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**THE TREATY OF LISBON:  
MULTILEVEL CONSTITUTIONALISM IN ACTION**

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# ARTICLES

## THE TREATY OF LISBON: MULTILEVEL CONSTITUTIONALISM IN ACTION

*Ingolf Pernice\**

*For years, the European Union has struggled with its structural and constitutional self-determination, searching for a sustainable balance between confederal and federal options, between intergovernmentalism and supranationalism. This Article understands the Treaty of Lisbon as one step in a long and complex process of constitutionalization in Europe, comprised of both the evolving European level and the national level of constitutional law. It comments on what is sometimes regarded as the failures in the process of constitution-making, and on the improvements achieved by the reform under the Treaty of Lisbon, both in light of the concept of multilevel constitutionalism. It explains what multilevel constitutionalism means as a theoretical approach to conceptualize the constitution of the European system as an interactive process of establishing, dividing, organizing, and limiting powers, involving national constitutions and the supranational constitutional framework, considered as two interdependent components of a legal system governed by constitutional pluralism instead of hierarchies. The ongoing process of trial and error in the continued reform of the Union where constitutional initiatives regularly lead to increasingly extensive debates with modest contractual results, with the entry into force of the Treaty of Lisbon yet being uncertain, is taken as an example for explaining multilevel constitutionalism in action:*

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*The Article seeks to show that both the process showing increased public participation and the results achieved in Lisbon are characteristic of the consolidation of a multilevel constitutional structure of a new kind, based upon functioning democratic Member States, complementary to them, and binding them together in a supranational unit without itself being a state or aiming at statehood.*

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## I. INTRODUCTION

Talking about the Treaty of Lisbon may seem equivalent, to 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 by the governments of the EU Member States 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 whose character does not fit within our familiar categories.

The European Union is facing political difficulties again. After the Irish rejection of the Treaty of Lisbon, it now finds itself attempting to salvage a treaty that is deemed to be itself a salvaging of the reform promised by the Treaty Establishing a Constitution for Europe. Having some distance now from day-to-day EU politics, my intention in this article is to find out how the Lisbon Treaty fits into the ongoing constitutional process in Europe.<sup>1</sup> I understand this process of constitutional creation and amendment to go 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 conceptions of the political organization of societies;

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<sup>1</sup> For recent discussions, see JACQUES ZILLER, *LES NOUVEAUX TRAITÉS EUROPÉENS: LISBONNE ET APRÈS*, (Montchrestien 2008); and the contributions to two recent symposia in Florence and Sofia in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* (Stefan Griller & Jacques Ziller eds., 2008); as well as *CECI N'EST PAS UNE CONSTITUTION—CONSTITUTIONALISATION WITHOUT A CONSTITUTION: 7TH INTERNATIONAL ECLN COLLOQUIUM, SOFIA, 17–19 APRIL, 2008* (Ingolf Pernice & Evgeni Tanchev, eds., 2008).

- challenging to the theories of states and constitutions, or, in short, of constitutionalism at the diverse levels of government; and
- promising as a model of supranational arrangements for the pursuit of goals in the public interest common to the peoples concerned.

Regardless of how undesirable it may seem to many commentators, the Treaty of Lisbon is where we are in European integration today, and we should endeavor to understand its place in that process. As such, Part II of this Article will comment on the issues of failure, democracy, and the process of constitution-making. Part III deals 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*).<sup>2</sup> Multilevel constitutionalism is a theoretical approach to

