The Treaty of Lisbon: Multilevel Constitutionalism in Action

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by

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### Introduction

Talking about the Treaty of Lisbon may seem equivalent, for some, to talking of an endless story of failures to reform the European Union substantially and to enhance its constitutional foundations.

For others it may mean talking about the – so far – last of several attempts of the governments of the Member States of the European Union to overrule democratic decisions of the peoples of Europe.

Again for others, like me, it is reflecting upon one of many steps in an extremely complex process of constitution-making for a political institution the character of which does not fit with our familiar categories.

Given the political difficulties the European Union is facing again, after the Irish people rejected the Treaty of Lisbon, and the attempt to salvage a treaty that was deemed, itself, to salvage the substance of the reform agreed with the Treaty establishing a Constitution for Europe, with some distance now from daily politics in the EU my intention is to find out what the Treaty of Lisbon is about as part of an ongoing “constitutional process” in Europe.¹ I understand this process

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¹ For recent discussions see Jaques Ziller, Les nouveaux traités européens: Lisbonne et après, 2008, and the contributions to two recent symposia in Florence and Sofia in: Stefan Griller/Jacques Ziller (eds.), The Lisbon Treaty. EU Constitu-
of constitution-making and –amending going hand in hand with the process of European integration involving both, the European Treaties which “constitute” the European Union and the national constitutions. This process is in my view

- revolutionary in that it breaks with traditional concepts for the political organisation of societies;
- challenging to the theories of state and constitutions, or: in short, of constitutionalism at the diverse levels of government;
- promising as a model of supranational arrangements for the pursuit of goals in the public interest common to the peoples concerned.

The Treaty of Lisbon is where we are in European integration today. Let me first comment on the issues of failures, democracy and the process of constitution-making. In the second part of my presentation I would like to deal briefly with the particular nature of the European Union which is not a state but a supranational polity, based upon states and binding their respective constitutions together into what I would call a composed constitutional system (“Verfassungsverbund”).² Multilevel constitutionalism is a theoretical approach to conceptual-
ise the “constitution” of this system as an interactive process of establishment, organising, sharing and limiting powers, a process which involves national constitutions and the supranational constitutional framework as two interdependent elements of one legal system. The European “constitution”, thus, is the progressive establishment and development of this multilevel system composed of the national constitutions as a basis and the evolving European primary law as a complementary constitutional layer. In this light the Treaty of Lisbon, including the efforts to bring it into force, can be understood as a case of multilevel constitutionalism in action. I will try to demonstrate this in the third part of this paper with some examples of the amendments to the EU-Treaty and the EC-Treaty as agreed upon in the Treaty of Lisbon.

I. Failures, Democracy and Constitution-making

Given the negative referendum in Ireland the Treaty of Lisbon seems to be the most recent and – so far – last case in a series of failures in European constitutionalism. But also democracy seems to be at stake inasmuch as the peoples’ vote in some Member States seems just to be passed over while parliaments of other Member States reach a degree of consensus as we may know it from times of dictatorship. To what extent, this is my question, are such points inherent to a process of constitution-making in a multilevel polity. My claim is that the process as a whole demonstrates the complexity of progressively establishing a functioning supranational framework for action on behalf of the citizens concerned and the need for continuous discussion, reconsideration and flexibility at this joint venture including more and more peoples, to find its appropriate constitutional shape for being successful.
1. A story of Failures?
Failures to substantially reform the European Union during the last twenty years went hand in hand with failures to substitute the European treaties by a founding treaty which looks more like a constitution, and this in a ten-years rhythm since the “eurosclerosis” of the early eighties last century. The initiatives were pushed by the need to “deepen” the Union each time it was enlarged. We can distinguish five steps of this difficult “constitutional” process.

a. Spinelli and the Single European Act
It started after the first enlargement (1973: Denmark, Ireland and the United Kingdom) and the accession of Greece (1981). The European Parliament adopted in 1984 the proposal of a real European Constitution drafted by Altiero Spinelli, but the governments of the then ten Member States did not like it. Instead they agreed upon some amendments to the EEC-Treaty in form of the Single European Act of 1986. This Act confirmed the qualified majority voting method in the Council in the areas where it was, since the De Gaulle-policy of the empty chair and the Luxembourg compromise, subject to a veto where a Member State invoked a “vital national interest”, and extended it to new policy areas like the harmonisation of legislation for the establishment and functioning of the Single Market. It associated the European Parliament to that legislation by the “co-operation” procedure and so permitted the completion of the Single Market by 1992. With a new provision on harmonisation for the completion of the Single Market and some new legislative powers such as in the field of environment and consumer protection policies the original concept of “negative integration” was replaced by the new approach of “positive integration”. This means that measures of harmonisation of national legislation aiming at the abolition of barriers to trade and complementary European policies have to secure a high level of protection for the public goods and interests on which national authorities relied to justify the respective restrictions of trade.

Regarding the constitution-issue, the refusal to base the Community on a Constitution according to the proposal of Spinelli can be regarded as a failure. But an important reform of the Community was indeed achieved. Nevertheless, the more European integration involved general policies, the more it was felt that its democratic legitimacy was in need, and the governments looked for a more direct control of what was to be decided in Brussels.

b. Delors and the Treaty of Maastricht

A new initiative was, therefore, taken only a few years later, closely linked to the unification of Germany (1990), but also in view of the accession of Austria, Finland and Sweden (1995): This not only required progress regarding democracy and efficiency of the decision-making procedures, but Jacques Delors was committed to complete the internal market by a common currency. The Treaty of Maastricht came into force in 1993,\(^6\) establishing the foundations for the EMU and for the Euro, extending the participation of the European Parliament in decision-making and shifting more policy areas into qualified majority voting at the Council. With a view to facilitate necessary cooperation among the Member States in foreign policies and home affairs, but also in order to contain the use of powers by the EC institutions, it established the European Council as an overall governing body for the EU. For the French President Mitterrand, speaking to the French people in the eve of the 1992 referendum on the Treaty of Maastricht, the fact that the “sovereigns” of Europe took back in their hand the power on Europe was the decisive achievement of this treaty. The French referendum passed, finally, with a very slight majority of 50.04%, while the Danish referendum failed with 50.7% voting “no”. Thanks to a declaration of the Edinburgh European Council of December 1992\(^7\) the Danes were confirmed to benefit from some derogations, including from the Euro, and voted again in May 1993 with “yes” (56.8%). The failure was overcome, but indeed, with the derogations and in creating the EU three-pillar structure the governments stepped back from a short and coherent basic legal instrument which could be considered to represent a constitution: It established the European Union, apart from the Community, without determining its legal capacity. Instead of generally applying the “Community-method” the two special chapters on Common Foreign and Security Policies and on Judicial and Police Cooperation were governed by the “intergovernmental” method. The whole exercise made the structure of the Union more complex for the people instead of clarifying its shape and functioning.

c. The Herman-Report and the Treaty of Amsterdam

This was not a solution for those who fought for an efficient and democratic Union based upon a “real” Constitution, a text, which contains only the essentials normally contained in a constitution and which also is named “constitution” with all the legal and political implications of this term. Given the re-unification of Europe since 1989 it was not, in addition, felt to be a sufficient basis for an

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\(^7\) Conclusions of the European Council in Edinburgh, 10-12 December 1992, \url{http://www.europarl.europa.eu/summits/edinburgh/default_en.htm}. 
enlarged Union to come, with more than ten new Member States. Ten years after the 1984 Spinelly-Draft, therefore, the European Parliament took a new initiative to formally constitutionalise the Treaties, this time on the terms of the “Herman-Report”. It was adopted in 1994 by the Institutional Affairs Committee and deemed to provide a framework and to consolidate the acquis communautaire in a genuine European Union constitution. It also included a catalogue of human rights to be guaranteed by the European Union. Yet, the Member States did not even seriously discuss this proposal. Instead, after intensive negotiations they agreed upon the Treaty of Amsterdam, which came into force in 1999. But again, the Member States could not agree upon the substantial institutional reforms as needed in an enlarged Union: Clarification on the delimitation of competencies, more democratic legitimacy and transparency, more efficient legislative procedures including the principle of qualified majority voting at the Council etc. Because of its poor substance, no referendum except in Ireland was organised for the ratification of the Treaty of Amsterdam.

d. The Treaty of Nice and the „Post-Nice-Process“

The matter was taken up again shortly later in Nice. What was called the “left-overs” of Amsterdam became the subject of further intense negotiations in Nice. However, even the Treaty of Nice signed in February 2001 could not settle the key-issues at stake. It almost failed because the Irish people rejected it in the referendum of June. Only with great efforts the Irish government achieved a positive vote in a second referendum of October 2002. Yet, the poor substance of the treaty and the fact that the “left-overs” of Amsterdam could not be settled made clear, that the method of diplomatic negotiation in an Intergovernmental Conference was not any more adequate in the enlarged Union to come to solutions as required. With a view to a new attempt, the Member States agreed, nevertheless, on four items to be resolved in the near future: efficiency and democratic legitimacy of decision-making, a better delimitation of the competencies of the Union, the legal status of the Charter of Fundamental Rights and the

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role of national parliaments. They envisaged also applying a new method for the preparation of the reform, with more deliberation instead of negotiation and bargaining\textsuperscript{13} as well as more public debates and participation during what was called the “post-Nice-process”. Both, the key-issues of the reform and the method were more precisely defined by the “Laeken-Declaration” of June 2001.\textsuperscript{14} This declaration established the Convention entrusted with the preparation of “options” or proposals for the reform. More importantly, in considering the simplification and reorganisation of the Union under the heading: “Towards a Constitution for European citizens”, the European Heads of State and Government broke a taboo and so paved the way for the Convention and its president Giscard d’Estaing to finally submit a draft “Treaty establishing a Constitution for Europe” to the European Council in 2003. We know what the fate of this treaty was.

\textit{e. Constitutional Treaty and Treaty of Lisbon}

With a few amendments this “Constitutional Treaty” was adopted and signed in October 2004 by the Heads of State and Government of the Member States meeting in Rome. It was welcomed both, by politicians and academia throughout the Union. Yet, the veto of the French and Dutch peoples dumped the EU into a deep crisis. The European Council ordered a “reflection-period” lasting more than two years. This period was used to analyse the reasons of the failure\textsuperscript{15} and discuss solutions. It was brought to an end when the European Council of December 2006 asked the coming German Presidency, to come up with a “report” on solutions for salvaging the substance of the Constitutional Treaty.\textsuperscript{16} Instead of a report, the Brussels Council of June 2007 came up with a “mandate” which very precisely defined the form and the terms of a new treaty. Instead of substituting the existing Treaties on the EU, as it was envisaged by the Constitutional Treaty, this new treaty should not replace but just amend them in the very traditional way under Article 48 EU.\textsuperscript{17} This more modest approach seemed to be suc-

\textsuperscript{13} Ibid., p. 604 et seq.
\textsuperscript{14} Laeken Declaration on the Future of the European Union, title II, fourth chapter: „Towards a Constitution for European citizens“, \url{http://european-convention.eu.int/pdf/LKNEN.pdf}.
\textsuperscript{15} For a summary and evaluation see: Peter Häberle, Europäische Verfassungslehre. 5th ed. (2008), p. 675 et seq.
\textsuperscript{16} Presidency Conclusions of the European Council of 14/15 December 2006, para. 5: „...The Presidency provided the European Council with an assessment of its consultations with Member States regarding the Constitutional Treaty. The outcome of these consultations will be passed to the incoming German Presidency as part of its preparations for the report to be presented during the first half of 2007“.
cessful when after a short IGC from July to October, on 17 December 2007 the Treaty signed by all 27 Member States in Lisbon. Yet, even this attempt seems to have become a failure, so far, after the negative vote of the Irish people in June 2008.

\[f. \text{Conclusion: Constitutional Character of the Process?}\]

There is still no “Constitution for Europe”, as the Treaty aiming at establishing it was rejected, and even the fate of the Treaty of Lisbon remains open. Can we talk of a “constitutional” process nevertheless? At this stage, three observations may already be made in favour of such a conclusion:

- Notwithstanding all the difficulties in making progress in reforming the European Union in parallel to its enlargement, and as required by it, not only governments and parliaments, but – more and more – also the public got involved in an intense discourse on the future of the Union. People become aware that the Union is not an international organisation, a matter only for the governments, but that it touches upon the daily life of the citizens, it matters them directly not less than domestic legislation and policies.

- Step by step the influence of the European Parliament was increased and the national parliaments have become significantly more aware of the need and the possibilities to have a stake in the policies implemented at the European level, but also in the decision-making process. Not only in a Protocol to the Treaty of Amsterdam their role and the need of their involvement has been formally recognised. Amendments also of national constitutions or new legislation in Member States take account of the important role national parliaments have to play in European policies which are becoming an increasingly important element of the internal policies of the Member States.

- Having in mind, finally, the four key issues defined by the Declaration of Nice – improved legislative procedures, power-sharing and subsidiarity, status of the Charter of Fundamental Rights and the role of the national parliaments –, but also the new role of the Convention comprising European and national parliamentarians as well as representatives of the governments to elaborate the terms on which the reform shall be realised, it seems to be difficult to deny that this process of amending the founding Treaties of the Union is a constitutional process – even if the result is not given the name of a constitution.
Andrew Moravcsik holds that a declared goal of the exercise, apart from a substantial institutional reform, to better legitimise the European Union in (re-)founding it, arguably, on (and by) a Constitution, was a failure both, a political and a scholarly one.\(^{18}\) Nevertheless, the process itself of drafting a Constitution in a process as open as that of the Convention,\(^{19}\) preparing and debating the ratification by national parliaments or by referendum in the Member States, and reflecting upon the consequences to be drawn from the rejection of the Constitutional Treaty and of the Treaty of Lisbon up to the final entry into force of the reform, raised public awareness, stimulated discourse and formed minds about the Union, its institutional framework, its powers and its goals more than any amendment of the Treaties in the past. This is not only important for the acceptance of a constitutional character of its foundations. But it will in its entirety also give the European Union as such, and through the improved transparency and the enhanced involvement of the European as well as of the national parliaments also the European policies, more democratic legitimacy as the Union has ever seen before.

