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A Tentative Survey of the Innovations of the Constitution for Europe that Might Impact Upon National Constitutional Law

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CHAPTER 8

A Tentative Survey of the Innovations of the Constitution for Europe that Might Impact Upon National Constitutional Law

Philipp STEINBERG

Résumé en français : Essai de synthèse des innovations de la Constitution pour l'Europe susceptibles d'affecter le droit constitutionnel national.

L'on peut distinguer deux types d'influences du projet de Constitution pour l'Europe sur le droit constitutionnel national. Parfois la Constitution européenne intègre les constitutions nationales dans son "programme". Dans ce cas, les ordres constitutionnels nationaux reçoivent certains droits ou se voient imposer certains devoirs par la Constitution pour l'Europe. Plus souvent toutefois, comme tente de le montrer ce chapitre, l'effet de la Constitution pour l'Europe est plutôt de nature indirecte : elle fixe des objectifs à atteindre sans exercer d'influence directe sur le droit constitutionnel national.

Du fait du système d'attribution des compétences, et en particulier de la « clause de sécurité structurelle » la constitution économique des États est moins prédéterminée par les choix constitutionnels européens. Le système d'alerte précoce pourrait créer la nécessité d'accentuer plus clairement le rôle européen des parlements dans les constitutions nationales. Du fait de l'absence de voie de recours spécifique à la protection juridictionnelle des droits fondamentaux dans l'UE, les cours constitutionnelles et les constitutions nationales devront garantir qu'une question préjudicielle sera toujours adressée à la Cour de Justice européenne en cas d'atteinte aux droits fondamentaux. L'intégration de la Charte des droits fondamentaux dans la Constitution pour l'Europe pourrait conduire à une convergence entre les protections nationales et européenne des droits fondamentaux. Du fait de l'importance croissante du niveau européen, les constitutions nationales devraient être révisées afin d'inclure des dispositions relatives à la nomination aux fonctions officielles de l'Union (Commissaires, juges, etc.).

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Introduction

The European Constitution is in the making – in fact, on July 10, 2003, the European Convention presented a proposal for a new "Constitution for Europe". Because of this – it was unthinkable to speak of a European Constitution until a few years ago – the question of the relationship between national constitutional law and European constitutional law is reemerging as a topic of political and scientific interest. Indeed,

countless studies focusing on this relationship have been carried out[1]. In this chapter, we will show that their findings are also still relevant for the analysis of the new European multilevel system of governance. However, certain findings stressing the cooperative nature, between the national and the European Constitutions, are strengthened by the Constitution for Europe. This is due to the fact that – as will be argued in this chapter – in spite of certain innovations that have a "positive" influence on national constitutional law because something truly "new" has been created at European level, the main repercussion of the Constitution for Europe on national constitutional law is of an encouraging nature. It leaves room for national innovations in order to compensate for – or supplement goals and standards set by the European Constitution.

The tasks which were set forth in the Laeken declaration[2] – a better division of competences, an easier and more "user-friendly" presentation of primary law, a clarification of the future role of the Charter of Fundamental Rights (CFR) and a strengthening of the role of national Parliaments – have been broadly achieved. The incorporation of the CFR may be characterised as a full-scale positive innovation at the European level, possibly entailing necessary adjustments of the procedural and material aspects of national human rights protection. In the same way, national Parliaments are given a more prominent role, thereby recognising and strengthening their "European role"[3]. However, these tasks have been carried out rather cautiously, leaving it to the member states to react to European innovations. This was partly the result of a political compromise and partly a process fuelled by the fact that the members of the Convention realised that certain tasks set out by the Laeken declaration had to be undertaken on the national level. In this respect, especially the "early warning mechanism" might have repercussions for national constitutional law. The fact that a protocol spells out that national constitutions have to provide for adequate means for parliamentary involvement might already be labelled an innovation.

Therefore, the Constitution for Europe as an ingredient of the European multilevel constitutional system leaves room for national Constitutions to take advantage and meet the challenges set by the offers – or invitations made by – the Constitution for Europe. This is what we mean by an 'encouraging role'. However this can only be considered truly innovative for national constitutional law if one accepts that the European and national Constitutions together form a system of multilevel governance in the European Union, the new European constitutional document being only one part of it. This chapter will start by quickly explaining this concept. Taking the tasks set out in the Laeken declaration as a starting point, the chapter will then survey some of the innovations of the new European constitutional document and their repercussions on national Constitutional

law. It will furthermore be argued that the role of "encouragement" dominates. The chapter will focus on the first and second parts of the constitution, elaborating on the third part only when necessary.

Multilevel constitutionalism in the European Union

In undertaking a survey of the innovations introduced by the Constitution for Europe that might impact upon national constitutions, it seems helpful to quickly explain what kind of influences or impacts may be conceptualised. For some time now, an ongoing process has been observed, described as the "Europeanisation" of national law, e.g. private, constitutional, administrative and even criminal law. The debate in constitutional law traditionally focuses on the question how European integration influences the way member states and citizens 'transfer sovereignty', the relationship of national (constitutional) courts to the European courts, the question of the protection of fundamental rights and the general influence of European law on the organisation of the member states, and the question of how the principles of direct effect and supremacy can be integrated into concepts of constitutional law[4]. In this respect it seems unlikely that the Constitution for Europe will alter the situation considerably, even though the primacy of European law will now be clearly established (Art. 10). Certain aspects, however, will be discussed in a different way, especially the protection of fundamental rights. Criticisms of the "democratic deficit" of the Union[5] might be softened because the European Parliament has been given considerably more power.

