

# Provisions for a European Constitution

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# I. Provisions for a European Constitution

## A. Constitutional principles

In addition to the six principles guiding the reform of the European Union listed in the Mapping of Policies — democracy, subsidiarity, efficiency, transparency, clarity, and ease of citizens involvement — Volt subscribes to the following principles for a Constitution of the European Union.

- **Republicanism.** Volt supports a republican form of government for European institutions in which the European people, endowed with a common European citizenship, are the sovereign and in which the rule of law applies to all citizens equally. This provision is not intended to force a republican model on Member States as long as their institutions are democratic.
- **Representative democracy.** Given its attachment to individual liberties, Volt supports a system of representative democracy in which citizens periodically and freely elect their representatives to deliberate and decide on legislation.
- **Parliamentary system.** In line with a long-standing European tradition and in order to avoid an undue concentration of power, Volt supports a parliamentary system of government in which the Executive of the Union is based on and derives its democratic legitimacy from a majority of the European Parliament.
- **Federalism.** In order to ensure an efficient common government while respecting the EU's diversity, Volt supports a federal structure for the Union. The EU's federal government and its federated state governments share the EU's competences and are endowed with rights as prescribed in the constitution. While initially based on the EU's Member States and expected to remain largely stable, state boundaries may evolve following a constitutional process involving citizens.
- **Principle of subsidiarity.** As far as possible, competences shall be distributed to the level at which they are best carried out. While cooperation between the federal and state levels is encouraged, the constitution delegates relevant responsibilities and accountability to each level. Where appropriate, we further encourage devolving competences and associated funds to the regional and local levels, for increased efficacy and the proper expression of Europe's regional diversity, including where these regions cross state borders.
- **Primacy of federal law.** Federal law takes primacy over Member State law. In the case of a dispute, the federal judiciary decides on the interpretation of competences and declares certain laws invalid and, in certain cases prescribed by the Constitution, State laws.
- **Majority rule.** In line with our support for democracy, Volt advocates decision-making processes based on majority voting and is explicitly opposed to the principle of unanimity. In exceptional cases, such as constitutional

amendments, qualified majorities may be required, as provided for in the Constitution.

## B. Individual and collective rights

- **Recognise human rights.** Any Constitution for the European Union must include the recognition and respect of human rights and human rights texts, including, but not limited to the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. These rights shall be inviolable and inalienable.
- **Respect and protect human rights.** The respect and protection of human rights shall be binding on federal and state institutions. Rights may only be limited in the public interest, as provided for by law and where the principle of proportionality is met. Individuals who find their rights compromised will have access to redress through the courts, which must provide fair, effective, and timely access to justice for all.

## C. Institutions<sup>1</sup>

- **Legislature**
  - The European Parliament shall be the lower house of the legislature. It shall be directly elected according to “Voll’s Improved Bundestag Method”, in which citizens provide one vote for a candidate in a local constituency and another for a European party on a State-wide list.
  - The legislature shall comprise an upper house representing citizens as members of the States; its members shall be elected by citizens or by the lower houses of States. States may be represented on an equal basis or with a small proportionality based on the population. The upper house shall be a participant in legislation and constitutional amendments.
  - The Constitution shall detail the respective powers of both legislative houses. Each of the two houses shall have significant power to materially influence the regular legislative process on federal level and has the right of legislative initiative.
  - In particular, the process for bills to become law shall ensure that both legislative houses have an appropriate say, while avoiding legislative blockage. In case of persisting disagreements, a conciliation committee consisting of members of both houses may be convened. If the draft legislation proposed is not adopted, the Parliament, as the direct

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<sup>1</sup> See also the supporting legal part, explaining the underlying constitutional concepts [Underlying constitutional concepts](#)

representative of European citizens, may adopt the draft legislation by qualified majority.

