respective procedures which can guarantee that in similar legal cases the system delivers similar and consistent, legally binding solutions.[99] This demonstrates why the multidimensional concept of sovereignty is not pluralist in strict terms - in fact it envisages the necessity of a conflict rule that ultimately accommodates constitutional conflict in a consistent manner. However, it is acknowledged (as in constitutional pluralism) that there is no 'natural' hierarchy of norms between European and national law. The supremacy of European law is therefore a functional principle following from the principle rule of law and equality before the law. The supremacy principle does not govern validity but the application of norms (and *effet utile* of European law). Additionally, multilevel structure means that legislative, executive and judicial powers are not only attributed to different institutions at each level but also that different functions are conferred to different levels. Furthermore, their European role and the loyalty of national courts are the essential devices for realising the direct effect of European law. That is also why democratic legitimacy of European legislative acts first of all depends on functioning democracy and electoral systems in the Member States. Here, the ECJ and national courts play a fundamental role as safeguards. And since the legislative, administrative and judicial implementation of European law depends on the national authorities, the respect of the common values, fundamental rights and principles, especially the rule of law, is a condition for the functioning of the entire system and is ensured by homogeneity clauses on both the European and the national level (eg Art 23 German Basic Law). The balance between national autonomy and European homogeneity is finally reflected in the fact that the EU has no power of coercive force but depends on the cooperation of national authorities.[100] This horizontal dimension of multilevel constitutionalism limits the constitutional autonomy of Member States and establishes a common European law shared by all Member States. In a nutshell it can be concluded that in the European constitutional compound public power is originally and autonomously constituted. However, the establishment of a

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[98] R. CROWE, *The Treaty of Lisbon: a revised legal framework for the organisation and functioning of the European Union*, in "ERA Forum" 9(2008), pp. 176 e 189; K.-H. LADEUR, *'We, the European people…' – Relache?* in "European Law Journal" 14(2/March 2008), p. 156 e ss.; M. P. MADURO, *The importance of being called a constitution: constitutional authority and the authority of constitutionalism*, in "International Journal of Constitutional Law" 3(2,3/2005), p. 340; F. C. MAYER, *Verfassungsstruktur und Verfassungskohärenz. Merkmale europäischen Verfassungsrechts?*, in "WHI working paper" (17/2003). Published in "Integration" 26(4/November 2003), p. 50; W. WALLACE, *The sharing of sovereignty: the European paradox*, in "Political Studies" 47(3/1999), p. 518; U. K. PREUSS, *The constitution of a European democracy and the role of the nation state*, in "Ratio Juris" 12(4/December 1999), pp. 420 e ss.; J.-C. PIRIS, *Does the European Union have a constitution? Does it need one?*, in "European Law Review" 24(6/1999), p. 584.

[99] I. PERNICE, *The global dimension of multilevel constitutionalism. A legal response to the challenges of globalization,* cit., p. 15 e ss.

[100] Ivi, pp. 15 e ss.

European constitution is not a single foundational act but a continuous process. Here, the national and European constitutional levels are intertwined into a substantial unity. Whether European citizens are the democratic source of European public power and thus legitimise the European political order[101] can be doubted and is furthermore not of greatest importance for the question about the architecture of sovereignty in Europe.

Furthermore, the multilevel constitutional authority in Europe means the absence of strict hierarchy and enforcement procedures by coercive force. Multilevel systems of governance and polities are not just systems of interactive co-operation but an autonomous form of polity: a heterarchical form of political power relationships.[102] The multilevel legal order and legal practice in Europe is guided and structured by constitutional terms, even in the absence of hierarchical relationships usually associated with constitutionalism.[103] According to the concept of multilevel constitutionalism, there is no hierarchy or competition between the European and the national constitutions but 'a functional distribution of powers and a need for co-operation of all those vested with public authority.'[104] According to Roeben (2004), the legal-political architecture of the EU is rather characterised by a system of 'inverse hierarchy' where the nation states are placed both at the lowest and at the highest level of a hierarchical system, and the Union in the middle. At the highest level, the Member States determine the actions of the European level through the heads of states and intergovernmental action, whilst at the periphery the Member States are affected by the EU's action:

> «There are thus two separate yet parallel constitutional processes operating. It is the specific interaction between centre and periphery in both processes that meets the demands of the institutions of a liberal democracy (...) this interaction of centre and periphery thus transcends the constitutional nation state».[105]

Roeben's conceptualisation of absent clear hierarchy – whilst clarity is a defining feature of hierarchy – as 'inverse hierarchy' does not seem fully accurate. It seems rather appropriate to regard Europe as a community of law rather than a community based on force. That means '(t)he relationship of European and national law, though, is not based on hierarchy between the European and the national level but rather pluralistic and cooperative.'[106] The absence of hierarchy and enforcement capacity is a particular property of the European legal system. This feature, again, is very different from federal systems.[107] The European political-legal order is based on the 'voluntary respect of the law' by its Member States instead of physical enforcement. This principle is most obvious in the relationship between the ECJ and national courts: both have no power to declare null and void a provision or judgement of the other; national courts are bound to follow the judgements of the ECJ, however, the European courts cannot set aside a judgement of a national court. The ECJ is not a court of higher instance but 'a co-operative partner, giving advice on the interpretation of Community law and, in case of doubts, on the validity of a provision thereof – all this in the framework of the judicial dialogue.'[108] This means that the relationship between national and European courts is none of hierarchy but of co-

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[101] I. PERNICE, *Die Verfassungsfrage aus rechtswissenschaftlicher Sicht*, in "WHI working paper" (8/1999), pp. 3 e ss.