There is some evidence that certain features that already may be detected in today's constitutional architecture will be more clearly accentuated by the Constitution for Europe. This concerns certain characteristics that are connected to the concept of multilevel constitutionalism[6]. Very briefly, according to this concept, national and European constitutions can no longer be considered individually, but rather are in many ways intertwined. Even if the exact degree of this intertwining is open to debate[7], and even if speaking of a 'single legal order'[8] might go too far, at least two elements of this theory are considered to be important for the topic of this chapter. First, it is important to realise that every revision of the European Treaties, which the Court correctly calls the "constitutional Charter of a Community based on the rule of law"[9], entails an implicit or explicit modification of national constitutions. Although originally autonomous, both institutional levels by now strongly depend upon each other. National courts, Parliaments and executives cannot any longer be labelled as purely "national". In the same vein, member states have to rely

on and operate through the European Institutions in order to pursue a policy in a given area[10] and promote the "European general interest", of which matters of national general interest are a part[11]. As a consequence, the implications of the Constitution for Europe might be twofold. First, they might have a direct positive influence when they integrate national (constitutional) law in their 'programme'[12]. Second, there is an indirect, encouraging impact when the Constitution for Europe does not provide for a particular arrangement in an area that may be identified as important for the European constitutional multilevel system. Here it sometimes might also be necessary to include *explicit* references to 'European affairs' in national constitutions, as has already happened in some cases. However, the new Constitution for Europe intensifies the need for such steps.

Innovations of the Constitution for Europe – Delimitation of competences

A BRIEF SURVEY OF THE NEW SYSTEM OF COMPETENCE ALLOCATION

One of the major concerns voiced in the Laeken declaration related to the need for a better division of competences between the European and national levels[13]. Especially in Germany fears were frequently expressed that there would be a "creeping" accumulation of EU competences to the detriment of national spheres of competences. The German Länder pressed especially – and are still pressing – for a "clear" competence catalogue, modelled on the German Basic Law. Furthermore, there were calls to abolish the "catch all" provisions dealing with the establishment of the common market and Art. 308 EC, which gives the Community the competences necessary to attain its objectives. Examples given of the Union's abuse of competences were never very frequent, but certain environmental directives, the equal-access directive as interpreted by the ECJ[14] and the Lomé agreements, which would not respect the right to property recognised by the European Community, are generally cited[15]. Therefore, Erwin Teufel, representative of the Federal Council (*Bundesrat*) at the Convention, expressed his delight at the fact that the Praesidium had proposed a system distinguishing between exclusive, shared, and supporting competences[16]. This allocation of competences indeed matches very closely the system enshrined in the German Basic Law. Furthermore, the Union is to coordinate the economic policies of the member states ; however, the general outline given in Arts. 9 to 16 is rather imprecise and needs refinement in the third part of the constitution. Agriculture and fisheries, for

instance, are named as shared competences in the same way as social policy and health care. At least according to today's system of competences, there is hardly any space left for national agricultural policy within the ambit of the common agricultural policy (CAP). On the other hand, public health is excluded from any harmonisation (art. 152 para. 4 lit. c TEC) at the European level. It also seems interesting that, whereas there is a shared competence for the common market, the concept of the internal market – Art. 94 TEC – had found an entry into the constitutional treaty only quite late in the process (in the June version of Art. 12), whereas the expression "common market" is abandoned in the final version. Considering the ongoing uncertainty of the definition and difference between the two concepts17, this seems to be a laudable simplification of the Treaty.

Attempts to achieve a more clear-cut delimitation of competences can also be found in Art. 5 para. 1 of the proposed Constitution. This Article, which responds to proposals made by Erwin Teufel[18] amongst others, aims at the "respect" of the national identities of the member states, and may be called the "structural security clause". This clause provides that "The Union shall respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security".

On the other hand the "flexibility clause" (art. 308 TEC, art. 17 of the Constitution) will be maintained, in a slightly more restrictive formulation.

POSSIBLE CONSEQUENCES FOR NATIONAL CONSTITUTIONS

It appears from this from this brief survey that possible consequences for national constitutional law are at least twofold. First, member states might have more freedom to organise and apply their (economic) constitutions due to clearer positive and negative competence rules. Second, the constitutional role of national Parliaments might be strengthened due to their role in the procedural mechanisms for the safeguard of competences.

Towards greater economic flexibility for member states?

A growing consensus seems to be developing that especially European competition law – the current Art. 81 TEC et seq. – and free movement rules should not encroach excessively upon certain developed national institutions and upon structural particularities of member states. This problem is of particular relevance in areas where there are no, or only

weak community competences. Recent very controversial cases concerning access to social security benefits, student grants, and health care services, illustrate this problem[19]. In those cases, the free movement rules and the principle of non-discrimination in conjunction with the provision concerning Union citizenship were applied in such a way as to grant Union citizens the desired benefits[20]. This jurisprudence, although very positive indeed for the individual citizen, is problematic because there is no possibility of harmonisation in the field of social security as yet, (see Art. 137 para. 2 lit. a TEC in conjunction with lit. b)[21]. The Court of course has repeatedly held that in areas where Member States retain competence, they must nevertheless comply with Community law when exercising those powers[22]. This is to be supported if only for practical considerations : it is sometimes extremely difficult to determine if there is a community competence or not.[23] On the other hand, areas exempted from community competences should no longer be subjected only to negative integration through the application of competition or free movement rules[24]. However, this has been happening very frequently, inducing the feeling that there is a steady transfer of competences to the Community. Fritz Scharpf has explained this transfer mechanism very neatly:

"But, as was true of dental care abroad, retail price maintenance for books, public transport, or publicly owned banks, the only thing that stands between the Scandinavian welfare state and the market is not a vote in the Council of Ministers or in the European Parliament, but merely the initiation of treaty infringement proceedings by the Commission or legal action by potential private competitors before a national court that is then referred to the European Court of Justice for a preliminary opinion"[25].