#### ➤ Executive

- The President of the European Union shall be the Head of State. The President shall be elected by citizens or a body of democratically elected representatives and act as an overarching figure of unity with predominantly ceremonial powers. The President shall sign legislative acts and may refuse to sign them if there is a clear and expressed concern about the constitutionality; he or she may send the act back to the legislature for review or request a ruling from the Constitutional Court. The Constitution shall delineate a process for such cases.
- A Federal Prime Minister shall direct the political action through a cabinet of Federal Ministers. The Federal Prime Minister shall be elected by the European Parliament among its members. The European Parliament shall have the right to remove its confidence from the Federal Prime Minister by agreeing on a new Prime Minister (known as a *constructive* vote of no-confidence); the exercise of this right may be suspended for fixed periods following the election of a Prime Minister and ahead of parliamentary elections.

#### ➤ Judiciary

- The judicial power of the Union shall be vested in a judiciary comprising a Constitutional Court, a Supreme Court, and lower courts as necessary.
- The structure of the judiciary and the appointment process of its members should be based on the values of independence and accountability. In particular, judges should be protected from undue political interference.
- In line with international standards,<sup>2</sup> an independent, non-political judicial council, comprising judicial and non-judicial members, shall contribute to federal judicial appointments as well as to additional administrative, supervisory, or advisory roles. Specific requirements may apply to the appointment of judges of the Constitutional Court.
- The Constitutional Court should have the power to assess the constitutionality of federal and state laws. Federal and, in certain cases prescribed by the Constitution, state laws may be invalidated. The Supreme Court may be the Constitutional Court or a separate court.

## D. Competences

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<sup>2</sup> These include the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary, and the Minimum Standards of the International Bar Association.

A European Constitution should address the distribution of competences and include at least the following competences.

- **Principle of subsidiarity.** Competences should be distributed to the level at which they are best handled. Cooperation between the Federal and State levels shall be encouraged. Unless the Constitution explicitly states otherwise specific competences, the Federal level shall have the power to decide on the distribution of competences.
- **Exclusive Federal competences.** Some competences shall be reserved to the Federal level. For instance, the Federal government shall have exclusive competence in matters relating to foreign, defence and fiscal policy. The European armed forces shall be under the responsibility of a European Minister of Defence and under parliamentary control.
- **Taxation powers.** The Federal legislature shall be empowered to establish and lay, directly and indirectly, federal taxes, custom duties, and any other relevant revenues for the European Union.
- **Constitutional amendments.** Amendments to the Constitution shall be initiated in a similar process to regular legislation, but require the approval of both houses with the qualified majority prescribed in the constitution.

## II. Underlying constitutional concepts

The Provisions for a European Constitution lay down the objective of establishing a European Union in the form of a sovereign European (Federal) State. This Part explains the underlying constitutional concepts, in particular that of a (democratic) sovereign state. It applies this concept on the one hand to today's European Union and on the other hand to the European (Federal) State as envisaged above. Finally, it outlines the constitutional process that is necessary for the realisation of a European (Federal) State.

### A. The concept of (democratic) sovereign statehood

According to the established definition, a state is a social entity that has the following characteristics: a permanent population, a defined territory and a government.<sup>3</sup> In international law, such an entity is considered a state if it is recognized by the global community.<sup>4</sup>

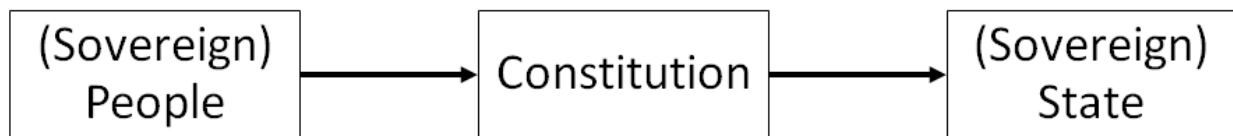
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<sup>3</sup> Three Elements Theory by Georg Jellinek (1851-1911), see Jellinek, General Theory of State (1900).

<sup>4</sup> Article 1 of the Montevideo Convention on Rights and Duties of States adds the qualification of "capacity to enter into relations with other states" to the previous three.