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<sup>2</sup> Ingolf Pernice, *Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and "Multilevel Constitutionalism,"* in GERMAN REPORTS ON PUBLIC LAW 40 (Eibe Reidel ed., 1998) [hereinafter Pernice, Multilevel Constitutionalism] (presented to the XV International Congress on Comparative Law, Bristol, July 26 to August 1, 1998); see also Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 COMMON MKT. L. REV. 703 (1999), available at <http://www.whi-berlin.de/pernice-cmlrev.htm> (also published as WHI-paper 4/99); Ingolf Pernice, *Europäisches und Nationales Verfassungsrecht* (Humboldt-University of Berlin, WHI, paper 13/01, 2004), available at <http://www.whi-berlin.de/documents/whi-paper1301.pdf>. The concept influenced or was further developed by Laurence Burgogues-Larsen, *La Démocratie au Sein de L'Union Européenne: de la "Constitution Composée" à la "Démocratie Composée,"* in VERFASSUNGSPRINZIPIEN IN EUROPA 83 (Hartmut Bauer & Christian Calliess eds., 2008); Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27, 28 (2000); JO SHAW, LAW OF THE EUROPEAN UNION 168, 179 (3d ed. 2000). At the international level, Cristoph U. Schmid, *Multi-Level Constitutionalism and Constitutional Conflicts* 19, 215 (2001) (unpublished Ph.D. Dissertation, European University Institute, Florence); Daniel Thym, *European Constitutional Theory and the Post-Nice Process*, in THE TREATY OF NICE AND BEYOND: ENLARGEMENT AND CONSTITUTIONAL REFORM 147, 156 (Mads Andenas & John Usher eds., 2003). See also John Bridge, *The United Kingdom Constitution: Autochthonous or European?* in Festschrift für Thomas Fleiner 293, 300 (2003) (regarding the reform of the Treaties by the European Convention: "Thus, the texts of the existing Treaties can be fairly described as the constitution of the EU and the Court of Justice as constitutional court. The UK, as a member of the EU, is consequently party to a process of multilevel constitutionalism."); Sergio Dellavalle, *UNA COSTITUZIONE SENZA POPULO? LA COSTITUZIONE EUROPEA ALLA LUCE DELLE CONCEZIONI DEL POPULO COME "POTERE COSTITUENTE"* 276 (2002); Ignacio Gutiérrez, *Un Orden Jurídico para Alemania y Europa*, 3 TEORÍA Y REALIDAD CONSTITUCIONAL 215, 218 (1999); Jörg Luther, *The Union, States and Regions: How do we Develop Multilevel Rights and Multilevel Democracy?*, in A CONSTITUTION FOR THE EUROPEAN UNION 113 (Umberto Morelli ed., 2005); BILANCIA PAOLA-PIZZETTI & FEDERICO GUSTAVO, ASPETTI E PROBLEMI DEL COSTITUZIONALISMO MULTILIVELLO (2004); UTZ SCHLIESKY, SOUVERÄNITÄT UND LEGITIMITÄT VON HERRSCHAFTSGEWALT—DIE WEITERENTWICKLUNG VON BEGRIFFEN DER STAATSLERHE UND DES STAATSRECHTES IM EUROPÄISCHEN MEHREBENENSYSTEM 359, 502, 532, 571 (2005); ANTONIO LÓPEZ PINA, EUROPA, UN PROYECTO IRRENUNCIABLE: LA CONSTITUCIÓN PARA EUROPA DESDE LA TEORÍA CONSTITUCIONAL 216, 220 (2006); Franz C. Mayer, *The European Constitution and the Courts*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 281, 314–29 (Armin von Bogdandy & Jürgen Bast eds., 2006); Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 95, 144 (Armin von Bogdandy & Jürgen Bast eds., 2006) (maintaining some reservations). Of course, the idea has its critics. E.g., Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION 3, 13 (Neil Walker ed., 2003); Matthias Jestaedt, *Der Europäische Verfassungsverbund—Verfassungstheoretischer Charme und Rechtstheoretische Insuffizienz einer Unschärferelation*, in RECHT DER WIRTSCHAFT UND DER ARBEIT IN EUROPA: GEDÄCHTNISSCHRIFT FÜR WOLFGANG BLOMEYER 638, 662, 664 (Rüdiger Krause et al. eds., 2004); Paul Kirchhof, *The Legal Structure of the European Union as a Union of States*, in PRINCIPLES OF

conceptualize the “constitution” of this system as an interactive process of establishing, organizing, sharing, and limiting powers<sup>3</sup>—a process that 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 Part IV with some examples of the amendments to the EU Treaty (TEU) and the EC Treaty (TEC) as agreed upon in the Treaty of Lisbon.<sup>4</sup>

## II. FAILURES, DEMOCRACY, AND CONSTITUTION-MAKING

Given the negative referendum in Ireland, the Treaty of Lisbon was felt to be the most recent and—so far—last incident in a series of failures in European constitutionalism. In addition, democracy also looks to be at stake inasmuch as the popular vote in some Member States seems to be simply ignored, while the parliaments of other Member States reach a surprisingly high degree of consensus—as we know from parliamentary consent in undemocratic regimes. To what extent are methods as applied in this case inherent or typical in 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. Moreover, it shows the need for continuous discussion, reconsideration, and flexibility in this joint venture—including more and more peoples—to find its appropriate, and ultimately successful, constitutional shape.

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EUROPEAN CONSTITUTIONAL LAW 765, 776 (Armin von Bogdandy & Jürgen Bast eds., 2006); *see also* FLORIAN SANDER, REPRÄSENTATION UND KOMPETENZVERTEILUNG: DAS HANDLUNGSFORMENSYSTEM DES MEHREBENENVERBUNDES ALS AUSDRUCK EINER LEGITIMITÄTSORIENTIERTEN KOMPETENZBALANCE ZWISCHEN EUROPÄISCHER UNION UND IHREN MITGLIEDSTAATEN 279 (2005). For further discussion, see VERFASSUNGSWANDEL IM EUROPÄISCHEN STAATEN—UND VERFASSUNGSVERBUND (Christian Calliess ed., 2007); particularly the contribution of Ingolf Pernice, *Theorie und Praxis des Europäischen Verfassungsverbundes*, in *id.* at 61, 72–85 (reacting to the first critics); Matthias Jaestedt, *Der Europäische Verfassungsverbund. Verfassungstheoretischer Charme und Rechtstheoretische Insuffizienz Einer Unschärferelation*, in *id.* at 93; Christian Calliess, *Zum Denken im Europäischen Staaten- und Verfassungsverbund: Abschließende Reflexion und Re-Konstruktion Eines Konzepts im Lichte der Vorstehenden Beiträge*, in *id.* at 187. For reports on the discussions by Daniel Thym, Konrad Lachmayer, and Martina Lais, see *id.* at 241, 247.