2. Issues of Democracy

Nevertheless, some “constitutional” questions arise regarding the procedures: Was it conform to our principles of democracy, that after the “no” to the Constitutional Treaty by the French and Dutch peoples the governments “repack”\(^{20}\) the substance of the reform into the traditional form of an international treaty amending the EU- and EC-Treaties and decide to submit this amending treaty to no referendum any more.\(^{21}\) Is it democratic if, even after the new negative referendum in Ireland, the process of ratification is continued with the express intention to show the Irish people how with its negative vote it is isolated? Indeed,

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\(^{18}\) This is the conclusion with excellent arguments of Andrew Moravcsik, The European Constitutional Settlement, in: Kathleen McNamara and Sophie Meunier, eds. Making History: European Integration and Institutional Change (State of the European Union, Vol. 8, 2007). p. 23, at 47 et seq.


\(^{21}\) Critical Jürgen Habermas, Ein Lob den Iren, Süddeutsche Zeitung 17.6.2008, in the Internet available: http://www.sueddeutsche.de/ausland/artikel/310/180753/, who stated that after the failing of the European Constitution the Lisbon Treaty was intended as a bureaucratically agreed emergency solution, that should be pushed forward passing over the peoples’ opinions. By this last show of strength the governments demonstrated callously that they decide themselves on the destiny of Europe: „Nach dem Scheitern einer europäischen Verfassung stellte der Lissabonner Vertrag die bürokratisch verabredete Notlösung dar, die verhohlen an den Bevölkerungen vorbei durchgepaukt werden sollte. Mit diesem letzten Kraftakt haben die Regierungen kaltschnäuzig vorgeführt, dass sie allein über das Schicksal Europas entscheiden.“
except in the Czech Republic the decision to ratify has meanwhile been taken in all other Member States, in most cases with an overwhelming majority in the national parliaments. The governments clearly looked for a way to bring the Treaty of Lisbon into effect notwithstanding the Irish “no”. A compromise has meanwhile been reached at the Brussels European Council of December 2008 specifying among other points meeting concerns of Ireland that every Member State will continue to have its Commissioner in Brussels. The compromise is based upon the express expectation that Ireland will hold another referendum by the end of the term of the current Commission. This referendum is regarded necessary as Ireland is the only Member State where a referendum seems to be required under its Constitution. But can the people of Ireland conceive to be taken seriously, if a referendum on more or less the same question, in substance, (English summary) http://angl.concourt.cz/angl_verze/doc/pl-19-08.php; the parallel case at the German Constitutional Court (2 BvE 2/08 and 2 BvR 1010/08 - Gauweiler) is still pending, thus the German ratification will not be submitted before spring 2009; on the substance of the case see Elmar Brok/Martin Selmayr, Per Popularklage zurück nach Nizza?, in: 19 Europäische Zeitschrift für Wirtschaftsrecht (2008), p. 487-491. For the situation of ratifications see the table cf. http://europa.eu/lisbon_treaty/countries/index_en.htm, (last visit: 4th December 2008). In Germany, for example, the Federal Chamber (Bundesrat) decided with the votes of 15 Länder one abstaining, while in the Federal Parliament (Bundestag) a majority of 90% (515 for, 58 against). In Austria the Parliament voted with 151 for, 27 against, in Denmark 90 for, 25 against, while 64 MP’s were absent (see: EurAktiv 25 April 2008, http://www.euractiv.com/en/future-eu/clear-votes-new-eu-treaty-denmark-austria-germany/article-171930. In the Netherlands 60 members of the Senate voted for, 15 against, see EurAktiv of 9 July 2008, http://www.euractiv.com/en/future-eu/netherlands-ratifies-eu-troubled-lisbon-treaty/article-174063. Weiler (note 20), p. 652, talks about „Ceausescu-type majorities“ in some of our national parliaments“.


• nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the Union's competences in relation to taxation;
• the Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States;
• a guarantee that the provisions of the Irish Constitution in relation to the right to life, education and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the EU Charter of Fundamental Rights or by the justice and home affairs provisions of the said Treaty.”

As a result, para. 1.4 reads: „In the light of the above commitments by the European Council, and conditional on the satisfactory completion of the detailed follow-on work by mid-2009 and on presumption of their satisfactory implementation, the Irish Government is committed to seeking ratification of the Treaty of Lisbon by the end of the term of the current Commission."


is just repeated?\textsuperscript{27} The Brussels compromise seems largely to take account of the reasons for the rejection,\textsuperscript{28} and as much explanation will have to be given as possible to help the people understanding what the Treaty is about. On that basis it will be asked to vote again, but the question whether or not is it democratic to repeat the referendum on the reform of the European Union remains.

\textit{a. Passing Over the Popular Vote in Ireland}

The question points to fundamental limits for what can be asked from the Irish people? Would the repetition amount to a disregard of common democratic principles, and thus de-legitimise the reform even if it is achieved?\textsuperscript{29} The answer in my view is no, with two aspects to be considered in this regard:

- Political pressure exercised by other Member States or by the European institutions against the Irish people seems to be unacceptable and incompatible with traditional democratic principles\textsuperscript{30}. While by signing an international treaty the governments take the obligation to take all appropriate steps to ensure ratification according to its constitutional requirements, where parliamentary or popular consent, as may be required, is refused, nothing more can be asked for. In particular, there is no obligation in the EU-Treaty for any Member State to accept a reform-treaty. Even if the EU- and the EC-Treaties underline the dynamics of the process of in-
tegration by talking, in their preambles, of “an ever closer union among the peoples of Europe”, this does not imply a legal obligation to ratify amendments agreed by the governments under the procedure of Article 48 EU. This provision expressly states, that “amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements”. The freedom to ratify or not to ratify amendments is an essential feature of the Union – as it will be, after the entry into force of the Treaty of Lisbon, the right of each Member State to withdraw.31

Yet, every government after having signed an international treaty has the responsibility under international law for taking all possible steps to ensure the entry into force of that treaty. This does include, before a referendum, thorough explanation of what is at stake and of the consequences of a failure. The question is, whether or not, after a failure, the government continues to be under the obligation to look for solutions permitting the entry into effect of the treaty. My answer would be yes. In the absence of clear provisions of the national constitution to the opposite, nothing excludes, after a negative vote, considering and negotiating with the other contracting parties solutions allowing another referendum on a possibly better informed basis. More generally, it does not seem to be a violation of democratic principles if an elected government asks people to consider the question of ratification again whenever arguments can be put forward which allow the expectation that there is a chance for another attitude.

It follows that given the outcome of the discussions among the governments during the past months and the new conditions under which the Irish people will be asked to take a position, there is no objection in terms of democracy against a second referendum on the Treaty of Lisbon. The remaining problem of democracy is how, after the compromise being reached at the European Council in December 2008, to appropriately explain the Treaty of Lisbon as well as the terms under which the Irish concerns are agreed to be met, and to convince the Irish people of the need and advantages of the reform of the Treaties.

b. From Popular to Parliamentary Ratification

The other, more general question is whether or not it was democratic, after the negative French and Dutch referenda, to reorganise the form and slightly amend the substance of the treaty, which was a “Constitutional” Treaty intended to replace the existing primary law of the European Union, into a “simple” treaty

31 See Article 50 EU-L.
amending the EU- and EC-Treaties, with the clear intention not to submit the new Treaty to another referendum in these countries? Is Lisbon, as Tom Eijsbouts puts it, “a Treaty spirited by fear from the Public”? The questions can be answered with a consideration of principle and some reflections regarding the specific countries in question.

The general criterion is whether or not a referendum is more democratic than a parliamentary decision? The reply in my view is no. Though it is argued that a referendum would be closer to the citizen, democracy does not require or even does not necessarily mean that decisions have to be taken directly by the individuals concerned. Direct democracy is not the regular mode in most of the EU Member States, nor is it common, at least at the national level, to the American or any other constitutional system in the world, with the famous exception of Switzerland. Regularly, constitutions of the EU Member States have chosen the model of a representative, parliamentary democracy. The legislative power is given to democratically elected representatives of the people in the parliaments. Even constitutions are rarely adopted by a popular vote. Thus, only where a national constitution expressly so requires, the decision whether or not the treaty on the reform of the EU shall be ratified needs to be subject to a referendum. This seems to be the case in Ireland only.

For the particular case at issue, in France and in the Netherlands the constitutions do not require a referendum, neither generally for the ratification of international treaties nor for the specific case of an “integration”-treaty as for the EU. Here, it was a political decision to submit the ratification to a referendum. It is a political decision, too, for governments to choose the procedure of parliamentary ratification as far as their respective constitutions so allow. In representative democracies parliaments are democratically elected bodies with the constitutional power exactly to do this. In Germany a – consultative – referendum would even require an amendment of the constitution.

Finally, for the case of France it should be kept in mind that the point was made one of the central issues in the presidential election campaign. Sarkozy has made clear from the outset that he would not re-submit this treaty or a modified “mini-traité” to a referendum, but search parliamentary consent to the kind of modified

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33 In this sense: van den Bogaert (note 20) p. 7, at 18 et seq.

treaty he had in mind. The people, thus, had a choice. With the majority having voted for him as the new President of France the electorate has expressed that, at least, the issue was not felt important enough as to vote for the alternative.

c. Conclusion

Consequently, a new referendum in Ireland would not be contrary to democratic principles. The people of Ireland remains free to decide, the result will depend upon the ability of the government to convince the Irish citizens of the need for, and the advantages of ratification.

Regarding the French and Dutch peoples, it cannot be considered anti-democratic that in these countries the parliamentary way was chosen for the authorisation to ratify the Treaty of Lisbon like in all the remaining Member States. As Laurence Bourgorgue-Larsen rightly points out, there is no “confiscation démocratique”, the Member States retain their choice between the parliamentary and the popular way of ratification. 35

Not only the language has been changed from the Constitutional Treaty to the Treaty of Lisbon, also the approach of the reform: Instead of replacing the existing Treaties, it will amend them. Thus, as will be shown, the Treaty of Lisbon does not contain anything fundamentally different from earlier treaties reforming the European Union. The question should be allowed, whether a referendum in one or the other Member State is the appropriate means for searching public support and legitimacy of Treaty amendments at all. 36 Other procedures for bringing amendments to the constitutional foundations of the EU into effect could, certainly, be imagined. Tom Eijsbouts proposes, in order to better involve the public, to delay the ratification until in each Member State parliamentary elections have taken place. 37 For replacing the Treaties by a Constitution in a more formal sense parliamentary ratifications in all Member States could be combined with a European-wide referendum. 38 What is essential for the procedures of ratification and the legitimacy of the process, though, is that the citizens are aware of the developments and feel adequately represented by their respective parliaments, represented as people(s) in the will of which the Union is rooted, feel taken seriously, included in the process and empowered as the ultimate subjects and owners of this supranational joint venture. This regards not

35 Bourgorgue-Larsen (note 2), p. 98 et seq.
36 This is the question of Ziller (note 1), p. 148.
37 Eijsbouts (note 32), p. 207-211.
only the internal political process in each of the Member States but also the ways of participation at the European level.

3. Constitutional Process in a Multilevel Polity

Difficulties in bringing into effect substantial reforms of the European Union and, particularly, in giving it a Constitution, have much to do with its specificities as compared to both, states and international organisations. The term “constitution” for many does confer the message that it is about a state, since traditionally it is assumed that only states can have a constitution. On the other hand, the Statutes of some international organisations, such as the FAO, the UNESCO and the ILO are called “constitution”, although they are not states and, in particular, are not vested with executive and legislative powers to be exercised with direct effect against individuals. Before I come to explaining the specific confusion created in the case of the Constitutional Treaty with regard to the term “constitution”, and what it meant for the constitutional process of the EU, let me shortly give some explanation on the terms used.

a. Terminology

Talking about a constitutional process in the EU was a provocation for a long period, since people including studied academics considered it to be an international organisation and, thus, a matter among states only. If I continue to do so, nevertheless, some clarification is needed: What is a constitution, what is a state and what is an international organisation, all with regard to the EU?

aa. A “Postnational” Concept of Constitution

While there are many definitions of the term “constitution”: formal, material, functional etc., most are referring to a legal instrument of a specific authority establishing, organising and defining the government of a state on the basis of the rule of law. Generally, it is related to a state. My proposition is to look more generally at its functions as an instrument of societies organising their political arrangements and to “unbundle” it from the state. According to – what I call – a “postnational” concept it would include all instruments – national, subnational and supranational – for the establishment, organisation and limitation of public authority including legislative, executive and judicial powers of institu-

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40 See: Mark E. Brandon, War an American Constitutional Order, in: Vanderbilt Law Review 56 (2003), p. 1815, at 1816, characterising a constitutionalist system by „(1) Institutions authorized by and accountable to the people...; (2) some notion of limited government...; and (3) rule of law“.
tions as defined by this instrument by the people concerned and regarded by them as binding upon them. The distinctive feature of the constitution as compared to any other law, thus, is its fundamental character to establish the original and basic legal relationship between such institutions and the individuals who in the case of a democratic constitution are considered both, as the authors and the addressees of such authority.

What distinguishes this “postnational” concept from the “classical” idea of constitution is twofold:

- First, it is not exclusive, not comprising the entirety of powers and public authority exercised within a determined territory or society. This allows conceptualising federal systems as systems based upon some sort of power-sharing among interrelated levels of public authority, each being based upon its “constitution”.

- Second, it is not based upon the pre-existence of a state, the (pre-defined) people of which – as the “constitution-making power” – gives this state a constitution. Instead, as Peter Häberle rightly puts it in his seminal “European Constitutional Theory”, in the present times of the “constitutional state” there is not more state than the constitution “constitutes”. And it may constitute political units of another kind or reach as well.

Thus, constitution reflects the formal consent of the individuals desiring to organise themselves to form a polity with determined institutions, powers and procedures for determined action, with determined rights and duties, which so define themselves as the “citizens” of a polity which may be a state but may also a supranational entity or even one of global reach.