Therefore by clearly delimiting the positive competences of the Union, by clarifying its competences, and by introducing a "structural security clause" (Art. 5 para. 1), two goals might be reached at the same time: greater predictability as to the possibility of positive integration whilst maintaining – or re-conquering – national margins of manoeuvre for national policies in the fields exempted from community competences. A very controversial and relevant area in this regard is the debate about services of general (economic) interest[26], which are very frequently run by local authorities. In conjunction with art. 16 TEC, which is being maintained and even reinforced in the Constitution (see Art. III-6), this new formulation of competences might give additional legal security to the national organisation of these services. Once again, the repercussion for national constitutions is of a rather indirect nature. However, since the doctrine of a European Economic Constitution[27] imposing a one-dimensional economic concept upon member states has once again been rejected by the Constitution for Europe, member states may structure their respective

economic constitutions[28] more freely, although they will of course have to respect the general rules including those on free movement and competition. In certain areas, however, which are being detailed in the Constitution, these rules will have to be balanced with national measures aiming at guaranteeing certain services.

Procedural safeguards for competences

From the point of view of national constitutional law, the question of procedural safeguards/mechanisms to supervise the decided distribution of competences seems particularly important. Because of the envisaged "early warning mechanism", as well as possible legal action, national constitutions might have to review clauses on national Parliaments with regard to their European role[29]. Once again, changes in the Constitution for Europe are rather moderate. Early proposals for the creation of new institutions to control subsidiarity, giving national Parliaments a stronger role by installing a Committee for subsidiarity composed of national and European Members of Parliaments, were not pursued[30]. However, national Parliaments are now given a more prominent role, although most proposed prerogatives are of a rather informal nature. According to the Protocol on the application of the principles of subsidiarity and proportionality, after a legislative proposal, national Parliaments may send a reasoned opinion to the Commission stating why the proposal in question does not comply with the principle of subsidiarity. Where at least one third of national Parliaments (one quarter in the field of freedom, security and justice) issue reasoned opinions on the Commission proposal's non-compliance with the principle of subsidiarity, the Commission must review its proposal. According to the protocol, the Court of Justice would have jurisdiction to hear actions brought by Member States under Art. III-270 of the Constitution, on grounds of infringement of the principle of subsidiarity, where appropriate at the request of their national Parliaments, *in accordance with their respective constitutional rules*. Here, national constitutions might have to be amended in order to provide national Parliaments with the possibility of imposing their will on their governments. Therefore, this innovation might have a substantial impact on national constitutions. In general, national Parliaments will have to consider themselves more as "European Parliaments"[31], devoting more attention and time to the transmitted European proposals. This would correspond to a working system of European multilevel constitutionalism. However, one has to clearly acknowledge the limitations of this system. Most Parliaments have created specialised European affairs committees. For them, it is impossible to oversee the influx of new European law proposals. Of course, specialised committees could – and should – also be involved. In order to really have a say, they have to abide by

the timetable set at the European level. This runs contrary to the "normal" parliamentary proceedings[32]. Therefore, it is unlikely that the altered prerogatives of national Parliaments will have an immediate effect. Nonetheless, national constitutions have to provide the framework for effective involvement of the Parliaments, thereby setting the scene for a political supervision of subsidiarity.

Innovations of the Constitution for Europe – Inclusion of the Charter of fundamental rights

The Charter of fundamental rights (CFR) is being incorporated into the Constitution for Europe as part II. The incorporation of the Charter can itself be considered an innovation, especially because it contains numerous "second" (social) and "third generation" (ecological) rights. Furthermore, it guarantees certain "first generation rights" in areas without community competences. To name just a few, the Charter contains provisions on the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to marry and the right to found a family, the right to education (art II-14), the "Freedom to choose an occupation and right to engage in work", the right to asylum, the right of collective bargaining and action as well as the recognition and respect for the entitlement to social security benefits and social services (art. II-34) and the right of access to preventive health care (art. II-35). Most of these rights are either innovative and/or do not correspond to a Union competence. However it is not that easy to highlight innovations for *national* constitutions. In some cases, effects may nevertheless be detected. The right to asylum has to be taken into consideration when the Union is framing its common policy on asylum, immigration and external border control according to Art. III-158. Once adopted[33], these EU measures are subject to the principles of supremacy and direct effect over national constitutional law. Therefore, national constitutions cannot abolish or substantively curtail the right to asylum. This might have a real effect for national constitutions in countries where this right is heavily debated such as in Germany[34]. This being said, the CFR might more widely affect national constitutions.

TOWARDS CONVERGENCE OF NATIONAL AND EUROPEAN FUNDAMENTAL RIGHTS PROTECTION?