<sup>3</sup> For more on the aspect of limitation of powers, see Ulrich Petersmann, *The Reform Treaty and the Constitutional Finality of European Integration*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 332, 337 (Stefan Griller & Jacques Ziller eds., 2008) (“As tensions between rational egoism and limited social reasonableness are the *conditio humana*, the perennial task of limiting abuses of power through multilevel constitutionalism will remain Europe’s finality.”).

<sup>4</sup> When discussing the Treaties as amended by the Treaty of Lisbon, I will use the acronyms TEU-L (EU-Treaty after Lisbon) and TFEU (Treaty on the Functioning of the EU). Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 50, Dec. 13, 2007, 2007 O.J. (C 306) 1 (ratification pending); Treaty on European Union as Amended by the Treaty of Lisbon, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU-L]; Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter “TFEU”].

### A. *A Story of Failures?*

Failures to substantially reform the European Union during the last twenty years have gone hand in hand with failures to substitute the European treaties with a founding treaty that looks more like a constitution—such attempts having occurred in a ten-year rhythm since the “eurosclerosis” of the early 1980s. The initiatives were pushed by the need to deepen the Union each time it was enlarged. We can distinguish five steps in this difficult constitutional process.

#### 1. Spinelli and the Single European Act (SEA)

It started after the first enlargement<sup>5</sup> and the accession of Greece.<sup>6</sup> In 1984, the European Parliament adopted a proposal for a real European Constitution drafted by Altiero Spinelli,<sup>7</sup> but the governments of the—then ten—Member States did not like it. Instead, they signed the Single European Act of 1986 (SEA),<sup>8</sup> which made some important amendments to the existing EEC Treaty. The SEA confirmed the qualified majority voting method in the Council in the areas where it was already in place, but not practiced since the De Gaulle policy of the empty chair in 1966 and the Luxembourg compromise.<sup>9</sup> The SEA also extended qualified majority voting to new policy areas, like the harmonization of legislations 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.<sup>10</sup> This procedure applied particularly to a special provision on the completion of the Single Market by harmonization of national legislation. In addition, the SEA added new legislative powers in fields such as the environment and consumer protection policies. Thus, the abolition of barriers to trade would go

<sup>5</sup> That is, the 1973 accessions of Denmark, Ireland, and the United Kingdom.

<sup>6</sup> Greece acceded in 1981.

<sup>7</sup> See *Spinelli Report: Draft of a Constitution of the European Union*, 1994 O.J. (C 77) 33.

<sup>8</sup> Single European Act, Feb. 28, 1986, 1987 O.J. (L 169) 1. The SEA was signed at Luxembourg on February 17, 1986 and at The Hague on February 28, 1986. *Notification Relating to the Date of Entry into Force of the Single European Act*, 1987 O.J. (L 169) 29.

<sup>9</sup> Reacting to the tough integrationalist policy of Walter Hallstein, then French President Charles de Gaulle refused French participation at the Council of Ministers until the Luxembourg compromise was reached. The Luxembourg Compromise, signed on January 30, 1966, provides that

Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavor, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community.

For a description of the Luxembourg Compromise with an English translation, see Europa, Glossary—Luxembourg Compromise, [http://europa.eu/scadplus/glossary/luxembourg\\_compromise\\_en.htm](http://europa.eu/scadplus/glossary/luxembourg_compromise_en.htm) (last visited Mar. 11 2009); European Comm’n, Press and Comm’n Service, Note to the File—Subject: Luxembourg and Ioannina, ¶ 1 (Dec. 15, 1999), available at [http://aei.pitt.edu/5208/01/001705\\_1.pdf](http://aei.pitt.edu/5208/01/001705_1.pdf) (original in French). Almost no voting took place in the Council until the mid-1980s. The spirit of the Luxembourg Compromise is perpetuated by Declaration No. 7 to the Final Act of the Treaty of Lisbon on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union.

<sup>10</sup> With the cooperation procedure (now Article 252 EC), the European Parliament is not only consulted; it can reject a proposal of the Commission or propose amendments, in which case the Council can only adopt the act unanimously and with qualified majority only as amended by the Parliament with the consent of the Commission.



along with complementary European policies securing a high level of protection at the European level for such public goods and interests as are the subject of national legislations. Restrictions of trade resulting from differences in the national solutions found in each Member State to meet these interests would continue to be justified under the exception clause to the Treaty provision on free trade. With the new powers, the Community could achieve the goal of completing the Internal Market by the end of 1992.

The refusal to base the Community on a Constitution according to Spinelli's proposal, thus was certainly a failure regarding the constitutional aspects, but it triggered an important reform of the Community in substance. On the other hand, the more European integration involved general policies, the more it was felt that its democratic legitimacy was lacking, and the Member States looked for a more direct way of controlling of what was decided in Brussels.