The essential characteristic of this notion is the status of the citizen as the author, and in some way also the owner of the polity or organisation so established, by what we may call a – certainly fictive – social contract. The establishment of such a social contract may take different forms and procedures, but its function and stability as a constitution will always depend upon the continuing recognition by the vast majority of the citizens of its legitimacy. This recognition must be contractual, meaning that it is based on reciprocity between the citizens so engaged, and this is where its binding power and authority is based upon.

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41 Most explicitly in this sense Carl Schmitt, Constitutional Theory, 1928, p. 21 (engl. translation by Jeffrey Seitzer, 2007, p. 75: „positive concept of the Constitution”), while the „absolute concept of the Constitution“ means identification: „the state is a constitution”, see ibid., at p. 4 (engl. translation, p. 60).

42 Häberle (note 19), p. 35.


bb. Elementary Characteristics of the State

The state has the monopoly of legitimate direct physical coercion. This is, according to *Max Weber*, its essential characteristic. Apart from other elements, used by *Georg Jellinek* for defining a state – a people, a territory, power of government in more general terms, for each of which it is at least debatable whether or not it applies for the EU – this power of direct physical coercion is definitely what the Union has not. The EU is not a state, but an entity based upon states and their respective constitutions and powers. There is no European army or police. Membership to the Union is entirely voluntary and where European law has to be enforced against the citizens it is through the national authorities. The European Court of Justice does not judge upon the validity of national law, while it exclusively does so of European law, for the interpretation of which it may also give preliminary rulings under the procedure of Article 234 TEC if so asked for by a national court.

There is another important feature: States are considered to have the competency to provide themselves with whatever competencies their people may wish (“competence-competence”). This is not the case for the EU, the powers of which are limited to what the provisions of the Treaties expressly confer upon its institutions. It is due to the multilevel structure of the EU that, in my view, the idea of “competence-competence” does not apply any more to the Member States of the EU either. But the limitation is essential for the EU. According to the EC-Treaty, in particular, the European legislation as a principle is implemented by the Member States. In sum, according to the principle of subsidiarity the Union acts only as far as Member States are not able to act effectively in pursuance of the determined goals, or not able to act at all.

cc. International Organisation

International organisations are a form of intergovernmental cooperation between states, based upon an international treaty for a determined purpose and equipped with institutions through which the contracting parties have agreed to cooperate and which are acting on their behalf. Acts of an international organisation may be binding for the states, in order to be applicable within a state, however, special authorisation by that state is needed.

In this light, the EU is not a classical international organisation, but – if at all – a new kind and very special one. It has real legislative powers with direct effect.

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47 See already ECJ Case 26/62 – Van Gend & Loos, 1963 ECR 1: „The conclusion to be drawn from this ist hat the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their natio-
for the citizens; its legislation has primacy over any conflicting national law. The citizens of the Member States – as citizens of the Union – elect the European Parliament, which controls the European Commission and co-decides upon legislative acts. The citizens are granted the right of free movement throughout the Union and they participate at municipal elections in their country of residence. Provisions for democratic legitimacy as well as the protection of fundamental rights are specific for constitutional public authority rather than for acts of an international organisation and hence more state-like features.

**dd. Conclusion: Voting on an Unknown Subject „Sui Generis“**

Yet, there is no pattern to describe adequately the Union and its functioning, often and meaningfully it is characterised as an organisation *sui generis*. People do not understand what it really is, what it is for and what it does. When mentioned by the media or politicians, they talk about excessive bureaucracy, high amounts of money wasted and measures taken which do not meet the concerns and expectations of the people. If things turn badly, politicians claim the EU responsible, while success is always for their own credit. How could people agree upon a Constitution or even a reform of such an unknown subject as the European Union? While the Treaty of Lisbon was generally welcomed by the political elites and, in particular, found the support of vast majorities in the national parliaments, this may explain why the people of Ireland did, and others would tend to vote “no”; the treaty is too complicated, too long, too abstract: they just don’t understand. It is surprising that under such conditions so many voters, nevertheless, said “yes”.

**b. Laeken and the „Constitutional Confusion“**

If there was little clarity on the terms, in addition, the political handling of the reform at the “post-Nice process” led to even more confusion on the issue of a Constitution for Europe. Instead of simply clarifying the constitutional character of the European Treaties, reforming them as necessary and reorganising them within one simplified and systematic text, the Convention produced the “Treaty establishing a Constitution for Europe” and claimed to have achieved a fundamental change. After this change having been rejected the Heads of State and Government decided to return to the more modest language of a simple reform of the Treaties and denied expressly the constitutional character of the future primary law of the European Union.

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48 This has been identified as a great mistake by the Luxembourg Prime Minister, Jean-Claude Juncker, in his Humboldt-Speech on Europe of November 21, 2005, on „Die Denkpause nutzen. Strategien zur Verfassung für Europa“, http://whi-berlin.de/hrg, p. 2 et seq.
With all due respect, my view is that they got all wrong, at each of the three relevant stages: The initial hypothesis was wrong, since the existing primary law already has a “constitutional” character. It was wrong, therefore, to sell the Constitutional Treaty as a major act of constitution-making. To pretend, finally, that by omitting all constitution-language and symbolism the result would be that the future EU-Treaty and Treaty on the Functioning of the EU would not have a constitutional character, was wrong and misleading as well. Let me explain more in detail:

**aa. The Constitutional Character of European Primary Law**

Legally speaking it was clear from the outset that the 1957 EEC-Treaty, like already the 1951 ECSC-Treaty, established a special, supranational organisation of a constitutional character. The explanatory memorandum to the 1957 German law of ratification for the EEC made this very clear when it described the Community as a “European body of constitutional nature”. The German Federal Constitutional Court recognised that the EEC-Treaty represents somewhat like a Constitution already in 1967 and, eventually, the European Court of Justice has taken this view since 1984 in the Case “Les Verts”. Confirming its established case law it stated in Case 402/05 – Kadi that

“...the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions...”

The Court also referred to the “constitutional architecture of the pillars” of the EU and to the

“constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights”.

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49 This does not mean that the EU has a Constitution in the traditional terms, see Häberle (note 15). p. 37, 273-599, 632 et seq.
50 See also Weiler (note 20), p. 650, pointing to the fact that the relationship between the EU, the Member States and the European citizens had already „followed for decades a constitutional rather than an international law sensibility and discipline...“. He also criticizes the pretention that „the legal mongrel produced by the Convention was a Constitution“.
53 Decision of the Federal Constitutional Court BVerfGE 22, 293/296
56 Ibid., para. 285; see also id ibid. para. 316; „As noted above in paras. 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community
Thus, for the Court of Justice the European Treaties and the fundamental principles of European law have a constitutional character already now. This is not the result of a “constitutionalisation” of the Treaties by jurisprudence57 but due to the very specific sources and the nature of the new European legal system. The EC-Treaty states in Article 249 – the former Article 189 of the EEC-Treaty – that like decisions as one of the forms legislative acts may take also the regulation

“shall have general application. It shall be binding in its entirety and directly applicable in all Member States”.

The ECJ referred to this directly binding character as early as in 1964 in order to establish the principle of primacy of Community law in Case 6/64 – Costa/ENEL.58 It shows that the concept of direct effect of Community law, as recognised more generally by the Court in Case 26/62 - Van Gend&Loos, was inherent already in the founding treaty of 1957.59 For the simple reason that under the EEC-Treaty such direct legislative powers are vested with the European institutions, the Member States had to use special provisions of their respective constitutions to ratify this particular treaty, provisions which expressly enable the state – to confer sovereign powers or rights upon institutions as established by this treaty.60

A comparative analysis of these “integration-clauses” in the constitutions of the EU Member States makes clear that almost everywhere special majorities and other conditions must be met, in order to bring such a treaty, a reform of it or the accession to the Union into effect. The new Article 23 of the German Basic Law – to give an example – requires that the procedure for the amendment of the constitution (two-thirds majority in both chambers) be applied; under Article 29, para. 4, of the Irish Constitution the membership to the Union and each of the reform-treaties are authorised by an express clause to be introduced in the Constitution under the amendment procedure of Article 46 of the Irish Constitution.

based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement”. For comments see Daniel Halberstam/Eric Stein, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order, in: 46 Common Market Law Review (2009), forthcoming, Chapter III.B.2 (near notes 134 et seq.).

57 This is the view of many authors interpreting the jurisprudence of the ECJ itself as having the effect of constitutionalising what, at the beginning, was a simple international treaty, see: Eric Stein, Lawyers, Judges and the Making of Transnational Constitution, 75 AJIL (1981) 1; Joseph H. H. Weiler, The Constitution of Europe, 1999, p. 224, who refers also to other actors as Commission and national Courts. If we talk about “constitutionalisation” of the EU, in my view, this means talking about the citizens of the Union taking ownership of the Union in the sense of multilevel constitutionalism (see below, p. 1 et seq.).


59 ECJ Case 26/62 – Van Gend& Loos (1963) ECR, 1, para. 10.

60 See Article 24, para. 1, of the German Basic Law; for other references see Grabenwarter (note 2), p. 95. See also Monica Claes, The National Courts’ Mandate in the European Constitution, 2006, and the Website of the European Constitutional Law Network (ECLN) which collects not only the national constitutions of the EU Member States but also important decisions of the Constitutional Courts and other highest national courts: http://www.ecln.net/index.php?option=com_content&task=view&id=29&Itemid=52.
It follows that also from the perspective of the national constitutions the EU is not only different from traditional international organisations but well of a specific constitutional character.

\textit{bb. The Convention: Putting on Constitutional Clothes}

Member States’ Heads of State and Government, however, did not use the term constitution, as I already mentioned, until the breakthrough of the “Laeken-Declaration” of 2001. The constitutional debate was reopened when the German Minister of foreign affairs, Joschka Fischer in his famous “Humboldt-Speech” of 12 May 2000 titled: „From Confederacy to Federation: Thoughts on the Finality of European Integration”. The idea found some echo in the Laeken-Declaration and the Convention took it up in deciding to produce a historical mile-stone in “giving” the EU a Constitution in the form of an international treaty, called: “Treaty establishing a Constitution for Europe”. The draft of the Convention was slightly modified by the Intergovernmental Conference, adopted by the European Council and signed by all Member States in Rome on 29 October 2004.

This treaty was intended to substitute the existing Treaties. While it took over most of their provisions, a number of important amendments in substance have nevertheless been added, they have been restructured and given new clothes: The Treaty of Rome II choose “constitutional” language for what so far was somewhat hidden behind technical administrative language: The primary law of the EU was named Constitution, the EU regulations and directives were named laws and framework laws, the “High Representative for the foreign and security policy” became the name Foreign Minister, the first Article of the Constitution stated that the Treaty is based upon the will both of the citizens and of the Member States of the Union, and the members of the European Parliament were identified as representing the citizens of the Union and not, as at present, as representatives of the peoples of their Member States. Thus, without really changing it in substance, the Constitutional Treaty allowed understanding a little more of what the EU really is and does. Finally, eighteen Member States out of 25, including two popular votes (Spain and Luxembourg) plus the two latest newcomers, Bulgaria and Romania, have approved the Treaty establishing a Constitution for Europe. The peoples of two Member States, France and the Netherlands voted against. Five governments did not take steps for ratification any more after the process was stopped by the two negative referenda.

\textsuperscript{61} Speech delivered by Joschka Fischer at the Humboldt-University the 12 May 2000, English translation: \url{http://www.jeannmoneymetrouzan.org/papers/00/joschka_fischer_en.rtf}.

\textsuperscript{62} Draft Treaty establishing a Constitution for Europe, of 18 July 2003, \url{http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf}.

cc. Dismantling the Constitution

Yet, all this new “constitutional” language was borrowed from state-related terminology. While it was argued that the EU is not and was not supposed to become a state, people and also politicians in a number of Member States had felt that a treaty “establishing a Constitution for Europe” would indeed create a state, because the mere term “constitution” seemed to imply that the entity established by it is a state. In spite of important academic writings on the possibility of constitutionalism or a “constitution beyond the state”, no hope therefore was left to bring the Constitutional Treaty into being.

In order to salvage the substance of the reform and to bring it into force without referenda, the only logical consequence apparently was to unclothe, or better: to “dismantle” the Constitutional Treaty by omitting the constitutional and state symbolism and turning back to the simple form of a treaty amending the existing EU- and EC-Treaties. The reform would be achieved and the Treaties after all would remain – ironically – what they were from the beginning: The constitutional charter of a Community of law. The history of the Treaty of Lisbon tells us, thus, a part of an ongoing process of European integration the principle of which is, as qualified by Jan-Werner Müller:

“...even what appears like constitutional failure – the popular rejection of a Treaty or an Accord – can be turned into part of a much more positive narrative: failure is a prelude to further inclusiveness, to hearing more voices, or hearing the same voices again with a different degree of attentiveness.”

II. The Concept of Multilevel Constitutionalism

The development and reform of the European founding treaties was and will remain a process of trial and error. It was driven, originally, by the need for a

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65 Armin Hatje/Anne Kindt, Der Vertrag von Lissabon – Europa endlich in guter Verfassung?, NJW 2008, 1761, at 1768, also see in this solution a turning back to the original modest language after some promoters of a more solemn Constitution did not find sufficient support in the population. See also the President of the German Federal Constitutional Court in a speech given at the Humboldt University’s „forum constitutionis europae“ the 18th of January 2008 on Europe’s new sobriety: Hans-Jürgen Papier, Europas neue Nüchternheit. Der Vertrag von Lissabon, FCE 1/2008, http://wissenschaft.uni-berlin.de/fce/2008.dhtml. Criticizing the process ironically, however, Weiler (note 20), p. 652: „Take the Treaty which masqueraded as a Constitution, do some repacking, and now it is a Constitution masquerading as a Treaty“.