Commentators[35], as well as the final report of working group II[36] have been constantly emphasising that the inclusion of the Charter should

not lead to an increase in the Union's competences, an assertion also found in the Charter itself (Art. 51 para. 2). In order to make this absolutely clear, the final report of working group II suggests *inter alia* amending Art. 51 para. 1 by "respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty / the Constitutional treaty." This amendment was accepted by the Convention – in a slightly modified version. However, in spite of these limitations on the Union itself, the extension of guaranteed rights beyond the Union's competences makes sense because although the Union's *competences* are limited, it has to *respect* all fundamental rights wherever it acts and must also therefore avoid indirect interference with such fundamental rights over which it would not have the competence to legislate[37]. Therefore, these rights may also be classified as 'negative competences',[38] leaving room for national policy-making in these areas. Existing jurisprudence in which the ECJ exempted certain national rules (mostly compulsory pension funds) from the reach of the Union's competition law, referring to the Union's attachment to certain social *objectives* strongly underscores this argument[39]. Furthermore, possible future Union competences need to take them into consideration[40].

The question still remains whether the incorporation of the CFR into the Constitution for Europe will have any effect on national constitutional law, especially concerning the protection of fundamental rights. One important and very controversial question is certainly related to the meaning of the "implementation of EU law" by the member states. Commonly, three situations where this is the case are named – the implementation of community law *stricto sensu*, the transposition of directives, and other areas arguably within the scope of community law, especially national measures seeking justification under an exception to community law, as illustrated by the so called "ERT-jurisprudence"[41]. When drafting the Charter there had been already considerable quarrels about the meaning of "implementation of Community law", with some members of the 1999-2000 Convention wanting to limit the applicability of European fundamental rights to Community institutions and organs only, while others wanted to extend it to "every action governed by community law"[42]. The final wording, which is taken from the jurisprudence of the ECJ[43], might result in a 'vertical competition' of human rights protection in Europe, at least if it is interpreted as suggested by the explanatory note of the Praesidium, which is considered as an authentic reflection of the Court's case law[44]. A new decision of the ECJ, *Carpenter,* illustrates this point. In a case concerning the expulsion of the spouse of a British citizen, the Court ruled that this might restrict the freedom to provide services of the husband. Then the Court examined whether the restriction of the (European) *fundamental right to a normal family life* could be justified because of mandatory

requirements[45]. Here, since the Court extended the applicability of European fundamental rights protection to an internal constitutionally regulated situation, similar national fundamental rights were also relevant. Therefore, there is a competition between European and national protection of fundamental rights[46]. If this jurisprudence were to be maintained[47], the innovation due to the integration of the CFR into the European constitutional treaty might strongly influence national constitutional law in the sense that, because of these tendencies towards competition, there might be a need to harmonise the catalogues of guaranteed rights. At least, there seems to be the need for parallel and harmonious interpretation of the different instruments on human rights. This view is supported by another case where the Court had to decide whether a national measure – the acceptance of a motorway road block because of the national constitutionally guaranteed right of freedom of assembly – was justified under the unwritten exceptions to the free movement of goods. Here, the Court followed the convincing argument of the Advocate General[48]. The Court found that the principle of free movement of goods had to be set aside. It was superseded by a national fundamental right that was accepted as a mandatory requirement and scrutinised according to the *ERT*-jurisprudence, as long as it was complying with a similar European fundamental right. This suggests a move towards convergence too. National constitutionally guaranteed fundamental rights will in future be more influenced by European fundamental rights as interpreted by the ECJ than they are today, due to the supremacy of European fundamental rights.

According to a perspective which is based less on rational construction and more upon speculation, it might also be that, due to the consecration of fundamental (participatory) rights, which the Union will probably not be able to guarantee due to the lack of relevant competences, national constitutional orders and legal systems will be pushed to either acknowledging or fulfilling the pledge of European fundamental rights[49]. There might thus be a move towards convergence in this regard and because of these developments as well.

THE ROLE OF THE JUDICIARY

The question of remedies in case of infringement of fundamental rights was discussed within the Convention, but no changes were proposed. The final report of Working Group II was already rather ambiguous. No specific recommendations are contained in the report regarding remedies. Neither a special court nor special procedures before the Court of Justice are considered useful. According to the Working Group, a possible reform of Art. 230 TEC allowing an individual remedy against EC regulations should

not entail substantial changes in the "present overall system of remedies, and the 'division of work' between Community and national courts"[50]. In this context, Art. III-270 clarifies and modifies Art. 230 TEC by removing the need to be "individually concerned" in the case of proceedings against a "regulatory act", but not against European laws or framework laws. The Court of First Instance had already attempted to effectuate relaxation of the locus standing rules in 2002[51], but the ECJ declined to accept the CFI's invitation, indicating that a treaty revision would be necessary[52]. This is a useful innovation at the European level, amplifying the possibility to institute proceedings against a regulatory Act of direct concern to the individual, but it has little effect on national constitutions. Indeed, it seems that the innovation of the incorporation of the CFR in the Constitution for Europe will lead to the need to strengthen the complementary role of national and European judiciary protection, especially (but not only) as regards human rights protection. This view is supported by art. 28 para. 1 of the Constitution for Europe, which provides that member states are to create the necessary remedies in order to guarantee an adequate judicial protection in the area of Union law. By not going beyond that – especially by rejecting proposals to establish a 'proper' European mechanism of fundamental rights protection, such as the German "*Verfassungsbeschwerde*" – the Constitution for Europe confers responsibility upon national Constitutions and their respective courts. It seems advisable and necessary in this respect to establish mechanisms compelling national courts to initiate preliminary proceedings in case of substantive concerns about the compatibility of an Act of the Union with the CFR. The German Constitutional Court has developed such a concept, urging courts of all instances to initiate Art. 234 TEC proceedings in such cases[53].