## 2. Delors and the Treaty of Maastricht

A new initiative was, therefore, taken only a few years later, closely linked to the unification of Germany in 1990, but also in view of the accession of Austria, Finland, and Sweden in 1995. These changes not only required progress regarding the democracy and efficiency of the decision-making procedures, but served the aims of Jacques Delors, who was committed to completing the internal market by launching a common currency. The Treaty of Maastricht came into force in 1993,<sup>11</sup> establishing the foundations for the European Monetary Union (EMU) and 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 facilitating the necessary cooperation among the Member States in foreign policies and home affairs, but also in order to contain the use of powers by EC institutions, it established the European Council as an overall governing body for the EU.

For French President François Mitterrand, speaking to the French people on the eve of the 1992 referendum on the Treaty of Maastricht, the fact that the "sovereigns" of Europe took back the power of 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,<sup>12</sup> the Danes were allowed to benefit from some derogations, including the Euro, and voted again in May 1993 with 56.8% voting "yes." While the hurdle was overcome, the derogations and the creation of the EU three-pillar structure show that the Member States stepped back from a short, coherent, basic legal instrument which could be considered to represent a constitution. The Maastricht Treaty established the European Union, apart from the Community, without determining its legal capacity. Instead of generally applying the Community method under which decisions and legislation with direct effect to the individual is adopted by the Council in consultation or

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<sup>11</sup> Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 4 (signed at Maastricht on February 7, 1992).

<sup>12</sup> Presidency Conclusions, Edinburgh European Council in Edinburgh, pt. A, B (December 11–12, 1992).

cooperation with the European Parliament and on the proposal of the Commission, the two special chapters on Common Foreign and Security Policies and on Judicial and Police Cooperation were governed by the intergovernmental method under which unanimity persists and no legislative acts can be adopted. The whole exercise made the structure of the Union more complex instead of clarifying its shape and functioning.

### 3. The Herman Report and the Treaty of Amsterdam

Maastricht was not a satisfactory solution for those who fought for an efficient and democratic Union based upon a “real” Constitution—a text that 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. Moreover, given the re-unification of Europe since 1989, Maastricht was not considered to be a sufficient basis for the enlarged Union that was sure to come.

Ten years after the 1984 Spinelli Report, therefore, the European Parliament took a new initiative to formally constitutionalize the Treaties, this time according to the terms of the Herman Report, which was adopted in 1994 by the Institutional Affairs Committee and deemed to provide a framework and to consolidate the *acquis communautaire* into a genuine European Union constitution.<sup>13</sup> It also included a catalogue of human rights to be guaranteed by the European Union.<sup>14</sup> Yet, the Member States did not even seriously discuss this proposal. Instead, after intense negotiations they agreed upon the Treaty of Amsterdam, which came into force in 1999.<sup>15</sup> But again, the Member States could not agree upon what substantial institutional reforms were needed in an enlarged Union, for example: a clarification of the delimitation of competencies, more democratic legitimacy and transparency, more efficient legislative procedures, including the principle of qualified majority voting at the Council, and the like. Because of its poor substance, no referendum—except in Ireland where it is constitutionally mandated—was organized for the ratification of the Treaty of Amsterdam.

### 4. The Treaty of Nice and the “Post-Nice-Process”

The matter was taken up again soon after, when what were called the “leftovers” of Amsterdam became the subject of further intense negotiations in Nice. However, even the Treaty of Nice, signed in February 2001,<sup>16</sup> could not settle the key issues at stake. It almost failed because the Irish people rejected it in its first referendum. It was only with great effort that the Irish government secured a positive vote in a

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<sup>13</sup> The *acquis communautaire* is what European integration has reached at a given moment; it includes all primary (Treaty) law and secondary law (legislation) of the Community.

<sup>14</sup> Resolution of 10 February 1994 on the Constitution of the European Union, EUR. PARL. DOC. 1994 O.J. (C 61) 155 [hereinafter “Oreja/Herman Report”].

<sup>15</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

<sup>16</sup> Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1.

second referendum in October 2002.<sup>17</sup> Yet the poor substance of the treaty, and the fact that the leftovers of Amsterdam could not be agreed upon, made it clear that diplomatic negotiation in an Intergovernmental Conference was no longer an adequate method in the enlarged Union to come to satisfactory solutions on adapting the Treaties to the political needs.

The Member States nevertheless agreed on four items to be resolved in the near future: the 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 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,<sup>18</sup> 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.<sup>19</sup> This declaration established the Convention, which was entrusted with the preparation of “options” or proposals for reform.<sup>20</sup> More importantly, in considering the simplification and reorganization of the Union under the title *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.<sup>21</sup>

##### 5. Constitutional Treaty and Treaty of Lisbon

After a few amendments, this Constitutional Treaty was adopted and signed in October 2004 at the Heads of State and Government of the Member States meeting in Rome. It was welcomed by both politicians and academia throughout the Union. Yet, after being vetoed in French and Dutch referenda, the EU was plunged into a deep crisis. The European Council ordered a “reflection-period” lasting about two years.<sup>22</sup> This period was used to analyze the reasons of the failure and discuss solutions. It was brought to an end when the European Council of December 2006 asked the incoming German Presidency to come up with a report on solutions for

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<sup>17</sup> See Karin Gilland, *Opposing Europe* Research Network, Referendum Briefing No. 1: Ireland’s Second Referendum on the Treaty of Nice (October 2002), available at <http://www.sussex.ac.uk/sei/documents/irelandno1.pdf>.