66 Jan-Werner Müller, A European Constitutional Patriotism? The Case Restated, 14 ELJ (2008), p. 542, at. 554. With regard to the various national authorities participating in such a process of a referendum, the re-negotiation of the treaty and a subsequent parliamentary ratification, as it happened in France, Bourgorgue-Larsen (note 2), p. 99, parle d’une „démocratie composée“, given that „chaque légitimité s’est exprimée: celle des peuples (qui ont dit non), celle des Exécutifs (qui en ont pris acte) et celle des représentants des peuples (qui pourront s’exprimer sur les choix ultimes des Exécutifs)“. 
new structure of political organisation that ensures peace and stability in Europe. It was given new impetus each time when a further enlargement came into sight, and visible economic benefits of a functioning internal market accompanied the efforts to deepen the legal framework of integration. Constitutional enthusiasm, on the other hand, was damped by considerations of preserving national sovereignty and meaningful statehood. And with the progress of integration and the referenda on the diverse reform-treaties another insight got increasing importance: that the development of the European Union – or in other words: the progressive “constitution” of the European Union – touches upon not only the daily life of the individuals, but also the constitutions of the Member States including the constitutional rights and duties of the citizens.

This is what the concept of multilevel constitutionalism focuses on: the correlation of national and European law from the perspective not only of the states but also of the citizens. On the assumption that in modern democracies the citizens are the basis and origin of whatever public authority and decision-making power, whether vested with national or with European – not to talk about global – institutions, it finally leads to the understanding that the two levels of government are complementary elements of one system serving the interest of their citizens, national and European.

1. National Constitutions and European Law

Failures and continued intensive debates about the Union and its constitutional future are phenomena inherent to constitutionalism as a process, particularly in a multilevel system of governance, such as the EU. I have proposed to use for this specific kind of constitutionalism the term “multilevel constitutionalism”, first of all with a view to develop a comprehensive perspective for the analysis of a process affecting the national and the European law simultaneously. Whenever the Treaties on the European Union are changed, national constitutions undergo significant changes as well. Both constitutional levels are in permanent interdependency. Nearly all parts of the national legal orders from constitutional to private and criminal law are affected by the Treaties and EU-secondary law and thereby “Europeanised”. The European level, in turn, is influenced by national law, in particular through the general principles of law including the human rights as referred to in Article 6 para. 2 TEU and developed by the ECJ case-law from national constitutional traditions. Powers assigned to European institutions are not to be exercised by the Member States individually. Where the Council is


68 Pernice, Multilevel Constitutionalism (note 2) p. 703 et seq.
vested with legislative powers, the respective national ministers – together with the European Parliament – act as European legislators; they obtain a function which is traditionally reserved to the parliaments. National parliaments, in turn, act as European executive authorities when transposing and implementing directives of the Council by national legislation. On the other hand, they do not only legitimise, but also control their respective ministers in the Council – or their Heads of State and Government in the European Council – and in this role they are actors of the EU and bear important European responsibilities.

What can be observed for the institutions at both levels, can also be said for the relationship between national and European law. It follows from the principle of primacy and the direct effect of European law, that in cases of conflict national administrations and courts have to give precedence to the European provision and set aside the act of their own national parliament. With a few exceptions such as competition policy, state aids and the management of the structural funds, implementing European legislation is their responsibility and their duty under Article 10 TEC, and in doing so national authorities act as European agencies.

Member States of the European Union, consequently, have changed their character. Though their sovereign equality within the meaning of Article 2 para. 1 of the UN Charter remains untouched, given the “constitutional culture” of membership to the Union, the process of European integration is, Jan-Werner Müller puts it,

„a ‘silent cosmopolitan revolution’ that has transformed nation states themselves, as opposed to superseding them with a ‘supra-nation state’ that simply replicates the logic of the nation state on a larger scale“.70

Thus, the constitutions of the EU Member States, not less than these states themselves, have undergone some important mutations: In addition to their character as founding instruments of the states, they became foundational components of the European multilevel constitutional system. Yet, only few of the substantial changes following from the conferral of powers to the Union and from European secondary legislation are reflected in the text of the national constitutions. In the absence of express amendments – as required under some constitutions e.g. for the electoral rights at the local level of the European citizens with residence in other Member States, or for the establishment of the EMU – these changes can

69 This is the established case-law of the ECJ, see Case 205-215/82 – Milchkontor (1983) ECR 2633, para. 17.
70 Müller (note 66) at p. 552, referring to Jean-Marc Ferry for the “constitutional culture” as being „about taming raw sovereignty, and establishing a politics of compromise, civilised confrontation and mutual learning“.
be recognised only when the constitutions are read together with the European Treaties, legislation and case law. As mentioned above, national constitutions subjects membership to, or changes of the contractual foundations of the Union to special requirements, sometimes to the same as for amendments of the constitution.\(^\text{72}\) In viewing the European constitutional process as encompassing national constitutions and the European primary law together – in spite of the formal distinction – as two interdependent, interwoven and reciprocally influential parts of one unit, the concept of multilevel constitutionalism facilitates understanding the peculiarities of the European Union.

2. European Citizens and New Sovereignty

Creating a functioning internal market, and, to this effect, conferring exclusive competencies to the Union for commercial or monetary policy, as well as shared legislative powers for environmental, consumer protection or transport policies has an impact not only on the constitutions of the Member States, the powers and functions of the national institutions, as described above. The provisions of the Treaties and of European legislation and decision-making directly affect also the daily life of the citizens and undertakings.

This is often understood as a loss of autonomy and sovereignty for the state and a threat to democracy and the rights of the individuals. As the attribution of these powers to the Union, and their exercise by its institutions, however, is governed by the principle of subsidiarity and, therefore, limited to what the Member States can not, or not effectively, achieve individually, to dispose of institutions to implement such European policies results not in a loss but rather in a gain of sovereignty and new opportunities in the interest of the citizens.\(^\text{73}\) Yet it is not national sovereignty in the traditional sense, but another kind of sovereignty. It is not so much autonomy nor autarchy (which thanks to globalisation pressures and dependencies does not exist any more) but rather the “capacity to participate in transgovernmental networks of all types …sovereignty as participation”.\(^\text{74}\) The new provisions in the Treaty of Lisbon on solidarity and, in particular in case of severe difficulties “in the supply of certain products, notably in the area of energy” (Article 122 TFEU), or, in the framework of environmental policies, to “combating climate change” (Article 191 para. 1 TFEU), are telling examples. In the face of certain threats from the Russian side in the case of Ukraine, another example is the conferral of new competencies of the Union for a “Union policy on energy”, introduced under Article 194 TFEU with the objectives to “(a) en-

\(^\text{72}\) See above, p. 21.

\(^\text{73}\) With the concept of „cooperative sovereignty“ see also Besson, Sovereignty (note 95) p. 18.

\(^\text{74}\) For this concept see Anne Marie Slaughter, The New World Order, 2004, p. 34, and 266 et seq.: „Disaggregated sovereignty“.
sure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks”. It was felt, that these objectives are more effectively served by common action than by each Member States alone, and the Treaty was amended conformingly.

This is the rationale behind the European Union, which is about citizens and their concerns rather than about abstract sovereign states. Yet, the more institutions representing their citizens at the national level realise their European function as an opportunity to pursue certain policies by common action through the European institutions, and the more the citizens become aware of this new function and responsibility, the more likely it is for the Union to function effectively and to get the public support needed for an effective reform.

Multilevel constitutionalism, thus, encourages conceptualising the European Union from the perspective of the citizens, as an instrument for meeting new challenges, and for achieving certain political goals in common at the European level through European institutions which are formally autonomous, but in fact interacting and interwoven with the national institutions, largely depending on them and their proper functioning.

It is assumed that, with the establishment of the European Union, the citizens of the Member States have created for themselves a new political status: They are citizens of the Union, with the rights and duties this status implies: Freedom to move, free trade and open capital markets, equality, electoral rights at the European and the municipal level, eligibility for important positions at the European civil service or political institutions, even diplomatic protection by the fellow Member States in third countries. Any modification of the Treaties, but also each particular measure taken by European institutions, therefore, is directly relevant for the individual citizen and his or her legal and political status.

Consequently, like in any federal system, powers conferred upon the European Union, just as the powers exercised by the national authorities, have their democratic roots in the will of the people(s): For national policies – including their stake in the European institutions such as the Council – it is the will of the citizens of the respective Member State. For policies implemented through European institutions it is the will of the same citizens, but in their common identity as citizens of the Union. The principle of conferral works at the two levels, as James Madison already put it very clearly in Federalist No. 46 explaining the federal division of powers:
I borrow from this great insight for demonstrating the concept applicable also to the European Union, notwithstanding all the differences. As representatives of the citizens of their respective countries the governments of originally six Member States established the European Communities and negotiated with the candidates the enlargement and with the new Member States the successive reform treaties for the European Union. Representing the peoples of their country, the respective national parliaments brought all these treaties into effect, as far as this was not done directly by referendum. The specific powers and the procedures for doing so are provided for in the national constitutions. Thus, when we talk of Member States pooling their sovereignty in establishing a supranational authority or, as Article 88-1 of the French Constitution does, about "States which have freely chosen to exercise some of their powers in common...", should we not admit that the sovereignty in question is that of the peoples or, in my understanding better: the citizens of the Member States having established, according to their respective constitutional procedures and on their behalf, the European Union? The concept of Union citizenship, consequently, helps the citizens of the Member States to identify their common political and legal status as a common European status.

As the citizens become more and more aware of the importance of European policies for their daily life, they may also see amendments of the European Treaties more critically. The times when such treaties were taken as international treaties, dealing with foreign policies only, are over. The EU is progressively understood implementing policies, which, so far, were regarded as internal policies of the Member States. If the referenda upon the Treaties of Maastricht and Nice, if the work of the Convention on the Treaty establishing a Constitution for Europe and the subsequent debates had a positive effect, it is the rising awareness of the citizens that this European joint venture really matters each of them.

People may reject the Union as being above comprehension and out of control. But this is short sighted. Others take ownership and constructively work on it as an opportunity and device for meeting challenges and achieving goals of shared interest in common. Pursuing such projects through supranational institutions could well reflect an emerging European constitutional patriotism,76 which embraces more than just the benefit of new rights and freedoms as the European Treaties provide for the individual and the national courts in dialogue with the European Court of Justice are required to protect effectively. While the policies

75 Hamilton/Madison/Jay, The Federalist Papers (1787/88), Federalist No. 46.
76 Müller (note 66), at p. 551, who sees the "EU as a polity not based on pre-existing or ‘pre-political’ solidarities, but on mutually agreed projects and enterprises; and it is certainly prima facie true that a European constitutional culture fits the notion of an ongoing project".
which are of the most immediate concern for the citizens, like social security, taxation, education, internal law and order as well as national security and defence, still – and rightly – remain in national competence, there are other important goals that (Member) States individually may not achieve: Peace among the Member States and, in particular, France and Germany was the first and most obvious of these goals after World War II, others are the benefits of a common market, effective environmental policies, energy security as well as combating climate change, organised crime and international terrorism... The list is long, and the Union is still missing a reform that would allow it to serve its important tasks effectively.

These European policies are certainly less “salient” for the citizens and may, as Andrew Moravcsik argues, not serve as a basis of political learning, allegiance, cleavages, organization, and voting behaviour on a sustained basis as we know it from national democratic processes, so that European citizens even do not exploit the opportunities of participation they have. What is needed, however, is the broader awareness that the Union is an efficient level of action for policies of common concern where state action would remain ineffective, and – what the Treaty of Lisbon offers better opportunities for than the existing law – the stronger involvement of the citizens in the decision-making processes, whenever salient political questions arise.

3. Dimensions of Multilevel Constitutionalism

The national constitutions and what can be called the European constitutional level are closely interwoven and interconnected, both regarding the institutions and the substantive law. In addition to this vertical bond, under the roof of and stimulated by the EU framework also horizontal bonds are developing between the Member States at all levels of administration, judiciary and even democratic representation, though this horizontal dimension has not been described and analysed sufficiently yet. Its development seems to be, nevertheless, what really makes the EU “an ever closer Union” of the peoples – and citizens – of Europe. Multilevel constitutionalism focuses the vertical as well as the horizontal dimensions of what may be called the EU-constitutional network and so allows for a comprehensive understanding of this complex system.

78 Ibid., p. 605, 615 et sequ.; see also Moravcsik, Settlement (note 18), p. 40 et seq.
a. The Vertical Dimension

Vertically, the citizens are both, the basis and origin for democratic legitimacy and the focal point of the policies at all levels, in many fields the addressees of these policies. Guided by the principle of subsidiarity responsibilities are assigned, as already mentioned, to the regional, national and European levels of government so to ensure that each task is implemented most effectively, by preference at the lowest possible level in order to safeguard the most direct democratic control possible for each policy. It is in the interest not only of the functioning of the system, but also of the citizens to ensure that national and European action are not overlapping and competitive, but complementary and reciprocally supportive. Regarding the vertical balance of powers, the principle of subsidiarity, thus, is closely linked to the democratic principle, it ensures efficiency and it is the basis for the justification and legitimacy of the action at the European level at all. It governs the relationship between the two levels of public authority as a key element of the composed constitutional system of the EU, and it is as essential for its unity and functioning as the principle of primacy regulating conflicts of norms from the two levels in a given case.

Multilevel constitutionalism, thus, helps to understand that the different levels of government are formally autonomous components of in substance one constitutional unit. It consists of the Member States and the European Union servicing, each at their respective level, the interests of the same citizens. These components are closely interdependent and interwoven. Where the EU has exclusive competencies or, in areas of shared competencies where national actors consider the EU to be the level where action must be taken and cooperate with its institutions for specific political issues of European reach, Member States depend on effective institutions and procedures at the European level to achieve their goals. On the other hand policies of the European institutions generally become effective within the Member States only through their implementation by national parliaments, administrations and judges.

b. The Horizontal Dimension

The other dimension of the European multilevel system of governance appears to be that of horizontal cooperation and mutual recognition. Effective and coherent implementation of European policies and equal treatment of all citizens of the Union throughout the Member States requires cooperation and networking at all levels among administrations, such as for the implementation of environ-

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80 For the concept see Pernice, horizontale Dimension (note 79), p. 372 et seq.
81 See insofar the study of Anne-Marie Slaughter (note 74) p. 19 et seq, 135 et seq.