In more specific terms, the need to come to a reasonable working arrangement or even better, to a system of complementary constitutional jurisdiction between national and European Courts[54], has also been recognised by the Convention. Within the ambit of the present third pillar (the area of freedom, security and justice) there is a specific problem concerning national and European (constitutional) judicial review, especially with respect to the legality of operational police actions[55]. This is recognised by Art. III-283 of the Constitution for Europe:

"In exercising its competences regarding the provisions of Sections 4 and 5 of Chapter IV of Title III concerning the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the

maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law".

Therefore, within the European system of multilevel constitutionalism, national constitutional orders will have to realise even more than today that their courts are European courts, too. However, from a strictly constitutional point of view, and apart from the outlined possible need for procedural reform, there seem to be few implications for national constitutions *stricto sensu*. What is required is rather a change of attitude of national constitutional institutions.

Innovations of the Constitution for Europe – The role of national Parliaments

An important aspect of the Laeken declaration concerned the role of national Parliaments. The possible influence of Parliaments resulting from their increased role with regard to the control of subsidiarity and proportionality were already discussed *supra*. But there are more innovations: especially within the ambit of the present "third" pillar, there seem to be steps towards a stronger role for national Parliaments: national Parliaments should be more involved "in the definition by the European Council (or the Council at the level of Heads of State or Government) of the strategic guidelines and priorities for European criminal justice policy. Such involvement will only be meaningful if there are substantive debates in national Parliaments about the options to be considered at the European Council well in advance of the latter taking place[56]".

The influence of the expanded role of parliaments on national constitutions could be twofold: on the one hand, as the final report of the working group explained, there is an influence of a political nature: an appeal to national Parliaments to become aware of their European role and to act accordingly. This could be labelled once again as an influence on national constitutional orders. On the other hand, there may be material effects on national constitutions themselves. It seems imaginable that national Parliaments could be empowered to have a binding say in the formulation of their government's policies – at least on the European policy in matters of criminal justice. This would create a dual parliamentary legitimacy via the European and national Parliaments – at least partly. A less far-reaching solution, of course, would be to use or refine the existing internal mechanisms of participation, especially via the European affairs committees[57]. In the same direction, the Constitution for Europe sets up a right of initiative "of a quarter of the Member States" in the area of freedom, security and justice (Art. III-165). Here again it is left to the

constitutions – or practice – of the member states to organise internally the right of initiative. The possible influence on the internal (constitutional) organisation will, naturally, depend upon the density of existing national constitutional rules. Today in Germany, the federal Parliament (*Bundestag*) is to be given the right to comment on legislative proposals of the Union the government must "take account" of these comments during the "negotiations"[58]. These provisions will have to be adapted to changed circumstances, so that the Bundestag is also involved in the process of initiating European laws within this area. In Great Britain, the Select Committee on the European Communities of the House of Lords and the Select Committee on European Legislation (SCEL) of the House of Commons, which scrutinise European proposals, and the European standing committees – which debate the proposals conveyed by the SCEL – are carrying out "European functions"[59]. The task of these institutions would also have to be adapted to the new powers conferred upon member states.

Within the area of freedom, security and justice, the role of national Parliaments will furthermore be strengthened through a modified threshold for the "early warning mechanism" for subsidiarity and proportionality. Where it is questionable whether a crime actually has a "cross-border dimension" and is of a serious nature, one quarter of national Parliaments will be able to initiate the early warning mechanism according to the protocol on the application of the principles of subsidiarity and proportionality.

One may doubt whether even the lowered quorum will ever be reached in practice. This being said, the "early warning mechanism" once again stresses the European role of national Parliaments within the European system of multilevel constitutionalism. This holds true for the planned involvement of national Parliaments in the political monitoring of Europe's activities too, which might lead at least to an adaptation of the tasks of bodies responsible for this at the national level: Art III-160 para. 2 of the Constitution: "Member States' national Parliaments may participate in the evaluation mechanisms contained in Art. III-161 and in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Arts. III-177 and III-174".

Institutional reform

Another major topic of the reform debate concerns institutional reforms. No working group had been set up to prepare the field – in spite of the sensitivity of the subject and the explicit reference to the necessity for

institutional reform in the Laeken declaration. The new institutional set up will however have a major impact upon the future nature of the European Union, together with other provisions – especially those concerning the future social and economic constitution. However, it appears that these possible influences on national constitutions are rather limited, since the debate centres on single or double presidencies, the future design of the Commission and the role of the European Parliament[60].

According to the proposed Constitution, every member state is to compile a list of suitable persons able to fulfil the task of Commissioner. Every member state has the right to nominate at least one judge in every court. Most national constitutions contain provisions on the appointment of at least the judges of the constitutional courts[61]; all constitutions contain provisions on the choice of the executive[62]. However, in most member states, there are no provisions on the nomination of the proposed Commissioners, nor for the national nomination of European judges. Within the system of European multilevel constitutionalism, where it is no longer possible to clearly separate areas of pure "European" and "national" interest, the mode of nomination of members of European institutions should be enshrined in national constitutions. This is not primarily due to the "innovative" new institutional design of the Union. However, the amplified Union competences at least in the area of freedom, security and justice as well as – probably – in the field of the Common Foreign and Security Policy (CFSP), might contribute to rendering material and procedural "European" questions a matter of national constitutional interest as well.