<sup>18</sup> See generally Christer Karlsson, *Deliberation at the European Convention: The Final Verdict*, 14 EUR. L. J. 604.

<sup>19</sup> Laeken Declaration on the Future of the European Union, tit. II (Dec. 15, 2001), BULL. EU 12-2001, 1.27 [hereinafter Laeken Declaration] (“Towards a Constitution for European Citizens”).

<sup>20</sup> The Convention is a body composed of representatives of the national governments and the Commission on the one hand, and of the national parliaments and the European Parliament on the other. The Convention will be part of the regular amendment procedure under Article 48(3) TEU-L.

<sup>21</sup> Draft Treaty Establishing a Constitution for Europe, Jul. 18, 2003, Doc. No. CONV 850/03, available at <http://european-convention.eu.int/DraftTreaty.asp?lang=en> [hereinafter “Draft Const. Treaty”].

<sup>22</sup> See Press Release, Eur. Council, Jean-Claude Juncker States That There Will be a Period for Reflection and Discussion but the Process to Ratify the Constitutional Treaty Will Continue with no Renegotiation (June 17, 2005), available at <http://www.eu2005.lu/en/actualites/communiqués/2005/06/16jclj-ratif/index.html>; see also *Commission Communication: The Period of Reflection and Plan D*, COM (2006) 212 provisional (Oct. 5, 2006), available at [http://ec.europa.eu/commission\\_barroso/president/pdf/com\\_2006\\_212\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/com_2006_212_en.pdf).

salvaging the substance of the Constitutional Treaty.<sup>23</sup> 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 would simply amend them in the very traditional way under Article 48 EU.<sup>24</sup> This more modest approach seemed to be successful when, after a short Intergovernmental Conference from July to October, the Treaty was signed on December 17, 2007 by all twenty-seven Member States in Lisbon. Yet even this attempt seems to have failed, so far, after the negative vote of the Irish people in June 2008.

#### 6. Conclusion: Constitutional Character of the Process?

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

First, notwithstanding all the difficulties encountered in reforming the European Union in parallel with its enlargement, the public has become increasingly involved in an intense discourse on the future of the Union. People have become aware that the Union is not an international organization—a matter only for the governments—but that it touches upon the daily life of the citizens; it affects them no less directly than domestic legislation and policies.

Second, the influence of the European Parliament was increased step by step and national parliaments have become significantly more aware of the need and the possibility of having not only a stake in the policies implemented at the European level, but also in the decision-making process. Their role and the need for their involvement has been formally recognized in a Protocol to the Treaty of Amsterdam. Moreover, a number of constitutional amendments in the Member States, as well new legislation, demonstrate the increasingly important role that European polices play in national parliaments.

Third, keeping in mind the four key issues defined by the Declaration of Nice,<sup>25</sup> while also considering the new role of the Convention—which comprises European and national parliamentarians as well as representatives of the governments—to elaborate the terms on which reform shall be realized, it seems difficult to deny that

<sup>23</sup> Presidency Conclusions, Brussels European Council (Dec. 14–15, 2003) (“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.”).

<sup>24</sup> See Presidency Conclusions, Brussels European Council, annex 1 (Jun. 21–22, 2007), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf); see also Ingolf Pernice, *Salvaging the Constitution for Europe* (Humboldt University Berlin, WHI, paper 4/07, 2004), available at <http://www.whi-berlin.de/documents/whi-paper0407.pdf>; Peter-Christian Müller-Graff, *Der Vertrag von Lissabon auf der Systemspur des Europäischen Primärrechts*, 31 *INTEGRATION* 123, 124 (2008). But see Jörg Philipp Terhechte, *Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag*, 43 *EUROPARECHT* 143, 147 (2008) (viewing the Treaty of Lisbon as entailing a fundamental and enduring change of the Union).

<sup>25</sup> Improved legislative procedures, power-sharing and subsidiarity, the status of the Charter of Fundamental Rights, and the role of the national parliaments.

this process of amending the founding Treaties of the Union is a constitutional process, even if the result is not given the name *Constitution*.

Andrew Moravcsik holds that a declared goal of the exercise—apart from a substantial institutional reform—of trying to better legitimize the European Union in (re-)founding it, arguably, on (and by) a Constitution, was both a political and a scholarly failure.<sup>26</sup> Nevertheless, the very process of drafting a Constitution in a manner as open as that of the Convention,<sup>27</sup> the preparing and debating of ratification in national parliaments and referenda, and the process of reflecting upon the consequences of the rejection of the Constitutional Treaty and the Treaty of Lisbon, has 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 the constitutional character of its foundations, but will also give the European Union as such—and European policies, through improved transparency and enhanced involvement of the European and national parliaments—more democratic legitimacy than it has ever seen before.