[102] J. NEYER, *Politische Herrschaft in nicht-hierarchischen Mehrebenensystemen*, in "Zeitschrift für Internationale Beziehungen" 9(1/2002), p. 15.

[103] M. KUMM, *The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty*, in "European Law Journal" 11(3/2005), p. 40.

[104] I. PERNICE, *Elements and structures of the European constitution*, in "WHI working paper" (4/2002), p. 11.

[105] V. ROEBEN, *Constitutionalism of the European Union after the Draft Constitutional Treaty. How much hierarchy?*, in "Columbia Journal of European Law" 10(2004), p. 346.

[106] I. PERNICE, *Does Europe need a Constitution? Achievements and challenges after Lisbon*, in "WHI working paper" (2/2010). Forthcoming in A. ARNULL / M. DOUGAN / E. SPAVENTA (eds), *A constitutional order of states? Essays in EU law in honour of Alan Dashwood*, Oxford UP, Oxford 2010, pp. 13 e ss.

[107] I. PERNICE, *The EU system of legislation and its modernization*, cit., p. 22.

[108] Ivi, p. 22.

operation based on judicial dialogue.[109] Since in a complementary constitutional system there is no hierarchical structure of norms, supremacy is one of application not of validity. The principle of European law supremacy does not suggest a hierarchy of norms but governs the application of a specific norm in cases of conflict.[110] The subordination of national under EU law cannot be explained in terms of a hierarchical relationship between federal and state or constitutional and statutory law.[111] The substance of the supremacy rule of European law accounts for this special, non-hierarchical relationship between European and national law. Although the literature has criticised the language of 'supremacy' for its hierarchical connotations and suggested to replace it by 'primacy',[112] the doctrine of supremacy as a positive principle of European law has indeed accounted for those concerns. It *does not* affect the *validity* of legal provisions at the Member State level and is therefore *not* a principle of hierarchy among different legal norms and systems. It rather governs the *application* of legal provisions in cases where there is a conflict between provisions of different legal systems. Supremacy is a rule that ensures the consistency between European and national political authority in a multi-level system where neither European nor national law are derivative law but original and autonomous and thus cannot brought into a strictly hierarchical order.

Furthermore, the supremacy of European law must also account for the principle of equality before the law that requires an even and equal application of European law throughout all Member States. That is why in cases of conflict the common norm has to trump the particular norm. Here again, European law supremacy is a functional, not a hierarchical principle.[113] That national constitutional courts claim to be in principle competent to review European acts can be understood not as a threat to European authority but as an 'emergency remedy' that ensures the existence of the entire system and emanates from the voluntary acceptance of the European architecture where supranational and national authorities are interdependent and closely interwoven.[114] That means that '(a)n intelligent primacy principle takes the concerns of the Member states seriously and accommodates them, but without undermining the integrity of the European legal order and the European Court of Justice.'[115] Thus a useful principle of primacy/ rule of conflict needs to accommodate both the functional requirements of European law and the

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[109] I. PERNICE, *Theorie und Praxis des Europäischen Verfassungsverbundes*, cit., p. 27.

[110] F. C. MAYER, *Wer soll Hüter der europäischen Verfassung sein?*, in "WHI working paper" (20/2004). Published in "Archiv des öffentlichen Rechts"129(3/2004), pp. 411-435. and O. BEAUD / I. PERNICE (eds), *Die Zukunft der Europäischen Union. Eine kritische Bilanz des Konvents*, Brüssel 2004, p. 10; F. C. MAYER, *Multilevel constitutional jurisdiction*, in Von Bogdandy, Armin/ Bast, Jürgen, Principles of European constitutional law, Oxford 2010, second revised edition, p. 428f.

[111] J. HABERMAS, *The crisis of the European Union in the light of a constitutionalisation of international law,* in "The European Journal of International Law" 23(2/2012), p. 341.