Conclusion

This brief survey has shown that there are innovations, which have repercussions on national constitutional orders. Sometimes, the Constitution for Europe integrates national constitutional orders in its 'programme'. This is the case mainly concerning judicial remedies and national Parliaments. Here, national constitutionally guaranteed institutions are given special rights – or certain duties are imposed upon them – by the Constitution for Europe. National constitutional orders will have to take up these impulses and adapt their constitutions – or at least the interpretation of existing rules – to these new circumstances. More importantly and less clearly visible, there are certain questions that are *not* regulated by the Constitution for Europe. Examples include the way in which "member states" exercise the right of initiative within the realm of the area of freedom, security and justice and the impact of the incorporation of the CFR. This mutual intertwining

shows, however, that it will become even more difficult than before to speak of "national constitutions" and the "European Constitution" : they are increasingly merging into a system of multilevel constitutionalism.

Notes

[1] To name just a few recent studies – PETERS, Anne, Elemente einer Theorie der europäischen Verfassung , Berlin: Duncker & Humblodt, 2002; SCHWARZE, Jürgen (Ed.), Die Entstehung einer europäischen Verfassungsordnung , Baden-Baden: Nomos, 2000; BIRKINSHAW, P; ASHIAGBOR, D., "*National Participation in Community Affairs: Democracy, the UK Parliament and the EU*", in Common Market Law Review, 33-1996, p. 499.

[2] The Laeken declaration – The Future of the European Union, 15 December 2001, Annex I to the Presidency Conclusions, Laeken European Council, 15 December 2001 http://europa.eu.int/futurum/ documents/offtext/doc151201_en.

[3] See PERNICE, Ingolf, "*The role of national Parliaments in the European Union*", WHI-Paper 5/01 , www.whi-berlin.de/pernice-Parliaments.htm, p. 11-12.

[4] See FLAUSS, Jean-Francois, "*Rapport Francais*", in: SCHWARZE (ed.), *cited n. 1*, p. 25-107; BIRKINSHAW, Patrick, "*British report*", in: SCHWARZE (Ed.), *cited n. 1*, p. 205-338; HAIN, Karl E., "*Zur Frage der Europäisierung des Grundgesetzes*", Deutsches Verwaltungsblatt , 2002, p. 148-157.

[5] DREIER, Horst, "*Die drei Staatsgewalten im Zeichen von Europäisierung und Privatisierung*", Die Öffentliche Verwaltung, 55-2003, p. 541.

[6] PERNICE, Ingolf, "*Multilevel Constitutionalism in the European Union*", European Law Review , 27-2002, p. 511-529, also available on the internet www.whi-berlin.de/pernice-constitutionalism; PERNICE, Ingolf, "*Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?*", Common Market Law Review , 36-1999, p. 703.

[7] THYM, Daniel, "*European Constitutional Theory and the Post-Nice Process*", in ANDENAS, Mads & USHER, John (eds.): The Treaty of Nice, Enlargement and Constit utional Reform , 2002, forthcoming, section C.

[8] NETTESHEIM, Martin "*Germany*" (Country report) in: SLYNN OF HADLEY, Lord & ANDENAS, Mads, (eds.), FIDE XX. Congress London 2002 , Volume 1, National Reports, BIICL: London, 2002, p. 84-173 at p. 106-111 and 181.

[9] Opinion 1/91, *European Economic Area I* [1991] E.C.R I-6079 at 6102.

[10] PERNICE, "*Multilevel constitutionalism*" . . . (*cited n. 6*) at 516.

[11] See HÄBERLE, Peter, "*Gibt es ein europäisches Gemeinwohl? – eine Problemskizze*", in: CREMER et al. (ed.), Fes tschrift für Helmut Steinberger , Springer Verlag: Berlin, 2002, p. 1153-1173 at p. 1154-1158.

[12] An example is Art. 28 para. 1 of the proposed Constitution. It reads: "The Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law".

[13] The Laeken declaration – The Future of the European Union, 15 December 2001, Annex I to the Presidency Conclusions, Laeken European Council, 15 December 2001 http: //europa.eu.int/futurum/documents/offtext/doc151201_en, section II.

[14] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and Case C-285/98, *Kreil,* (2000) ECR I-69. On this decision, see STAHN, Carsten, "*Streitkräfte im Wandel – zu den Auswirkungen der EuGH-Urteile Sirdar und Kreil auf das deutsche Recht*", Europäische Grundrechte Zeitschrift, 2000, p. 121-135.

[15] TEUFEL, Erwin, "*Die Europäische Verfassung im globalen Kontext*", http://www.whiberlin.de/teufel.html.

[16] TEUFEL, (*cited n. 15*) referring to Art. 11, 12, 15 as conceived by the Praesidium, draft articles 1–16 of the constitution, http://european-convention.eu.int/docs/Treaty/CV00528.EN03.pdf, now Art. 11 to 13 of the proposed Constitution.

[17] For an explanation of the internal market concept and the need to reconcile possibly contradictory elements see MORTELMANS, Kamiel, "*The Common Market, the Internal Market and the Single Market, what's in a market?*", Common Market Law Review , 35-1998, p. 101-125 at p. 117-120.