### B. *Issues of Democracy*

Notwithstanding the above, some constitutional questions have arisen regarding the procedures used. Does it conform to our democratic principles that after the French and Dutch voters said “no” to the Constitutional Treaty, their governments proceeded to “repack”<sup>28</sup> the substance of the reform into the traditional form of an international treaty amending the EU and EC Treaties and then failed to submit this amending treaty to another referendum?<sup>29</sup> 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 isolated they are in their negativity? Indeed, with the exception of the Czech Republic, the decision to ratify has

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<sup>26</sup> This is, with excellent arguments, the conclusion of Andrew Moravcsik, *The European Constitutional Settlement*, in 8 STATE OF THE EUROPEAN UNION—MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE 23, 47 (Kathleen McNamara & Sophie Meunier eds., 2007).

<sup>27</sup> See Paul Craig, *Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC*, 10 EUR. PUB. L. 653, 657 (2004); Juliane Kokott & Alexandra R  th, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions*, 40 COMMON MKT. L. REV. 1315 (2003); see also Agustin Jos   Men  ndez, *An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105, 116 (2005) (providing a more critical analysis).

<sup>28</sup> See Stefaan van den Bogaert, *The Treaty of Lisbon: The European Union’s Own Judgment of Solomon?*, 15 MAASTRICHT J. EUR. & COMP. L. 7, 18 (2008); see also Joseph H.H. Weiler, *Editorial: Marking the Anniversary of the Universal Declaration: The Irish No and the Lisbon Treaty*, 19 EUR. J. INT. L. 647, 650–53 (2008).

<sup>29</sup> See J  rgen Habermas, *Ein Lob den Iren*, S  DDEUTSCHE ZEITUNG, Jun. 17, 2008, available at <http://www.sueddeutsche.de/ausland/artikel/310/180753/> (stating 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 europ  ischen Verfassung stellte der Lissabonner Vertrag die b  rokratisch verabredete Notl  sung dar, die verhohlen an den Bev  lkerungen vorbei durchgepaukt werden sollte. Mit diesem letzten Kraftakt haben die Regierungen kaltschn  uzig vorgef  hrt, dass sie allein   ber das Schicksal Europas entscheiden.”).

meanwhile been taken in all other Member States<sup>30</sup>—in most cases with an overwhelming majority in the national parliaments.<sup>31</sup> The governments have clearly looked for a way to bring the Treaty of Lisbon into effect notwithstanding the Irish “no.” Meanwhile, a compromise was reached at the Brussels European Council of December 2008 satisfying, among other things, Irish concerns that every Member State should continue to have its Commissioner in Brussels.<sup>32</sup> The compromise is based upon the express expectation that Ireland will hold another referendum by the end of the current Commission’s term.<sup>33</sup> The referendum is necessary because Ireland is the only Member State where a referendum is required under its Constitution.<sup>34</sup> But can the people of Ireland believe that their vote is being taken

<sup>30</sup> The procedure of ratification will now be started in the Czech Republic since the Czech Constitutional Court has decided the case brought against the ratification of the Treaty of Lisbon in *nález Ústavního soudu č. 19/2008* (English summary available at [http://angl.concourt.cz/angl\\_verze/doc/pl-19-08.php](http://angl.concourt.cz/angl_verze/doc/pl-19-08.php)); the parallel case at the German Constitutional Court, 2 BVerwGE 2/08 and 2 BVerwGE 1010/08—Gauweiler, is still pending, thus the German ratification will not be submitted before May 2009. On the substance of the case, see Elmar Brok & Martin Selmayr, *Per Popularklage zurück nach Nizza?*, 19 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 487, 487–91 (2008). For the ratification situation, see the table in Europa, Treaty of Lisbon—In Your Country, [http://europa.eu/lisbon\\_treaty/countries/index\\_en.htm](http://europa.eu/lisbon_treaty/countries/index_en.htm) (last visited Mar. 11, 2009).

<sup>31</sup> In Germany, for example, the Federal Chamber (Bundesrat) decided with the votes of 15 Länder, one abstaining, while in the Federal Parliament (Bundestag) there was 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.com, Clear Votes for new EU Treaty in Denmark, Austria and Germany (Apr. 25, 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.com, Netherlands Ratifies EU’s Troubled Lisbon Treaty (Jul. 9, 2008), <http://www.euractiv.com/en/future-eu/netherlands-ratifies-eu-troubled-lisbon-treaty/article-174063>. See also Weiler, *supra* note 28, at 652 (discussing “‘Ceausescu-type majorities’ in some of our national parliaments”).

<sup>32</sup> See EurAktiv.com, EU Summit Gives in to Irish Demands on Lisbon Treaty, Dec. 12, 2008, <http://www.euractiv.com/en/future-eu/eu-summit-gives-irish-demands-lisbon-treaty/article-178004>; Presidency Conclusions, Brussels European Council (Dec. 11–12, 2008). The other commitments made read as follows:

The necessary legal guarantees will be given on the following three points:

- 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 defense 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, paragraph I.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.” *Id.* ¶ I.3, I.4.

<sup>33</sup> *Id.* Jo Leinen and Jan Kreutz had proposed to proceed this way. Jo Leinen & Jan Kreutz, *Das irische ‘Nein’ zum Vertrag von Lissabon: Optionen für die Lösung der neuen Krise*, 31 INTEGRATION 307, 309–10 (2008).