A state is sovereign if it is not subject to a higher power. Such a higher power may be another (external) state or power that exerts control over the (then non-sovereign) state. In multi-level political structures, a higher power might lie with a different entity than the respective state. A state is thus sovereign if it has supreme power over a certain territory.<sup>5</sup> (State) Sovereignty can thus be defined as the claim to **self-determination**.<sup>6</sup>

State sovereignty is derived from a sovereign. In (historical) monarchies, sovereignty lay with the crown. In modern democracies, sovereignty lies with the people.<sup>7</sup> People can establish a sovereign state by a conscious act, the instrument of which is the constitution:



The claim of self-determination manifests itself in certain prerequisites that are constitutive for a sovereign (self-determined) state:

- *Competent self-determination*: In multilevel political systems, the division of competences is key to the exercise of power. Competences are naturally distributed among several levels, but there is a maximum of one level that decides over the division of competences. The power to decide over the division of competences is labelled as *Kompetenz-Kompetenz*. The political level that has the *Kompetenz-Kompetenz* determines who (i.e. which political level) wants to exercise which political powers. It can exercise political powers at its own level or delegate them to another (higher or lower) level. By deciding on the division of competences, it is *competency self-determined*.
- *Financial self-determination*: Politics cannot be conducted without financial resources. Thus, for a political entity to be able to act in a self-determined way, it must have the exclusive power of disposal over its revenues and expenditures (budget sovereignty)<sup>8</sup>, i.e. its revenues and expenditures cannot be determined by an external political power.
- *Physical self-determination*: Political self-determination requires the physical freedom to do so. If a political entity is subject to force by another power (e.g. in the context of an occupation or a serious threat), it is subject to the will of this other power and thus no longer acts freely and self-determined. The ability to

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<sup>5</sup> Philpott/Zalta, *The Stanford Encyclopedia of Philosophy*, Fall 2020 ([Link](#)).

<sup>6</sup> The concept of self-determination is the core concept in the theory of sovereign statehood as defined by the German Federal Constitutional Court (FCC), see e.g. FCC, judgment of 30 June 2009 - *Lisbon*, para. 228 ([Link](#)).

<sup>7</sup> The concept of sovereignty has only very limited factual elements. It is largely a theoretical construct used to justify the claim of an entity to supreme authority (e.g. in distinction to other state actors).

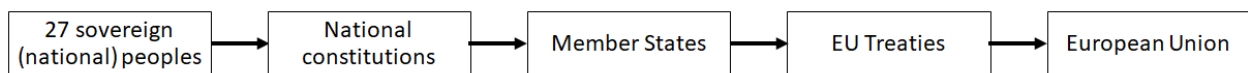
<sup>8</sup> See FCC, judgment of 18 March 2014 - *ESM*, para. 161 ([Link](#)).

ensure non-interference of foreign powers is thus constitutive to political self-determination.<sup>9</sup>

## B. The constitutional nature of today's European Union and of the envisaged European (Federal) State

Based on the above, today's European Union is not a sovereign State. It can be argued that the EU has a permanent people, a defined territory and a government (understood as public authority). In application of the Montevideo Convention, one can even argue that the EU can enter into relations with other states as it has been empowered to do so by its Member States. Thus, the EU has the quality of a state.

The EU is not sovereign, however, because it does not base itself on a sovereign (people). Rather, the EU derives its power - indirectly - from 27 separate sovereign peoples - those of its Member States. Thus, the emergence of the EU can be visualised as follows:



The EU Treaties<sup>10</sup> fulfil the constitutional function of setting up a political entity (the European Union) and they contain classical elements of a constitution (e.g. institutional provisions, fundamental rights). But they do not constitute a constitution insofar as they are derived from a sovereign and establish a sovereign State. In this regard, the Member States act as intermediaries, retaining all their state sovereignty but passing some of their political powers to the European Union. The EU Treaties are international treaties (albeit with far-reaching content).

The EU lacks the above-mentioned prerequisites of a self-determined/sovereign state.

- It does not have the *Kompetenz-Kompetenz*. Rather, Article 5(2) TEU provides for the principle of conferral according to which “the [EU] shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. The principle of conferral complements the principle of *Kompetenz-Kompetenz*. Where one part has the *Kompetenz-Kompetenz*, the other part is subject to the principle of conferral. In today's European Union, the *Kompetenz-Kompetenz* rests with the Member States. No power is transferred against the will of a single Member State. It is thus not a *competent sovereign*.