[18] At least the "Freiburger Entwurf" for a constitutional treaty, inserted into the Convention's discussions as "Teufel's" vision of the future treaty, also contains such a clause. Furthermore, this can be deduced from a speech given within the context of the "Forum Consitutionis Europae" on 23 April 2003, http://www.whi-berlin.de/teufel.html.

[19] Case C-368/98, *Vanbraekel*, (2001) ECR I-5363; Case C-157/99, *Smits und Peerbooms*, (2001) ECR I-5473; on these cases, see HATZOPOULOS, Vassilis, "*Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in Vanbraekel and Peerbooms*", Common Market Law Review, 39-2002, p. 683-729; Case C-224/98**,** *Marie-Nathalie D'Hoop* [2002] ECR I-6191; Case C- 184/ 99, *Rudy Grzelczyk* (2001) ECR I-6293.

[20] See KANITZ, Ralf; STEINBERG, Philipp, "*Grenzenloses Gemeinschaftsrecht? Die Rechtsprechung des EuGH zu Unionsbürgerschaft, Grundfreiheiten und Grundrechten als Kompetenzproblem*", Europarecht, 6/2003 (forthcoming).

[21] It is not quite clear if there will be any modifications; Art. III-9 para. 2 of the proposed Constitution mentions the possibility of harmonisation of social security provisions for certain purposes "and unless the Constitution has provided for powers of action in this area" .

[22] Case C-158/96, *Kohll* [1998] ECR I-1931 para. 19; Case C-120/95, *Decker* [1998] ECR I-1831 para. 23.

[23] BOGDANDY, Armin von, in: GRABITZ/HILF (eds.), Kommentar z. EUV/EGV , München: Beck 2000, Art. 6 Rn. 35.

[24] On this aspect see also EHLERMANN, Claus-Dieter, "*Harmonization versus Competition Between Rules*", European Review , 3-1995, p. 333. The connection between different constitutional concepts and the free movement rules has been impressively analysed by POIARES MADURO, Miguel, We, the Court. The European Court of Justice and the European Economic Constitution , Hart Publishing: London, 1998, p. 103-143.

[25] SCHARPF, Fritz, "*The European Social Model*", 40-2002, Journal of Common Market Studies, p. 645-670 at p. 657.

[26] The Barcelona European Council has asked the Commission to prepare a framework directive on the services of general economic interest. See Conclusions of the presidency Barcelona European Council, para. 42. See also the "Green paper on Services on General Interest", COM(2003) 270 final of May 21, 2003.

[27] The concept of an "economic constitution" was first coined by German ordo-liberal thinkers with regard to the ‚Grundgesetz' and was then transferred to the European level. See BEHRENS, Peter, "*Die Wirtschaftsverfassung der Europäischen Gemeinschaft*" in: Brüggemeier (ed.), Verfassungen für ein ziviles Europa, Baden-Baden: Nomos, 1994, p. 73-90; STREIT, Manfred E.; MUSSLER, Werner, "*The Economic Constitution of the European Community: From ‚Rome' to Maastricht*", European Law Journal , 1-1995, p. 5-30 esp. at p. 5-14. However, the expression can also be used in a more descriptive way. See. MADURO, (*cited n. 24*) e.g. p. 166 who places "the emphasis on the political values of non-discrimination, representation and solidarity between States, rather than on the market freedom of economic agents".

[28] The concept is also known and used in member states other than Germany. See RABAULT, Hugues, "*La Constitution économique de la France*", Revue Francaise de Droit Consitutionnel , 2000, p. 707-745.

[29] On the current role of national Parliaments in the European Union see WEBER-PANARIELLO, Nationale Parlamente in der Europäischen Union, Baden-Baden: Nomos, 1995, esp. at p. 306-316.

[30] PERNICE, Ingolf, "*Kompetenzabgrenzung im Europäischen Verfassungsverbund*", Juristenzeitung , 2000, p. 867-876 at p. 876.

[31] On the European role of national Parliaments see PERNICE, Common Market Law Review (*cited n. 6*), p. 703 and PERNICE, (*cited n. 3*).

[32] See the thorough analysis of WEBER-PANARIELLO, (*cited n. 29*) esp. at p. 307-314.

[33] According to the conclusions of the European Council of Tampere, a common policy is to be put in place. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers has now been published, (2003) OJ L 31/18.

[34] In fact, after the 1992 reform of the "relevant provision of the German Basic Law (Art. 16 and 16 a), some commentators say this right has virtually been eradicated, see PIEROTH, Bodo; SCHLINK, Bernhard, Grundrechte , C. F. Müller: Heidelberg, 2001, p. 252.

[35] SCHMITZ, Thomas, "*Die EU-Grundrechtecharta aus grundrechtsdogmatischer und grundrechtstheoretischer Sicht*", Juristenzeitung, 2001, p. 833-843 at p. 834; THYM, Daniel, "*Competition or Consistency of Human Rights Protection in Europe*?", Finnish Yearbook of International Law XI , 2002, p. 11-36 at p. 19-30.

[36] Final report of working group II CONV 354/02, Annex p. 17.

[37] Final report of working group II, (*cited n. 36*) p. 5.

[38] MAYER, Franz, *"Die drei Aspekte der europäischen Kompetenzdebatte*", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht , 61-2001, p. 577-640 at p. 584; PERNICE, Ingolf; MAYER, Franz, in: GRABITZ/HILF (eds.), Das Recht der EU , C. H. Beck: München, 2002, EUV nach Art. 6 para. 12.