<sup>34</sup> But see Laurent Pech, *Le Référendum en Irlande pour Ratifier les Traités Européens: Obligatoire ou Coutumier?*, Robert Schuman Foundation (Sept. 1, 2008), [http://www.robert-schuman.org/doc/actualites/QE-Irlande-referendum\\_25\\_09\\_2008\\_3.pdf](http://www.robert-schuman.org/doc/actualites/QE-Irlande-referendum_25_09_2008_3.pdf); see also EurAktiv.com, ‘Danish’ Scenario ‘Most Likely Outcome’ of EU Treaty Crisis, Oct. 30, 2008, available at

seriously if a referendum on more or less the same question is just repeated?<sup>35</sup> The Brussels compromise seems largely to have taken the reasons for the Irish rejection into account,<sup>36</sup> but as much explanation as possible will have to be given to help the Irish people understand what the Treaty is about. On that basis they will be asked to vote again, but the question of whether or not it is democratic to repeat the referendum will remain.

### 1. Passing Over the Popular Vote in Ireland

The democracy question points to the fundamental limits of what can be asked from the Irish people. Would the repetition amount to a disregard of common democratic principles, and thus de-legitimize the reform even if it is achieved?<sup>37</sup> The answer in my view is no, with two aspects to be considered in this regard.

First, 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.<sup>38</sup> Although it is true that by signing an international treaty the governments have an obligation to take all appropriate steps

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<http://www.euractiv.com/en/future-eu/danish-scenario-outcome-eu-treaty-crisis/article-176799> (English language summary). Pech sees this as a tradition only, based upon an earlier judgment of the Irish Constitutional Court on the Single European Act. For the development of this tradition, see Gerhard Hogan, *The Nice Treaty and the Irish Constitution*, 7 EUR. PUB. L. 565–66 (2001).

<sup>35</sup> Recent polls seem to indicate that a positive result would be possible under certain conditions. See Steven Collins, *Voters May Approve New Lisbon Treaty*, IRISH TIMES, Nov. 17, 2008, available at [http://www.irishtimes.com/newspaper/frontpage/2008/11/17/1226700659487\\_pf.html](http://www.irishtimes.com/newspaper/frontpage/2008/11/17/1226700659487_pf.html); see also Deaglán de Bréadún, *Decision on Lisbon re-run “by December,”* IRISH TIMES, Nov. 17, 2008, available at <http://www.irishtimes.com/newspaper/ireland/2008/11/17/1226700658961.html> (quoting the Irish Minister of Foreign Affairs, Martin: “We will be giving them the elements of a solution, and we are working on that at the moment in terms of a range of issues pertaining to neutrality and defence . . . ethical issues . . . social issues . . . economic issues and tax and so on like that.” When asked if the Government would hold another referendum if it got the necessary assurances, he said: “The Government will make that decision in advance of the December meeting. We haven’t made that decision as of now . . . . We have looked at a variety of alternatives and we’ve also consulted with our political parties here at home. We do want to genuinely make it a societal effort here, it is not just the Government.”).

<sup>36</sup> See Min Shu, *Referendums and the Political Constitutionalisation of the EU*, 14 EUR. L. J. 428, 437 (2008) (pointing at the special opportunities for sectoral interest groups and ad hoc movements to influence the result); see also Leinen & Kreutz, *supra* note 33, at 307–08 (referring to the prohibition, according to the case law of the Constitutional Court, for the government to campaign for the ratification of the Treaty); Brigid McLaffin, *Notre Europe, Ireland and the EU Post-Lisbon*, (Dec. 2008), available at [http://www.notre-europe.eu/uploads/tx\\_publication/B\\_Laffan\\_-\\_Traite\\_Lisbonne.pdf](http://www.notre-europe.eu/uploads/tx_publication/B_Laffan_-_Traite_Lisbonne.pdf), (mentioning as one reason for voting no: “erosion of Irish neutrality, abortion and conscription to a European army. The loss of a Commissioner was also cited as a concern by no voters . . . .” Also, the lack of understanding of the Treaty and the lack of knowledge was cited by 65% and 45% (respectively) of the “no” voters). As to the Irish concerns, see also Presidency Conclusions, Brussels European Council, annex I (Dec. 11–12, 2008), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/104692.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf).

<sup>37</sup> Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, not Hearts*, 45 COMMON MKT. L. REV. 617, 700 (2008) (seeing a problem of legitimacy arising from a process which has been “driving Europe even further away from even more of its citizens than ever before”).

<sup>38</sup> See Weiler, *supra* note 28, at 653 (stating that “the President of the French Republic, on assuming the Presidency of the Union, issues barely veiled threats to the Irish should they not toe the line”). It may be questioned, however, whether these principles are still valid in an interdependent world. Andrew Moravcsik rightly commented on this paragraph that such transnational pressure might be not only democratically permissible, but democratically required. Taking account of the horizontal dimension of multilevel constitutionalism in the EU, people of other Member States have a legitimate interest in the policies of each Member State. See *infra* Part III.D.