84 See in particular Article 197 para. 2 EU-L: "The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States."


86 This kind of “mutual evaluation mechanisms”, inspired, as Clemens Ladenburger reminds, “by the examples of mutual evaluation already conducted within the Council”, have the triple advantage of better ensuring implementation, institutionalising horizontal cooperation and learning from each other on best practices. “Cooperation on internal security” will further be promoted and strengthened within the Union by a “standing committee” to be set up within the Council under the new Article 71 TFEU. More generally, Article 74 TFEU will empower the Council to adopt “measures to ensure administrative cooperation between the relevant departments of the Member States” and with the Commission in the areas covered by the Title on the Area of Freedom Security and Justice. Even where the new Treaty expressly excludes any European action – “maintenance of law and order and the safeguarding of internal security” (Arti-
Article 72 TFEU), Article 73 TEFU invites them to cooperate nevertheless, by making clear that

"it shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security".  

Furthermore, the new provisions introduced by the Treaty of Lisbon regarding the more active role of the national parliaments, namely on the “early warning system” (Article 5 (3) subpara. 2 EU-L and the new Protocol on Subsidiarity) will lead to an extension of networks between national parliaments as well as between the national parliamentarians and the members of the European Parliament, in addition to the important work of COSAC. Title II of the Protocol No. 1 on the Role of National Parliaments in the European Union expressly addresses “Interparliamentary Cooperation”. Such networks are tying the diverse institutions of the Member States together to develop more and more a coherent system of interchange and cooperation.

Common values such as laid down in Article 6 para. 1 EU, and more in detail in Article I-2 of the Constitutional Treaty, taken over in Article 2 of the Treaty on the European Union as amended by Treaty of Lisbon, but also the procedure for sanctioning Member States violating these common values, such as set up by Article 7 EU and Article 7 of the new EU-Treaty, and the European Charter of Fundamental Rights, are contributing to this process. The common values and, in particular, respecting the rule of law as well as the principle of democracy at the national level are not only important for the functioning of the Union as such. They play a fundamental role as a precondition for the increasing use of the principle of mutual recognition as it has been developed for the completion

87 Ladenburger (note 86), p. 36, interprets this „ carve out“ as applying „merely to member state intelligence services, provided that they do not carry out any law enforcement measures“.  
88 In preparing the entry into force of the Treaty of Lisbon national parliaments have revised their legislation regarding the control of European activities of the governments and the procedures allowing coordinated action within the framework of the „early warning system“, see for Germany: Draft of a „Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union“ (BT Drs. 16/8489). In particular, the COSAC (see Article 10 of Protocol No. 1 on the Role of National Parliaments in the European Union) will be the forum in which such cooperation develops; see insofar the result of an enquiry around national parliaments on their new role and cooperation: „Cooperation among national parliaments is essential to ensure the effective exercise of parliamentary competences in the monitoring of the principle of subsidiarity and to promote the exchange of information and best practice according to the opinion of the overwhelming majority of parliaments that replied to the questionnaire. As far as the mechanisms deemed needed to improve this cooperation further, three main suggestions were made: the focus that COSAC should put on this, the more intensive use of IPEX and the strengthening of the informal network of national parliament representatives in Brussels“ (COSAC, 9th bi-annual report, May 2008, p. 26 - http://www.cosac.eu/en/documents/biannual/. IPEX is the new Interparliamentary EU Information Exchange System, see: http://www.europarl.europa.eu/webmp/webdav/site/myjahiasite/users/jribo/public/IPEX_leaflet_EN.pdf.  
89 This provision reads: „The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.“.
of the internal market as well as for the area of freedom, security and justice. Without the mutual trust based upon the recognition of these common values in all Member States new instruments for the combat of transborder crime and terrorism like the European arrest warrant could not properly function. The implications of this horizontal effect of national law under the principle of recognition, furthermore, trigger new kinds of interest also of the people in one country for policies of the other: Where legislation or decisions of one Member State become legally relevant in other Member States, the citizens of each Member State begin to have an interest in politics, the legal culture and legislation of the other Member States. Academic networks are established and strive for horizontal exchange of knowledge and understanding of the law, which is common to the citizens of the Union.

4. Multilevel Structure Without Hierarchies

Talking about a multilevel structure and the vertical and horizontal dimensions of multilevel constitutionalism seems to imply the subordination of the “lower” level of constitutional law to the “higher” levels and, consequently, a hierarchy between European and national law. Such a hierarchy would certainly comply with a monistic normative model such as described in the legal theory of Hans Kelsen. Yet, insofar as European and national law are understood as formally autonomous systems each of which is based originally on the will of the people or citizens united under their constitution respectively, such hierarchy does not follow as a theoretical necessity.

The relationship between the two levels of law is rather functional and follows from both, the objectives of the entire system and the principles of law. As it is an inherent quality of law that each rule applies equally to all people meeting its defined conditions, European legislation, in order to be law, must apply equally in all Member States and prevail in the case of a conflict with national law. This is a condition of the unity and functioning of the European legal system. On the other hand, supranational law is limited to certain purposes and policies, complementary to national law; it is not meant to jeopardize the validity of national law and, in particular, the fundamental principles of the diverse national consti--

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91 See Pernice, horizontale Dimension (note 79) p. 12 et seq.
93 For a critique of multilevel constitutionalism based on the theoretical terms of Kelsen see namely Jestaedt, Der Europäische Verfassungsverbund, in: Callies (note 2), p. 100 et seq., 120-124, and my reply ibid., p. 78-84.
tutions. Mutual consideration and regard to the function of the European system as well as to the basics of national constitutional law is therefore required as well as cooperation between the relevant actors at both levels.

Accordingly, Member States and their constitutional courts have acknowledged primacy of European law even over national constitutions, but not unconditional. In the light of multilevel constitutionalism – there is no hierarchy between the two components of the European legal system. The relationship is pluralistic and cooperative, based upon the general recognition that European law is given precedence above national law – including constitutional provisions, but that courts at the national and the European level share a responsibility to ensure the proper functioning of the Union, equal and effective application of the law throughout the Union and the full respect of the basic principles common to the Union and its Member States including the fundamental rights and liberties of the individual (Article 6 para. 1 TEU). This distinguishes the European model of multilevel constitutionalism from most federal states where federal law in a case of conflict trumps state law. It is not what Carl Schmitt and those who apply his theory of a federation to supra- or international contexts understand when talking about a federation. Instead of monism there is constitutional pluralism, instead of hierarchy and supremacy of federal law there is functional primacy, based upon mutual consideration, recognition and cooperation between the courts. There is no ius belli of the federation and no “right of supervision” on the member states or right to intervene. Thus, national courts generally respect the primacy of European law, except – so far theoretically – for

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95 See also, on basis of legal pluralism: Samantha Besson, Sovereignty in Conflict, 8 European Integration Online Papers (2004), no. 15, http://eiop.or.at/eiop/texte/2004-015.html#4.4, p. 13, 22.
96 Clearly so defined by the German Federal Constitutional Court in BVerfGE 89, 155 – Maastricht.
102 These two elements are characterising the federation in the theory of Carl Schmitt (note 99), p. 360 et seq. (engl., p. 386 et seq.).
particular situations where basic values, rights or structures of the national constitutions are in question. \(^{103}\)

### III. Multilevel Constitutionalism in Action

To what extent does the Treaty of Lisbon\(^{104}\) materialise this idea of multilevel constitutionalism and can be understood as a case for multilevel constitutionalism in action? To summarize, this expression points to the idea of citizens organising or re-organising political power and responsibilities at various levels in order to best articulate and achieve political goals of their common public interest.

Though the qualification as “constitutional” and corresponding symbolism has been given up in the text of the Treaty of Lisbon, the major amendments to the Treaty on the European Union and to the EC-Treaty seem to confirm and strengthen the Union as a multilevel form of political association and governance. Various aspects elaborated above as determining this understanding can be found further developed by the terms of the new EU-Treaty and the Treaty on the Functioning of the EU: The central position of the citizens, transparency and democratic legitimacy of its action, role of the national parliaments, subsidiarity and complementarity of its tasks and powers, efficiency of the decision-making procedures, legal personality and foreign representation, rule of law and voluntary membership. Let me deal with each of them separately.

#### 1. The Citizens of the Union

If, in a democratic multilevel constitutional system, it is ultimately the citizen to whom any political actor must be accountable and on whom legitimacy must be based, the Treaty of Lisbon can be seen as a major step forward to actually giving this concept a positive expression. More than ever before since the introduction of European citizenship in the primary law of the EU\(^{105}\) the amendments envisaged by the Treaty of Lisbon refer to the position and rights of the individ-

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\(^{103}\) For more details see: Pernice, Verhältnis (note 97), p. 49. For the materialisation of these terms by new provisions of the Treaty of Lisbon see below, p. 54. Cohen (note 99), p. 477, proposes in view of the rights of the individuals to challenge acts at the European and on the national level that this element of „constitutional pluralism” should be „reproduced on the international level”, though it should be added that for acts of the EU the recourse to national (constitutional) courts is *ultima ratio* available in extreme situations only.

\(^{104}\) For summaries and comments see e.g.: Dougan, Treaty of Lisbon (note 29); Stefan van den Bogaert, Annette Schrauwen, Andrea Ott and others, in: Maastricht Journal 15, 2008 Issue 1; Ekaterina Sabatakakis, Cécile Rapoport Muriel Le Barbier-LeBris and others, in: Series in Revue du Marché commun et de l’Union européenne (2008) Nr. 518 et seq.; Rudolf Streinz/Christoph Ohler/Christoph Herrmann, Der Vertrag von Lissabon zur Reform der EU, 2nd ed. 2008; Terhechte (note 17).

ual and, in particular, develop the political status of the citizens of the Member States in their additional identity as citizens of the Union.

With the cleaning operation under the Treaty of Lisbon also the references in the Preamble and in Article I-1 of the Constitutional Treaty to the “will of the citizens and States” reflected in “this Constitution” have been scrapped. Nevertheless, the status and rights of the citizens as being the source of legitimacy of European policies will be referred to in a number of new provisions. They give a more precise meaning to the general clause already contained in the existing Article 1 para. 2 EU, according to which

„This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen“.

If Article 2 EU-L defines among the values common – and binding – for the EU and its Member States the “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, it is made clear, from the outset, that the individual is the focal point of the Union comprising the European institutions and the Member States. The drafting of these objectives remind the idea of a social contract which, through diverse new provisions on solidarity among the Member States (e.g. Articles 3 para. 3, subpara. 3 EU-L, 122, para. 1, 194, para. 1, and 222 TFEU) would embrace citizens individually but also their respective countries. Furthermore, the protection of the citizens is mentioned among the aims of the Treaty in Article 3 para. 3 and 5 EU-L, and Article 13 EU-L states that the institutional framework shall serve the interests of the Union and its Member States but also those of the citizens.

On the same line, the new reference to the Charter of Fundamental Rights in Article 6, para. 1 EU-L, as a legally binding instrument “which shall have the same legal value as the Treaties” underlines that these values are not only political promises but turned into concrete binding law to be respected by the institutions as well as by the Member States when they are implementing European Law. This also applies to the provision for the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 6 para. 2 EU-L. In addition, the Treaty takes over from the existing Article 6 para. 2 TEU the general provision in Article 6, para. 3 EU-L that “the Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute gen-

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106 See also the observations of Müller-Graff (note 17), at p. 126.
eral principles of the Union's law”. The protection of the individual fundamental rights of the citizens, thus, is becoming a prominent issue in the new constitutional framework of the European Union.¹⁰⁸

Furthermore, the central political status of the citizens is explained in a particularly clear manner in the new “provisions on democratic principles” (Articles 9 to 12 EU-L). All citizens are equal under European law (Article 9), the citizens – and not any more the peoples of the Member States – are directly represented at Union level in the European Parliament (Articles 10, para. 2, and 14, para. 2 EU), while the national governments representing the Member States at that level are “democratically accountable either to their national Parliaments, or to their citizens” (Art. 10).

This accountability of the national governments to their respective parliaments or citizens herewith becoming a “democratic principle of the Union”, not only recognises the citizens as a source of democratic legitimacy of the Union. It also makes national constitutional arrangements regarding accountability for European politics a concern of the European Union. Thus, Article 10 EU-L may be understood as materialising the references in the Treaty to the common values, including namely democracy (Article 6 para. 1 EU / Article 2 EU-L). They are, indeed, a basis for the functioning of the entire system. Both provisions seem to strengthen the Union as another instrument for the citizens to preserve, on the basis of these common values and principles, constitutional stability in their own countries.¹⁰⁹

Electoral rights for the European Parliament, but also at the local level within the Member States, as introduced under the Treaty of Maastricht already materialised the citizenship of the Union as a common European political status. This status will be given another expression by the Treaty of Lisbon with the introduction of a citizens’ initiative (Article 11, para. 4 EU-L). A million of citizens from a significant number of Member States signing an initiative can “invite” the Commission to work out and submit a proposal for a legal act. The citizens, thus, get the same rights as the existing law already confers to the European Parliament and to the Council, though they may not only invite, but even “request”


the Commission to submit an appropriate proposal on a specific issue (Articles 192 para. 2 and 208 EC, Articles 225 and 241 TFEU).

2. Transparency of the Union and Democratic Legitimacy

Not only the political status of the citizens is strengthened, but also the mechanisms allow more efficient political control. Although it is more than doubtful that a “democratic deficit” in the Union can really be detected, the Treaty of Lisbon amends and reorganises the existing EU- and EC-Treaties in order to increase transparency and enhance democratic legitimacy by several measures.

a. Reorganisation of the Treaties

Though the Treaty of Lisbon does not abolish the separation between the EU- and the EC-Treaty, it changes the nature of the distinction. The EU-Treaty will no longer be a basis for the “three-pillar” structure of the Union – which is abolished, but contain sort of the “constitutional umbrella” for the primary law of the EU: The new EU-Treaty will be the place for the common values, general objectives and principles of the Union as one political unit, it will contain general provisions on fundamental rights and the institutional framework, on enhanced cooperation as well as the final provisions on membership, amendments and the entry into force. Except for the Common Foreign and Security Policy, the more detailed provisions on specific rights in the Union, European competencies and policies, institutions and financial matters will be included in the amended EC-Treaty, the name of which will be: “Treaty on the Functioning of the European Union” (TFEU).