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<sup>9</sup> The list does not claim to be exhaustive. However, the listed prerequisites are considered crucial for understanding the concept of sovereign statehood for the purposes of this Supporting Document.

<sup>10</sup> TEU, TFEU plus annexes, protocols, declarations and the Charter of Fundamental Rights of the European Union, in short, EU primary law.



- The EU does not determine its financial resources. Rather, it is dependent on financial contributions from the Member States. The financial resources are defined in the Multiannual Financial Framework which requires unanimity from the Member States.<sup>11</sup> The same applies for the Own Resources Decision.<sup>12</sup> The EU is thus not financially sovereign, but depends on the financial will of the Member States.
- Finally, the EU cannot ensure its own defence without the Member States. It does not have its own armed forces, and the establishment of a common defence requires a unanimous decision by the Member States.<sup>13</sup> Thus, the EU also lacks military sovereignty, which remains with the Member States.

In addition, the EU cannot substantially amend its own constituting document (the EU Treaties) and ensure its own existence without the will of the Member States.<sup>1415</sup>

The European (Federal) State envisaged by this Policy shall have the constitutional quality of a sovereign (federal) State. Within the Federation which it constitutes, the European level shall have the supreme authority and shall not depend on the political will of its constituent states.

For these purposes, the European (Federal) State shall be based on its own constitution which gives it full sovereign statehood, including *Kompetenz-Kompetenz* and budgetary and military sovereignty.

### C. The constitutional process to a European (Federal) State

The creation of a democratic sovereign European (Federal) State requires a unified European sovereign, one European people. That European people can be the democratic foundation of a sovereign European Federal Republic in the following way:



The creation of a (sovereign) European people requires the integration of currently separate peoples of the Member States into a single one. This integration requires a willful act of each of these peoples to join a (to-be-created) European people, e.g.

<sup>11</sup> See Article 312(2) TFEU.

<sup>12</sup> See Article 311 TFEU.

<sup>13</sup> See Article 42(2) TEU.

<sup>14</sup> See Article 48 TEU.

<sup>15</sup> See Article 50 TEU which allows for one-sided withdrawal from the EU, something which is not possible in a sovereign State unless the supreme authority consents (see e.g. Scotland, Catalonia); there is no general right to secession from a sovereign State, neither under constitutional nor under international law.

respective referenda. With the execution of this act, democratic sovereignty is shifted from the peoples of the Member States to the (one) European People.<sup>16</sup>

Once the European People is established, it can, by way of another wilful act, give itself a European Constitution by which it establishes a sovereign European (Federal) State.

Insofar as this European Constitution foresees the integration of the previously sovereign Member States into the newly created European (Federal) State, they now become (non-sovereign) federated states of this European (Federal) State.

The separation of both acts, the integration of national peoples into one European people and the passing of a European Constitution, would be the cleanest way to conduct the necessary constitutional process. Because the first act, the integration of national peoples into one European people, is a decision to be taken by each national people separately (because up to that moment they remain sovereign and independent). The decision to pass a European Constitution, however, is a decision of the (newly integrated) European people.

However, it is conceivable that both acts are conducted simultaneously. To this purpose, national referenda could be held on a pre-drafted European Constitution, which each national people would vote on whether to accept or reject. The acceptance of the European Constitution necessarily implies the integration of the peoples accepting the European Constitution into the European people and the loss of their (independent) sovereignty.

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<sup>16</sup> Even though it was created for a different purpose, Article 146 of the Basic Law for the Federal Republic of Germany explicitly provides for the possibility of the German people to give themselves a new Constitution. This includes the possibility of giving up sovereignty and of integrating into a larger nation with other peoples. (Article 146 of the Basic Law articulates the concept of democratic sovereignty which underlies the Basic Law. However, even without the existence of Article 146, that right of the German people would still exist, as it is pre-constitutional.)