[112] It has been debated by Avbelj (2011) whether the principle of supremacy actually means 'supremacy' or 'primacy.' The difference between those is seen in their range of operation. Supremacy is regarded as an intra-systemic feature of European legal acts operating within the legal orders of the Member States and thus concerning the validity of law. Supremacy thus only operates within the respective legal order but does not extend beyond it. Hence, relationships between distinctive legal orders are not governed by supremacy. Each legal order had its own internal hierarchy with the supreme legal provisions on top, but there was no hierarchy between the multiple legal orders in Europe, there is no overarching hierarchical pyramid of all European legal orders. Their relationship was rather heterarchical and ruled by the principle of primacy. According to Mayer, primacy implies a non-hierarchical relationship between norms, whereas supremacy implies a hierarchical one (Mayer, 2010: 431). Supremacy implies the idea of hierarchy whereas primacy implies primacy in application (not validity) (Mayer, 2006: 3). Primacy is a trans-systemic principle governing the relationships between autonomous legal orders and thus the sovereign levels in the European legal architecture. Accordingly, primacy was a feature of European law and operates as a rule of conflict governing the scope and application of legal provisions, it thus requires conflicting national law to be disapplied and hence ensures the effect and uniform application of European law across all Member States (Avbelj, 2011: 750f.).

[113] I. PERNICE, *Theorie und Praxis des Europäischen Verfassungsverbundes*, cit., p. 23.

[114] I. PERNICE, *Elements and structures of the European constitution*, cit., p. 11.

[115] F. C. MAYER, *Supremacy – lost?*, in "WHI working paper" (2/2006). Published in PH. DANN / M. RYNKOWSKI (eds), *The unity of the European constitution*, Berlin, Heidelberg 2006 and „German Law Journal", 6(11/2006), p. 9.

constitutional identity of Member States. Through the interaction and dialogues between EU judges and national judges, cases of hard conflict have been mostly settled or avoided in pragmatic way, thus EU law has enjoyed supremacy without a respective clause[116] until the Treaty of Lisbon. This particular supremacy construction and its unique features are an expression of multidimensional sovereignty:

«The inclination of the national courts to accept the supremacy of Community law in pratice, while reserving their ultimate power to intervene if the Community clearly oversteps the limits of the powers bestowed upon it by the respective national constitution, has thus created an unusual situation. The competence of the central entity to settle low-intensity conflicts between EU law and national law is assigned to the ECJ, whereas the courts of the Member States maintain their ultimate competence to settle conflicts involving sensitive issues of sovereignty. In a sense, then, the European order is unitary at its base (...) but it is pluralist at its top because it lacks a generally recognised supreme authority for settling issues of a fundamental character. To put it differently, the European order can be described as constitutional up to a certain level; but from that point upwards, it is still wedded to its internationalist origins».[117]

Consequently, in a multilevel constitutional structure such as the European Union constitution

«it is clear that absolute or unitary sovereignty is entirely absent form the legal and political setting of the European Community. Neither politically nor legally is any (M)ember (S)tate in possession of ultimate power over its own internal affairs (...) So the (S)tates are no longer fully sovereign states externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they any unimpaired political sovereignty. The community on the other hand is plainly not a state. Nor does it possess sovereignty as a kind of Federation or Confederation. It is neither legally nor politically independent of its members».[118]

The European constitutional process is not a zero-sum game in a way that a gain on the European constitutional level would lead to a loss (of sovereignty, validity etc) on the national constitutional level. It rather means the establishment of a complementary and multilevel structure that entails a re-configuration of political authority.[119] MacCormick (1999) suggests that the term 'divided sovereignty' is appropriate to grasp this state of affairs in Europe, where sovereignty is far from being lost but newly configured by division and re-combination beyond the sovereign state.[120] However, as has been shown sovereignty is not only divided but also non-unitary, consequently sovereignty is now much more than just 'divided': it is multidimensional in a way that it entails complementary and multiple sources of authority that are dispersed across multiple levels of constitutional authority.

7. Conclusion

This article has introduced a new concept of multidimensional sovereignty in the European Union constitution that leaves behind the assumption of indivisible and unitary sovereignty but instead offers an approach that incorporates the new architecture of European sovereignty as emerging from multiple sources and dispersed across multiple levels in the multilevel European constitution. This concept of multidimensional sovereignty oscillates between the poles 'constitutionalist' and 'pluralist' in a way that on the one hand it acknowledges

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[116] E. CANNIZZARO, *The European constitutional framework. Re-reading Eric Stein's Thoughts from a Bridge on the 50th anniversary of the Treaty of Rome*, cit., p. 779.

[117] Ivi, p. 780.

[118] N. MACCORMICK, *Questioning sovereignty. Law, state, and nation in the European Commonwealth,* Oxford UP, Oxford, New York 1999, p. 132.

[119] I. PERNICE, *Die Verfassungsfrage aus rechtswissenschaftlicher Sicht*, in "WHI working paper" (8/1999), p. 6.

[120] N. MACCORMICK, *Questioning sovereignty. Law, state, and nation in the European Commonwealth,* cit., p. 133.

a plurality of constitutional orders that lack systemic hierarchy. On the other hand and for normative reasons of (rule of) law it is deemed necessary to reconcile competing constitutional norms in cases of conflict in order to ensure even application and predictability of law. Hereby, the rule of European law supremacy is considered a functional rule of accommodating constitutional plurality and thus turn it into fully-fledged operational constitutional pluralism.