The new arrangement, so, largely follows the approach of the Constitutional Treaty: Most of the substance of Part one and four of the Constitutional Treaty will be integrated in the EU-Treaty so amended, while the technical provisions of Part three of the Constitutional Treaty was integrated into the TFEU, which can now be understood as the more technical part of the primary law.

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111 See however the critical remarks of Andrea Ott, „Depillarisation‘: The Entrance of Intergovernmentalism through the Backdoor?, 15 M3 (2008) 35 et seq., talking about a diffusion of pillars and an illusion of unity; intergovernmental elements spread over the entire Treaties.

Though the systematic distinction between the more general clauses and the technical details will facilitate understanding the structure of the Union, there is no hierarchy between the two future treaties. The first provisions of both Treaties make this quite clear. Article 1, para. 1 EU-L reads:

„The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community."

Some hierarchisation may be deduced, however, from the final provisions of Article 48 (6) and (7) of the new EU-Treaty\textsuperscript{113}. They provide for simplified procedures for amendments to Part III of the TFEU on the European policies, as well as for substituting provisions in the TFEU on unanimous acting of the Council or special legislative procedures, by allowing the Council to act by qualified majority and to apply the regular legislative procedure. Interestingly, the simplified switch to majority voting in the Council will also apply to Title V of the EU-Treaty on the Common Foreign and Security Policy, which was retained in the reformed EU-Treaty, except for decisions with military implications and those in the area of defence (Article 48 para. 7 subpara. 1, second sentence EU-L).

Nevertheless, the reform not only facilitates oversight and understanding of the European primary law\textsuperscript{114}, but it can also be seen as recognising implicitly its constitutional character, contrary to what was explicitly denied by the Brussels mandate.

\textit{b. Public Sessions of the Legislative Council}

An important step towards transparency with the effect of facilitating and enhancing democratic control of the European policies will be the provisions for public sessions of the Council when it is acting in its legislative capacity (Article 16, para. 8 EU-L). The European Council had already concluded that opening these sessions to the public is necessary and so to practice it even before the entry into force of the reform.\textsuperscript{115} To include the provision for public control in the Treaty, however, gives it the necessary constitutional authority. Access of the public to legislative deliberations is a basic condition for democratic account-

\textsuperscript{113} Ibid., talking about “hierarchisation politique”.

\textsuperscript{114} See also Sieberson (note 110), p. 448 et seq.; Dougan, Treaty of Lisbon (note 29), p. 690.

\textsuperscript{115} See para. 35 of the Presidency Conclusions of the European Council of 15/16 June 2006: „Providing citizens with firsthand insight into EU activities is a pre-requisite for increasing their trust and confidence in the European Union. The European Council therefore agrees to further open up the work of the Council and adopts an overall policy on transparency (Annex I). In particular, all Council deliberations under the co-decision procedure shall now be public. It requests the Council to take the measures necessary to ensure implementation of the new policy and to review their implementation in six months with a view to assessing their impact on the effectiveness of the Council's work“.
ability of the governments acting in the Council. Indeed, only where national parliamentarians and the public can observe how the ministers argue and come to decisions democratic control may be exercised more effectively.

Though this provision for publicity only deals with the European institutions, it is closely related to the national constitutional arrangements for the accountability required under Article 10 para. 2 EU-L of the national governments acting as European legislators, to their respective constituencies.116

c. The European Parliament’s New Powers

More transparency of the legislative activities of the Union and, consequently, more democratic legitimacy also follows from the various provisions enhancing the powers of the European Parliament which meets in public. Article 14 para. 1 EU-L underlines that the legislative and budgetary functions in the Union shall be exercised “jointly” by the Parliament with the Council. This is the rule for the “ordinary legislative procedure” as defined in Articles 289, para. 1, and 294 TFEU, which will in future apply to an increased number of policies, for example in the agricultural policy, common commercial policy and in many parts of the Area of Freedom, Security and Justice, eventually in most of the areas where the EU is given legislative powers.117

The European Parliament will also be given the right to “elect” as President of the Commission the candidate proposed by the European Council. In choosing the candidate the Council has to take into account the elections to the European Parliament and to hold “the appropriate consultations”. The more political parties can come to agreement at the European level upon their political agenda and on the person of their respective top-candidate for the European elections, the more the citizens’ will as expressed by their electoral vote will gain impact on the policies to be proposed by the Commission. This may increase the political influence of the European Parliament as well as the interest of the citizens in European politics, while it would also support the political function of the European Commission.118

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116 Sieberson (note 110), p. 445, rightly criticizes, however, that non-legislative acts are not covered by this mechanism (ibid., p. 458) and that the accountability of the Commission and the Council to the European Parliament should be improved by mechanisms of institutional control (ibid. p. 452 et seq).

117 Problems remain in areas where the Treaty provisions refer to the non-legislative acts in which the EP must be consulted but has no vote, see Sieberson (note 110), p. 456.

118 Dougan, Treaty of Lisbon (note 29), p. 636, who sees the risk, however, for a loss of „the relative independence from the rough-and-tumble of the ordinary left-right politics that still dominate public life within the Member States“ (ibid., p. 694).
d. New Responsibilities for the National Parliaments

The European Parliament, however, is not the only institution providing democratic legitimacy and control. As already mentioned, the active role of the national parliaments in the institutional setting of the EU is now recognised in the text of the Treaties. This is contrary to the traditional approach of the “unitary state” under which the Community was communicating with the Member States only through their permanent representations in Brussels. It can be understood as a case, instead, for the “disaggregated state” described by Anne Marie Slaughter as the new form states take in the “New World Order”, an innovation by which the EU also deviates from the classical model of international organisations and underlines the peculiar multilevel constitutional structure of the EU.

Article 12 EU-L summarises the various forms in which “national Parliaments contribute actively to the good functioning of the Union”, the “early warning system” instituted for the protection of subsidiarity is one of them, though the most striking one. In terms of multilevel constitutionalism it seems to be particularly striking that Article 12 EU-L includes the participation of the national Parliaments particularly in the procedures for amending the Treaty and for accession of new Member States:

“... (d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty”.

Even if this model of cooperation and participation rather means information than intervention and the benefits of this procedure are questioned by practitioners, the formal constitutional status of the national parliaments in the European decision-making processes as such is an important innovation. The terms of the provisions to which Article 12 refers are without parallel in international law already insofar, as they involve the institutions of the EU in the processes of amendment of the Treaty and enlargement of the Union. Yet, the inclusion of representatives both of the European Parliament and of the national parliaments, in addition to those of the national governments and the European

119 Slaughter (note 74) p. 31-33, 131 et seq.
Commission as members of the European Convention to be established for preparing the amendments of the Treaties to be adopted by the Intergovernmental Conference and ratified by the Member States (Art. 48 para 3 and 4 EU-L), and the early information of the national parliaments, besides of the European Parliament, on any application for accession to the Union (Article 49 EU-L) clearly demonstrate that the national parliaments are becoming a constituent part of the multilevel European institutional system.\textsuperscript{123} In addition, these innovations are due to enhance the legitimacy of the Union altogether.\textsuperscript{124}

3. Conferral, Clarification and Subsidiarity of EU Powers

One of the major problems of the constitution of any multilevel system of governance is an appropriate and clear division of powers. Provisions on competencies – like fundamental rights or the institutional setting – clearly have a constitutional character. Here again, the Treaty of Lisbon provides for a major progress in transparency and legal certainty, namely by giving the principle of subsidiarity procedural teeth, by clarifying the guaranty for the respect of the national identity of the Member States and by spelling out the system of conferred competencies.

a. Making the Principles of Conferral and of Subsidiarity Effective

Articles 4 para. 1 and 5 para. 2 EU-L establish the principle of conferral. These provisions reiterate: “competences not conferred upon the Union in the Treaties remain with the Member States”. More and more negative delimitations, such as the provision for the “sole responsibility of each Member State” for “national security” in Article 4 para. 2 EU-L or the general exclusion in Article 2 para. 5 TFEU of any “harmonisation of Member States’ laws or legislations” in the areas where the Union only has “competence to carry out actions to support, coordinate or supplement the actions of the Member States”, but also specific provisions like Article 77 para. 4 TFEU on the competency of the Member States for the geographical demarcation of their borders, or Article 147 para. 1 sentence 2 TFEU on the respect of the national competencies for employment policies, clarify the division and balance of powers between the Union and the Member States.

\textsuperscript{123} Ibid., p. 498, referring to J. Maja, La contrainte européenne sur la loi”, in: “La Loi”, Pouvoirs, n 114, 2005, p. 53, at 68, stating that the Lisbon Treaty confers them a “forme nouvelle de diplomatie parlementaire distincte des relations internationales du pouvoir executive”; see also the reference to E. de Poncins, Le traité de Lisbonne en 27 clés, éd. Lignes de repères, Paris 2008, p. 216, who regards this as a change from a purely international logic, in which the executive retains the monopole of the representation of the state, to a true logic of integration in which every national power intervenes on the European level.

\textsuperscript{124} See also Sabatakakis (note 109) p. 432, at 438.
While for exclusive competencies now defined and listed in Articles 2 para. 1 and 3 TFEU the principle of conferral is reversed so that Member States have no power to legislate except where expressly so empowered, in areas of shared competencies the limits for European action need to be clarified. This is where Article 5 with the principles of subsidiarity and proportionality plays a decisive role. The definition of subsidiarity is maintained from the existing EC-Treaty, but an important procedural device has been added with the “early warning system”.\(^{125}\) Article 5 para. 3 EU-L will contain a new paragraph reading as follows:

„The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.“

Protocol No. 2 sets up a procedure according to which the national parliaments may submit to the Presidents of the Council, the European Parliament and the Commission a reasoned opinion on each draft legislative act, stating why it considers that the draft does not comply with the principle of subsidiarity. Express provision is made for they may consult their “regional parliaments with legislative powers”. The reasoned opinion has to be taken into account by the institutions. Depending on the number of national parliaments rising questions the proposal must formally be reviewed, and the Commission, should it decide to maintain it, has to give a reasoned opinion for why it considers that its proposal is conform to subsidiarity. The European Parliament and the Council have to consider all these opinions, knowing that each national parliament – or even a chamber thereof – finally has the right to bring a case to the Court of Justice if a legal act is considered to be incompatible with the principle of subsidiarity.

There are doubts and discussions on the effectiveness of this procedure, particularly because national parliaments will only have eight weeks for considering their position and there is no veto right.\(^{126}\) Given the vagueness and the political character of the criteria of subsidiarity, this procedural solution may develop nevertheless as a powerful instrument for protecting the competencies of the national legislator available, because it gives a say on the – potentially excessive – use of European competencies to those institutions who are the first to lose power. While it is true, that in the European system it is one of the responsibilities of the national governments sitting in the Council, to take care of the na-

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\(^{126}\) See Dougan, Treaty of Lisbon (note 29), p. 658 et seq. For further comments and discussion see: Gavin Barrett (ed.), A New Improved Formula? The Treaty of Lisbon and National Parliaments, in: National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures. Clarus Press: Dublin, 2008. See also Bermann (note 125), p. 160, noting, however, that the earlier discussions on green papers, white papers and other policy documents of the Commission during the “pre-legislative” period may be the solution.
tional freedom of action, governments may also tend to (ab-)use the “European path” for pushing through legislation, which seems to be unpopular at home.\textsuperscript{127} If the parliaments, and the more so: if the political minority in the national par-

\textsuperscript{128} liaments\textsuperscript{128} have the right to intervene in cases of doubt, it will be more probable that the principle of subsidiarity is really taken seriously.\textsuperscript{129} What is more important in the present context, however, is that the use of these new powers of the national parliaments will trigger a political debate about the legislative activities at the European level. It may also get the parliamentarians as well as the public in the Member States more actively involved in politics implemented at the European level – and rise awareness of the opportunities the EU offers for using its institutions for proactive politics outside the normal reach of national legis-

\textit{b. Protection of National Identity}

In addition to these provisions clarifying the division of powers between the Union and the Member States it was of great importance at least for some to give specific and precise expression to the respect of national identity. Article 4 para. 2 EU-L reads:

\begin{quote}
"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."
\end{quote}

The major innovation here is the provision for the respect for the internal structure of each Member State, the regional and local levels of self-government. It signals that the Union is not any more “landesblind” – meaning blind as regards the existence and interests of the sub-state components of some Member States\textsuperscript{130} – and underlines that the regions are indeed considered as a part of the European multilevel construction. They are respected (Article 4 para. 2 EU-L),

\textsuperscript{127} Such strategies are criticized by Herzog/Gerken (note 110) p. 209, at 211, as „Spiel über die Bande“.