[39] Case C-115/97 to C-117/97, *Brentjens* (1999) ECR I- 6025 paras; 50 *et seq*; Case C-219/97 *Maatschappij Drijvende Bokken* (1999) ECR I-6121 paras 41-47. c.f. MORTELMANS, Kamiel, "*Towards Convergence in the Application of the Rules on Free Movement and on Competition?"*, Common Market Law Review , 38-2001, p. 614-649 at p. 629 who calls this the "Brentjens approach".

[40] SCHMITZ (*cited n. 35*) p. 834.

[41] See STEINBERG, Philipp, "*Zur Konvergenz der Grundfreiheiten auf Tatbestands- und Rechtfertigungsebene*", Europäische Grundrechte Zeitschrift, 2002, p. 16.

[42] See the reports by VITORINO, Antonio, "*La Charte des droit fondamentaux de l'Union européenne*", Revue du Droit de l'Union Européenne, 2001, p. 27-64 at p. 41 and BRAIBANT, Guy, La Charte des droits fondamentaux de l'Union européenne, Seuil: Paris, 2001, p. 251.

[43] Case C-292/97, *Karlsson,* (2000) ECR I-2737, para. 37 ; Rs. C-60/00 *Carpenter*, (2002) ECR I-6279, para. 40; Case C-260/89, *ERT*, [1991] ECR I-2925, para. 42; Case C-368/95, *Familiapress*, [1997] ECR I-3689, para. 24.

[44] THYM (*cited n. 35*) at 29, suggests a convincing autonomous interpretation of this provision.

[45] Case C-60/00, *Carpenter*, (2002) ECR I-6279, para. 40.

[46] MAGER, Ute, "*Anmerkung zur Carpenter-Entscheidung*", Juristenzeitung, 2003, p. 204-207 at p. 206-207.

[47] MAGER (*cited n. 46*) p. 207 suggests that the ECJ wanted to ‚fly a kite'.

[48] Opinion of AG JACOBS, *Schmidberger,* Case C-112/00, para. 102.

[49] HOFFMANN-RIEM, Wolfgang, "*Kohärenz europäischer und nationaler Grundrechte*", Europäische Grundrechte Zeitung, 2002, p. 473-483 at p. 480.

[50] Final report of working group II, (*cited n. 36*) p. 15-16.

[51] Case T-177/01, *Jégo-Quéré et Cie SA,* not yet reported, reported in Europäische Zeitschrift für Wirtschaftsrecht, 2002, p. 412 para. 49.

[52] Case C-50/00, *Unión de Pequeños Agricultores,* (2002) ECR I-6677, para. 45.

[53] BVERFG, Beschluss vom 9.1.2001 – 1 BvR 1036/99 – *Teilzeitarbeit*. This is an interpretation shared by one of the court's judges, too, HOFFMANN-RIEM, (*cited n. 49*) at p. 477.

[54] For this concept see MAYER, Franz C. "*Europäische Verfassungsgerichtsbarkeit*", in V. BOGDANDY (ed.), Europäisches Verfassungsrecht , Springer: Berlin 2003, p. 229-282 at p. 259-278.

[55] A good example of the problem of delimitation of judicial competences is the recent case C-94/00, *Roquette Frères SA*, paras 39-53.

[56] Explanation of draft Art. 31 Part One of the Constitution and draft articles from Part Two of the Constitution relating to the "area of freedom, security and justice", proposed by the Praesidium and accompanied by explanatory notes, CONV 614/03, http://european-convention.eu.int/docs/Treaty/cv00614.EN03.pdf p. 6, citing the Report of the role of national Parliaments, p. 22.

[57] On their role and powers see PFLÜGER, Friedbert, "*Die Beteiligung der Parlamente in der Europäischen Verfassungsentwicklung*", in WALTER HALLSTEIN INSTITUTE (ed.), Die Konsolidierung der europäischen Verfassung : von Nizza bis 2004 , Nomos: Baden-Baden, 2002, p. 9-26 at 17-21 (for Germany); WEBER-PANARIELLO (*cited n. 29*) p. 41-103 (Great Britain) and p. 133-189 (France).

[58] Art. 23 para. 3 Grundgesetz – Basic Law in conjunction with a law regulating the cooperation of the federal government and the federal parliament, BGBl. 1993 I 311.

[59] See the detailed description of WEBER-PANARIELLO, (*cited n. 29*) at p. 46-88 and BIRKINSHAW (*cited n.4)* p. 245.

[60] See the German-French "Elysée proposals" proposing a double presidency Contribution submitted by Dominique de Villepin and Joschka Fischer, members of the Convention, Franco-German contribution to the European Convention concerning the Union's institutional architecture, http://register.consilium.eu.int/pdf/en/03/cv00/cv00489en03.pdf, CONV 489/ 03 of 16 January 2003 in conjunction with Art. I-18 to I-28 of the proposed Constitution. Institutional aspects of the reorganisation of CFSP are highlighted by PERNICE, Ingolf; THYM, Daniel, "*A New Institutional Balance for European Foreign Policy*?", European Foreign Affairs Review , 7-2002, p. 369-400, at p. 391-399.

[61] E.g. Art. 94 para. 1 *Grundgesetz* (Germany); Art. 64 – 66 *Constitution de 1958* (France).

[62] E.g. Art. 62 – 69 Grundgesetz (Germany); Art. 20 – 23 Constitution de 1958 (France).

[63] E.g. Art. 62 – 69 *Grundgesetz* (Germany); Art. 20 – 23 *Constitution de 1958* (France).