\textsuperscript{128} This is the case in Germany, at least, for the right to bring the case to the ECJ (future Art. 23 para. 1a German Grund-

\textsuperscript{129} gesetz, cf. Gesetz zur Änderung des Grundgesetztes BT-Drs. 16/8488 v. 11.3.2008, approved on 24.4.2008)

\textsuperscript{129} For this reason my proposal had been to create a „Parliamentary Subsidiarity Committee“ consisting of representatives of the national parliaments, as a new body having the right to alert the political institutions in cases of violation of the principle of subsidiarity, see: Ingolf Pernice, Rethinking the Methods of Dividing and Controlling the Competencies of the European Union. Introductory Report, in: Mads Andenas / John Usher (eds.), The Treaty of Nice and Beyond. Enlargement and Constitutional Reform, Oxford and Portland (Hart) 2003, p. 121-145, available as WHI-Paper 6/01, http://www.wbi-berlin.de/pernice-competencies.htm, p. 17.

their parliaments may be consulted when questions of subsidiarity arise (Article 6 para. 1 of the Subsidiarity-Protocol), and they are represented by the Committee of the Regions (Articles 305-307 TFEU), which now will be given also the right to bring cases of violation of the principle of subsidiarity to the Court (Article 8 (2) of the Subsidiarity Protocol). The Treaty of Lisbon so sets up and improves the conditions for a meaningful representation of the interests of the respective authorities at the European level through the Committee of the Regions (Article 263 EU, Article 305 EU-L) and makes more explicit the multilevel structure of the European system of government.

c. Distribution and Delimitation of Competencies

It was never really clear, who in the EU is responsible for what. The new systematic definition introduced by the Treaty of Lisbon, of the categories of competencies of the European Union – exclusive, shared, coordination and support – and an exhaustive listing of the areas of action in each category (Articles 2 to 6 TFEU) can be regarded as a major step towards transparency and legal certainty. Article 2 (6) TFEU points out that the precise scope of, and arrangements for exercising the Union’s competencies are determined by the provisions of the Treaties relating to each area. Accordingly, for “communitarising” the Area of Freedom, Security and Justice the Treaty of Lisbon defines the powers involved not only exhaustively but also much more precisely and restrictively. ¹³¹ Compared to the definition of exclusive and concurrent legislative competencies of the federal legislator in the German Grundgesetz, namely Articles 73 and 74, the attributions of powers to the Union, thus, are much more detailed, concrete and limited.

There is strong debate, however, whether or not the unchanged Article 95 EC (Article 114 TFEU) regarding harmonisation of legislations of the Member States and, in particular, the amended terms of the “flexibility”-clause in Article 352 TFEU do not put into question the entire system of conferred powers because of the vagueness of their terms. While paragraphs 2 to 4 of the new Article 352 TFEU provide for strict subsidiarity control and some important exceptions, the first paragraph conferring the competency to the Union reads:

„If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.“

¹³¹ For details see Ladenburger (note 86), p. 34 et seq. explaining that this was „probably the most important precondition“ for an agreement at the Convention to „communitarise the Third Pillar“. 
Some assume that this clause gives an unlimited “competence-competence” to the Union, while others see no widening of the powers in this provision compared to the terms of the existing Article 308 EC, which are interpreted quite restrictively by the EJC.\(^{132}\) My contention is that the limitation to the “framework of the policies defined in the Treaties” is more restrictive than the reference just to the “framework of the Common Market” the existing Article 308 EC refers to. More important are the new procedural safeguards requiring the consent of the European Parliament and the alert of the national Parliaments under Article 352 (1) and (2) TFEU as well as the exclusion of harmonisation in the policy fields where specific provisions of the Treaty do not allow harmonisation, and the inapplicability of the flexibility clause to objectives pertaining to the foreign and security policies Article 352 (3) and (4) TFEU).

On that basis, also the new flexibility-clause enhances legal certainty in the divided power system of the EU. The question is a central issue in the constitutional proceedings against the Treaty of Lisbon before the Federal Constitutional Court of Germany.\(^{133}\) No doubt, a restrictive interpretation will have to be given with regard to the principle of conferral which otherwise would be meaningless.

4. Efficiency of Decision-Making Procedures

The design of the decision-making procedures and, in particular, the balance of state’s and citizen’s representation and the question where the Council decides by qualified majority or takes unanimous decisions, is of great relevance also for the constitutional balance of powers between the EU and its Member States. One of the most difficult chapters in the Treaty of Lisbon therefore was the decision-making in the Council. While everybody agreed on the need for the most general application of the ordinary legislative procedure, with the Council deciding by qualified majority, Member States had quite divergent ideas about where unanimity had to be maintained and where decisions by qualified majority were possible or needed. A great number of areas have eventually been transferred from unanimity to qualified majority, yet with the “alarm bell system” and important opt-outs for the UK in the specific areas of criminal justice and police cooperation.\(^{134}\) This alone is an important progress in efficiency in a Union of 27 Member States.

The other issue presented even more problems: What are the criteria for qualified majority? The “Nice-system” was felt impracticable and also unfair by most

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\(^{132}\) Last: Case 402/05 – Kadi, para. 203, not yet reported, see also Opinion 1/94 – WTO (1994) ECR 5267, para. 60.


\(^{134}\) Ladenburg (note 86), p. 32 et seq. calls it the „emergency brake“, considering it nevertheless „also as an accelerator“, since it allows an „ad hoc opt-out“ of Member States experiencing persistent problems with an initiative.
of the Member States, while the German proposal of “double majority” under which a qualified majority is reached if at least 15 members of the Council having 55% of the votes, representing together at least 65% of the population of the Union agree (Article 16, para. 4 EU-L) was strongly opposed by Poland and Spain, the countries who had the greatest advantage under the Nice-system. Finally, an agreement was found by which the “double majority”-system will be introduced\(^{135}\), but not before 1 November 2014. A protocol regarding these provisions states that even until the 31 May 2017 any Member State can ask that the old method is applied in a particular case\(^{136}\). Such “constitutional dynamics” are familiar to the EU system as shown by the original provisions on the time-frame for the abolition of costumes among the Member States (Articles 13 to 15 EEC-Treaty 1957), “passarelle”-clauses like Article 42 TEU or the future Article 48 § 7 TEU-L. Though the transition period is extremely long for the double majority-system to come, this system is regarded as more democratic\(^{137}\) and, above all, more transparent and simple than the actual voting system at the Council.

The intensive struggle on a change of the present voting system, under which the probability for the Council to adopt an act would be lower as ever\(^{138}\) seems to be somewhat unnecessary since decisions of the Council are regularly made by consensus and without voting.\(^{139}\) It does, nevertheless, show how sensitive the amount of influence in the Council is particularly for new Member States having re-gained sovereignty not long time ago.

5. Legal Capacity and Foreign Representation of the Union

The issue of national sovereignty was also relevant for the question of legal personality of the European Union as well as for the provisions on the representation of the Union in external policies.

a. The EU’s Legal Capacity and Unity

So far, probably with a view to preserve national sovereignty of the Member States undisputable, the Union was not expressly given legal personality under

\(^{135}\) For details see e.g. Stefan van den Bogaert, Qualified Majority Voting in the Council: First Reflections on the New Rules, 15 MJ (2008), p. 97.

\(^{136}\) Find a detailed description of the QMV in Dougan, Treaty of Lisbon (note 29), p. 630 et seq.; Terhechte (note 17) at p. 166 et seq.

\(^{137}\) Müller-Graff (note 17) at p. 131, criticizes nevertheless that this is not sufficient.


\(^{139}\) See the table showing an average of 83.17% of legislation adopted by consensus during the period from 1994 to 2005, ibid., p. 82.
international law, while the EC had legal personality from the outset (Article 281 EC). The result is that with the distinction between the supranational pillar one and the intergovernmental pillar two the Union appeared somewhat awkward particularly because its legal nature was left open. Nonetheless the EU has acted in practice as if it had legal capacity, it was recognised by its partners as an international player and it has even concluded a great number of international agreements under Article 24 EU.\textsuperscript{140} This means that the Union acted as if it had legal capacity, but the mere fact that legal personality will now formally be recognised under Article 47 EU-L simplifies its status and appears as an important step towards legal certainty.

\textit{b. Uniting Shared Competencies: The High Representative for CFSP}

The recognition of its legal personality also underlines the character of the Union as a multilevel actor with competencies shared among itself and its Member States. Without regard to the question whether a specific action is a matter of European competency or of Member States’ responsibility – or of both – for matters of common interest it will, after Lisbon, always be the Union who is acting. The question of competency will only be relevant for the choice of the internal procedures and of the person representing the Union: Within the areas of Community competency it is always the European Commission, for the other areas negotiations and representation is ensured by the presidency of the Council.

But the new position of the “High Representative of the Union for Foreign Affairs and Security Policy” in some respect will represent the unity of the two domains: This person will play the double role of being the Vice-President of the Commission responsible for foreign affairs\textsuperscript{141} and the Council’s High Representative of the Union for Foreign Affairs and Security Policy. In the function of what under the Constitutional Treaty was called the EU “foreign minister”, he or she will also chair the Foreign Affairs Council, make proposals for the shaping of the foreign and security policy and be responsible, together with the Member States for putting these policies into effect (Articles 18 para. 2, 26 para. 3 and 27 para. 1 EU-L). The “double hat” and “double role” in some way mirrors the unity of the supranational (Commission) and the intergovernmental (Council) logic of the Union, it combines in one person the European and the Member


\textsuperscript{141} See in particular Article 18 para. 4 EU-L: „The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.”
States’ lines of interest. The responsibility of ensuring the “consistency of the Union's external action” (Article 18 para. 4 EU-L) precisely describes what the Treaty of Lisbon is aiming at: The Union shall be perceived as one unit, speak with one mouth and implement consistent policies in external matters.

These provisions, however, do not imply that the competence for external and security policies will entirely be passed over from the Member States to the Union. As can be seen from Article 34 TEU-L, the Member States will continue to act in international organisations and conferences, though they are hold to coordinate their action, to defend the common positions of the EU and to inform each other. Article 24 § 1 third phrase TEU-L states expressly that “the adoption of legislative acts shall be excluded”. Particular tensions may exist with the national security and defence policies. There is provision, however, ensuring consistency, since under Article 24 § 1 TEU-L

“the Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence”.

This seems to be contrary to Article 4 § 2, last sentence TEU-L, under which “national security” is said to remain “the sole responsibility of each Member State”. As this provision does not seem to be limited to internal matters of police and home affairs, the contradiction could be reconciled only if national security were distinguished from the security of the Union defined in Article 21 § 2 TEU-L as one of the objectives of the Common Foreign and Security policy of the EU. Yet, the distinction seems to be rather artificial. Article 42 § 2 TEU-L envisages the possibility of a future inclusion of defence policies in the framework of coordinated or even common action:

„The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.“

Clearly, this further step would allow more coherent policies of the EU in external matters including security at the European level, but national security – remaining the responsibility of each Member States – would necessarily be an aspect, and become a result of successful common security and defence policies. Autonomous, but coordinated external policies of the Member States, thus, could produce synergies and benefits resulting from “the strength inherent in united

142 The provision reads: “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity...”
action”, as Joseph H. Weiler puts it, and the use of special relations each of the Member State may traditionally have to other countries of the globe. Common foreign and security policies in this sense eventually represent what can be called the external dimension of the composed – or multilevel – European constitutional setting.

c. The President of the European Council

With a view to ensuring better and more continuous representation towards third states as well as towards the citizens of the Union the new position of the President of the European Council is a significant progress. The President will be elected by qualified majority of the European Council for a period of 2 ½ years, renewable once (Article 15 para. 5 EU-L). He or she will at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, and so provide for the necessary continuity. Yet, for foreign issues under Union competence, the representation at this highest level remains the responsibility of the President of the Commission. The unity achieved at the ministerial level, thus, is not realised at the level of Heads of State and Government.

The Treaty of Lisbon, however, does not exclude merging the functions of the President of the European Council and the President of the Commission. Article 15 EU-L only states that the “President of the European Council shall not hold a national office”. Though it is not what most of the Member States had in mind, a “double hatted” President would have many advantages. It would indeed better represent the unity of the Union towards the citizens as well as towards third countries. It would also allow for a more direct democratic control of that
person by the European Parliament.\textsuperscript{147} Giving the highest representative of the Union a personal face and political responsibility as it would be the case for a double-hatted President of the European Council and the Commission, thus, would be another step towards a more effective, coherent and democratic system of multilevel governance.

6. Rule of Law and Voluntary Membership

Last but not least, it is the respect for rule the law, which the Treaty of Lisbon not only mentions but also enhances in various aspects. It is, as the ECJ has again confirmed recently,\textsuperscript{148} a fundamental constitutional principle, all the more since the Union, was created by law, acts only through law, is bound to the law and relies upon the voluntary respect of the law by all Member States. This rule is as essential for the Union and its functioning as it is for Member States and for its citizens, who entrust powers to the European institutions and mutually rely on the respect of the common rules of law.

In this Union based upon the rule of law instead of the rule of man and on conviction instead of physical coercion through central authorities, four constitutional changes envisaged by the Treaty of Lisbon appear to be of particular importance regarding multilevel constitutionalism: The provisions on the protection of fundamental rights, the extension of the judicial protection of the individual against regulatory acts, a clarification of the principle of primacy of European law and the right of Member States to withdraw from the Union.

\textit{a. New Provisions for the Protection of Fundamental Rights}

The established jurisprudence of the ECJ since 1969 clearly confirms that the fundamental rights of the individual are protected as part of the general principles of law to be respected by all the institutions.\textsuperscript{149} In order to strengthen this guaranty and to make it part of the positive law, the Heads of State and Government solemnly proclaimed the Charter of Fundamental Rights at the summit of Nice in December 2000. The Charter had been drafted by the first Constitutional Convention of the EU, established by the European Council of Cologne in June

\textsuperscript{147} For a model of organising a more democratic function of the President of the European Council see Pernice, Democratic Leadership (note 145).

\textsuperscript{148} ECJ Case C-402/05 – Kadi.

and chaired by the former President of Germany, Roman Herzog. The objectives are, as the Preamble of the Charter states,

„to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.”\textsuperscript{151}

Article 6 para. 1 EU-L now refers to this Charter as a legally binding instrument which will have the same legal status as the Treaty itself. The new EU-Treaty also contains a reference to the European Convention of Human Rights to which the Union shall accede (Article 6 para. 3 EU-L), and maintains the reference of Article 6 para. 2 EU to the “fundamental rights… as they result from the constitutional traditions common to the Member States”. It specifies that they “shall constitute general principles of the Union's law”. With these new “three pillars” to be the basis for the protection of fundamental rights in the Union the Treaty of Lisbon makes entirely clear that the powers of the Union – be they exercised by the European institutions or implemented by the Member States’ authorities – are limited to what is compatible with the fundamental rights of the individual.\textsuperscript{152} It confirms and strengthens, as stated above,\textsuperscript{153} the basic role of the individual and, in particular, the status of the citizens of the Union as the genuine subjects of the European multilevel constitutional setting. With the reference to the constitutional traditions as a basis for the European fundamental rights, in addition, it maintains not only the necessary dynamics of the regime of rights protection\textsuperscript{154} but also the necessary openness at the Union level for the continuous matching and trade-off between the national and the European standards of rights in the Union through the judicial dialogue between the two constitutional levels.

Obviously, though not intentionally, the protection of the European fundamental rights at the national level as the national courts have to ensure in close dialogue with the ECJ under Article 234 EC (267 TFEU), if effective, may set standards for a high level protection of fundamental rights within the Member States also in matters which are not directly related to European action. At least, individuals

\textsuperscript{150} Presidency Conclusions of the European Council of 6 and 7th June 1999, points 44 and 45: „The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident. 45. To this end it has adopted the Decision appended as Annex IV. The incoming Presidency is asked to establish the conditions for the implementation of this Decision by the time of the extraordinary meeting of the European Council in Tampere on 15 and 16 October 1999.” See also ibid. Annex IV. The term „body“ is used here for what in fact developed to be the first Constitutional Convention.


\textsuperscript{153} See above p. 36.

\textsuperscript{154} In this sense Dougan, Treaty of Lisbon (note 29), p. 665: „legal basis for a flexible evolution of the Union’s human rights jurisprudence”. See also Pernice, Treaty of Lisbon (note 108), p. 240.
would not understand why fundamental rights which are included in the Charter or recognised by the ECJ as general principles of law are not protected in other cases, even if they are purely national. In short: The “three pillars” of human rights protection under Article 6 EU-L (Charter, ECHR and general principles of law) not only ensure coherence between the two constitutional levels but also provide for considerable harmonisation in substance at a high standard of protection throughout the Union.

b. Judicial Review of Regulatory Acts

The EC-Treaty establishes by the Articles 220-245 a system of effective judicial review of all legal acts of the Community, though under Article 230 para. 4 EC access to justice is limited for the individual to decisions against a decision “addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. Under the so-called “Plaumann-jurisprudence” of the ECJ this means that for European acts of general application individuals can obtain judicial protection only against “measures of direct and individual concern to them”. This was contested in the Jégo Quéré case of 2002 regarding Regulation No 1162/2001 establishing measures for the recovery of the stock of hake. On the application of a fishing company which was not allowed under this regulation to continue its activity, the Court of First Instance detected a lacuna in the system of legal protection and found that access to justice under Article 230 para. 4 EC should be extended to cases where individual rights are directly affected by a regulation although the applicant was not individualised in the regulation as required by the established case-law of the ECJ. In line with the convincing arguments developed by Advocate General Francis Jacobs in another case, the Court of First Instance by giving the criterion of individual concern a larger meaning has held the application admissible. This judgement was annulled, however, by the ECJ holding that this extensive interpretation was contra legem. In the parallel Case 00/50 – UPA the Court had already explained that if there is a lacuna it was for the Member States to fill it within the framework of the ongoing reform of the Treaties.

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158 ECJ Case C-263/02 P – Jégo Quéré, para. 29-39.
159 Case C-50/00 P – Unión de Pequeños Agricultores v Council (2002) ECR I-6677, para. 45: „While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force“.
This reform is indeed included in the Treaty of Lisbon. Article 230 para. 4 EC which will be Article 263 para. 4 TFEU-L will be completed by a phrase giving the Court jurisdiction also for applications of individuals “against a regulatory act which is of direct concern to them and does not entail implementing measures”\textsuperscript{160}. Moreover, as advised by the Court in the UPA-Case, the new EU-Treaty will underline in Article 19 para. 1 subpara. 2, that the Member States “shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”\textsuperscript{161}.

Hence, the Treaty of Lisbon does not only strengthen the protection of individual rights in the EU but also underlines the co-responsibility of the Member States and their courts as part of the multilevel judicial system of the Union. It confirms what the German Federal Constitutional Court had already underlined in its famous “Solange II”-judgement: That because of the specific character of the EC’s judicial system consisting of the national courts and the European Court of Justice as integral parts of this system, the latter is to be regarded as “gesetzlicher Richter” within the meaning of Article 101 para. 1 second sentence of the German Constitution.\textsuperscript{162} Where a national court, contrary to its obligation under Article 234 EC, arbitrarily refuses to refer a case to the ECJ, namely for a violation of a fundamental right, the applicant, thus, is entitled to bring this case to the Constitutional Court for violation of this constitutional guarantee of “access to the right judge”.\textsuperscript{163}

c. Clarifying the Principle of Primacy

The rule of law, for the EU also includes the principle of primacy of European law over whatever kind or quality of national law. It is a condition both for the functioning of the European legal system as such, and for the individuals to effectively benefit from the rights and freedoms granted under European law. In cases of conflict courts have to give precedence to the European rule and disapply the opposed national provision. The mere existence of this conflict-rule

\textsuperscript{160} Concerning the problems in interpreting this provision see Dougan, Treaty of Lisbon (note 29), p. 677 et seq.; Usher, Direct and individual concern: An effective remedy or conventional solution?, 28 ELRev. (2003), 575, at 599; Schwarze, The legal protection of the individual against regulations in European Union law, 10 EPL (2004), 285; Koch, Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy, 30 ELRev. (2005), 511.

\textsuperscript{161} ECJ Case C-50/00 P – Unión de Pequeños Agricultores v Council (2002) ECR I-6677, paras. 40 and 41, concluding: „Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.”

\textsuperscript{162} BVerfGE 73, 339 (368), in German: http://www.servat.unibe.ch/law/dfr/bv073339.html, for an English translation see: 3 CMLR 225, noted by Frowein (1988) 25 CMLRev 201 et seq.

\textsuperscript{163} The German Federal Constitutional Court has reiterated this guarantee namely for alleged violations of fundamental rights by an EU regulation in the Order of 9 January 2001, case 1 BvR 1036/99 http://www.bverfg.de/entscheidungen/rk20010109_1bvr1036099.html, paras. 17 and 18.
demonstrates that European and national law in the EU indeed constitute one coherent legal system with two formally autonomous components.

Though the express provision on primacy as contained in Article 6 of the Constitutional Treaty has been omitted in the Treaty of Lisbon, its Declaration No. 17 concerning primacy with a reference even to an Opinion of the Council’s Legal Service makes entirely clear that the established case-law of the ECJ will also apply in future:

„The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law...“164

As the respect of this principle by all the Member States and national authorities is a condition for the functioning of the European Union, no exception is admissible. Even for national constitutions, which are regarded as the supreme law in the land, the Constitutional Courts, such as in Spain and in Germany, accept that the principle of primacy is part of the deal165. Dialogue and close cooperation between the Constitutional Courts and the ECJ, guided by the principles of mutual respect and the guaranty for national identity will bring about an adequate solution where essential rules of national law seem to be in question. Where a true conflict remains, the Union may need to digest the exceptional disregard or the Member State concerned may consider its withdrawal from the Union.

d. The Right of Withdrawal

The case of a real conflict between the supreme courts at the two levels seems to be rather academic, but the mere fact that it may occur and that there is no clear hierarchy, demonstrates that the membership to the Union and the respect of the rule of law are voluntary and imposed by anybody. There is no preceptor, no domination of one legal order or court on another, no coercion. Though the con-

164 The Declaration continues with a reference to the Opinion of the Council’s Legal Service of 22 June 2007 which reads as follows: „It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.‖ This Opinion also contains a footnote quoting Case 6/64: „It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.‖

165 The claim of Frédérique Michéa, La primauté du droit de l’Union à la lumière du Traité de Lisbonne, Revue du Marché commun et de l’Union européenne, n. 520 (July 2008), p. 446, at 447, to mention the jurisprudence of the national Constitutional Courts, is therefore not comprehensible.
cept clearly seems to be outdated under the present conditions of globalisation.\footnote{See above, p. 26.} Member States may continue to consider themselves sovereign.

In addition to the flexibility provided by new opt-outs and improved provisions for enhanced cooperation, it is in order to underline this voluntary character that the Treaty of Lisbon now introduces the possibility of withdrawal in Article 50 EU-L. It is made clear, thus, that for all the states, continued membership to the EU remains an option but is not a duty. This can add to the legitimacy of the Union, as no Member State is forced to participate.\footnote{For this idea see Terhechte (note 17) at p. 153.} Clearly the option of withdrawal is more hypothetical than real, politically at least for some of the Member States like Germany. But it is not realistic also in terms of law, because the European Union is more than a form of cooperation among states. The more the Union can be considered as based upon constitutional rights and freedoms of individuals, the more the option of a withdrawal of one Member State becomes unacceptable – for its own citizens as well as for the citizens of the other Member States holding a stake in that one Member State. This indeed, would be a reason to rethink the concept of sovereignty again.

**Conclusion**

The Treaty of Lisbon is neither a failure nor is it overruling of democratic decisions of the peoples of some Member States. Before too quickly questioning the legitimacy of the process\footnote{Dougan, Treaty of Lisbon (note 29), p. 700 et seq.} the political background of the referenda in France, the Netherlands and Ireland and of the negative outcome need to be carefully examined, as well as the conditions under which new attempts with a second referendum or a switch to another mode may be made. Even if the Treaty of Lisbon were not to be brought into force, it contains a number of insights and clarifications, which are important for the future understanding and operation of the European Union. In confirming the common values, making explicit the fundamental rights and enhancing constitutional principles such as, in particular, democracy, the rule of law, subsidiarity and proportionality, the Treaty reflects the “state of the art” of constitution-making for a system of multilevel governance with a constitutional framework which is complementary to the national constitutions. If there was no “constitutional moment” in the making of Europe,\footnote{Considering this for the Convention and its work: Neil Walker, After the Constitutional Moment, in: Ingolf Pernice/Miguel Piores Maduro (eds.), A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention, 2003, p. 23 (http://www.ecln.net/index.php?option=com_content&task=view&id=23&Itemid=41); see however Dario Castiglione, Constitutional Moment or Constitutional Process, in: Dario Castiglione/Justus Schönlaub/Chris Longman/Emanuela Lombardo/ Nieves Pérez-Suárez Borragán/Miriam Aziz, Constitutional Politics in the
conclusion and earlier revisions of the Treaties, but also the attempt to substitute them by the Treaty establishing a Constitution for Europe and the finally the submission of the Treaty of Lisbon to ratification and, under some new conditions, to a second Irish referendum are certainly steps of the “constitutional process” by which the European peoples, having learned from horrible experiences of the past centuries and, in particular from World-War II are trying to find a legal framework for better organising their common future.\textsuperscript{170}

This process results in developing the citizenship of the Union providing the people in the Member States with a more effective, transparent and democratic political device for efficiently articulating and implementing policies in their common interest, as far as individual Member States are not able to meet effectively the challenges of globalisation. Thus, the Treaty of Lisbon would not challenge sovereignty but strengthen it under a new, multilevel form. To restructure the Constitutional Treaty and bring it in the traditional form of a treaty amending the European Treaties for parliamentary ratification, as far as possible, and even to try a second referendum in Ireland does not demonstrate disregard of a democratic decisions. It rather shows a legitimate determination of democratically elected governments, eventually including that of Ireland, to make the advantages and the necessity of this Treaty sufficiently understood also by the Irish people and, after further intense debates and under the conditions to be found, to give it the opportunity to reconsidering its position.

The analysis of the terms of the Treaty of Lisbon in the light of multilevel constitutionalism shows an important step forward in this treaty, in the development of the Union as a composed system of multilevel governance, in which the Member States and their constitutions are the basis upon which the supranational institutions are built in order to do in common what to do individually is impossible or ineffective. Instead of creating or developing the EU to a European super state,\textsuperscript{171} which would replace the Member States, the Treaty of Lisbon, thus, balances supranational and intergovernmental elements of the Union\textsuperscript{172} and un-


\textsuperscript{171} For more arguments against the thesis of a super-state see: Moravcsik (note 77) at p. 606 et seq.: „Yet the threat of a European superstate is a myth.“

\textsuperscript{172} Dougan (note 104), p. 692, states that there is a trend of balancing supranationalism with intergovernmentalism, i.e. that that greater supranational governance is counter-weighted by more effective checks and balances to protect Member States prerogatives.
derlines its subsidiary character as a complementary instrument of the citizens for pursuing in common certain common objectives.

To this end, the Treaty of Lisbon furthers the system of effective protection of fundamental rights of the individual in establishing a substantial dialogue and coherence between the two constitutional levels. It confirms and enhances the additional political status of the citizens of the Member States as citizens of the Union. It provides for more efficient action of the institutions exercising their respective competences, which will more systematically and more clearly defined and delimited. It clarifies the principles of subsidiarity and proportionality and establishes procedural means to better ensure their respect. By creating the function of the President of the European Council it gives the Union a personal face and mouth; the foreign minister (who cannot be called so) is given the power to ensure coherent foreign policies and more effective external representation of the Union. The Treaty of Lisbon gives the national parliaments a clear European role and responsibilities for the control of the legislative activities of the Council; it revaluates the European Parliament on equal terms with the Council as one of the legislative and budgetary authorities of the Union, it defines a limited set of forms in which the Union may take action, and develops in many other ways the features of the Union as a multilevel system of governance.

Multilevel Constitutionalism regards not only supranational constitutional processes such as the European integration, but understands such processes as part of, and in close relation to the constitutional development at the national level. National constitutions change with the progress of supranational constitutional arrangements, as much as the states themselves change their face, political structure and nature as a result of their integration in supranational organisations. Even the individual citizen as the political owner of its national policy changes identity and status, in that citizenship of the Union is regarded as “additional” to the national citizenship and expresses what can be the ownership also regarding the European Union.

To establish such a supranational union, to develop its democratic structures and procedures, to organise its powers and their limits with regard to the rights of the Member States and their citizens through discussing, negotiating, evaluating and finally ratifying the Treaty of Lisbon, thus, is as much a constitutional exercise as organising the statutes of a state. It is much more complex, however, and more challenging, as a social and cultural process it is a new and innovative venture for all concerned: This is Multilevel constitutionalism in action.

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