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 integration process 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 on by the governments according to 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.”<sup>39</sup>

The freedom to ratify or not to ratify amendments is an essential feature of the Union—as will be, after the entry into force of the Treaty of Lisbon, the right of each Member State to withdraw.<sup>40</sup> Yet after signing an international treaty, every government 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, a 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. I argue that the government is indeed so obligated. In the absence of clear provisions of the national constitution to the opposite, nothing precludes, after a negative vote, careful consideration and negotiation with the other contracting parties of solutions and changes to the agreement that may allow another referendum to take place among a better-informed electorate. More generally, it does not seem to be a violation of democratic principles if an elected government asks people to reconsider the question of ratification when arguments can be put forward which allow the expectation that the public perception may have changed.

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 based on democratic values against a second referendum on the Treaty of Lisbon. The remaining democratic problem is how, after the compromise 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 for, and the advantages of, the reform of the Treaties.

## 2. 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 reorganize 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 *amending* the EU and EC Treaties, with the clear intention of avoiding the submission of the new Treaty to another referendum in these countries. Is Lisbon, as Tom Eijsbouts puts it,

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<sup>39</sup> Treaty of Lisbon, *supra* note 4, art. 48.

<sup>40</sup> See TEU-L, *supra* note 4, art. 50.



“a Treaty spirited by fear from the Public?”<sup>41</sup> This question can be answered with a general consideration and some reflections regarding the specific countries in question.

The general inquiry is this: is a referendum more democratic than a parliamentary decision? The reply, in my view, is no. Though it is argued that a referendum is closer to the citizen,<sup>42</sup> democracy does not require, or even necessarily prefer, that decisions be made directly by the individuals concerned.<sup>43</sup> Direct democracy is not the regular mode in most of the EU Member States, nor is it common, at least at the national level, in the American or any other constitutional system in the world—with the famous exception of Switzerland. Constitutions of the EU Member States regularly have chosen the model of a representative, parliamentary democracy, wherein 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, the decision of whether or not a reform treaty shall be ratified must be subject to a referendum only where a national constitution expressly so requires. This seems to be the case in Ireland alone.

For the particular case at issue, the French and Dutch constitutions do not require a referendum, neither for the ratification of international treaties generally, nor for the specific case of an EU “integration” treaty. In each case, 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 to do exactly this. In Germany, the ability even to hold a (consultative) referendum would require a constitutional amendment.

Finally, in the case of France it should be kept in mind that this point was made one of the central issues in the presidential election campaign. As a candidate, Nicolas Sarkozy made it clear from the outset that he would not resubmit the Lisbon Treaty or a modified “mini-traité” to a referendum, but rather would secure parliamentary consent for the kind of modified treaty he had in mind. The people, thus, had a choice; when the majority voted for him as the new President of France, the electorate expressed that, at least, the issue was not felt important enough to cast a vote for the alternative.

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<sup>41</sup> Tom Eijsbouts, *Lisbon and the Quest for the European Public: Let Elections so do some of the Work*, in *CECI N’EST PAS UNE CONSTITUTION—CONSTITUTIONALISM WITHOUT A CONSTITUTION*, *supra* note 1, at 206. For the option of a European-wide referendum in addition to the parliamentary ratification in all Member States, see Ingolf Pernice, *Referendum sur la Constitution pour l’Europe: Conditions Risques Implications*, in *LES PRINCIPES FONDAMENTAUX DE LA CONSTITUTION EUROPEENNE* 301 (Christine Kaddous & Andreas Auer eds., 2006), available at <http://www.whi-berlin.de/documents/whi-paper0706.pdf>.

<sup>42</sup> See Van den Bogaert, *supra* note 28, at 18.

<sup>43</sup> For a critical view on the conditions for a functioning “constitutional democracy,” see Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 *INT’L ORG’N*, 1 (2009).

### 3. Conclusion

Bearing in mind the preceding discussion, a new referendum in Ireland would not be contrary to democratic principles. The people of Ireland remain free to decide, and the result will depend upon the Irish government's ability to convince its citizens of the need for, and the advantages of, ratification.

Regarding the French and Dutch peoples, it cannot be considered anti-democratic that these countries chose the parliamentary method of authorization to ratify the Treaty of Lisbon—just as all the remaining Member States did. As Laurence Burgorgue-Larsen rightly points out, there is no EU “confiscation démocratique,” because the Member States retain the power to choose between the parliamentary and the popular methods of ratification.<sup>44</sup>

Not only has the language been changed from the Constitutional Treaty to the Treaty of Lisbon, but 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 operate in a fundamentally different way than earlier treaties reforming the European Union. It should be asked, then, whether a referendum in one or another Member State is the appropriate means for gauging public support for, and the perceived legitimacy of, Treaty amendments at all.<sup>45</sup> 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—delaying the ratification until parliamentary elections have taken place in each Member State.<sup>46</sup> For replacing the Treaties by a Constitution in a more formal sense, he argues, parliamentary ratifications in all Member States could be combined with a Europe-wide referendum.<sup>47</sup> What is essential for the ratification procedures and the legitimacy of the process, though, is that the citizens are aware of the developments and feel adequately represented by their respective parliaments; that is, represented as people(s) in the will of which the Union is rooted, taken seriously, included in the process, and empowered as the ultimate subjects and owners of this supranational joint venture. This regards not only the internal political process in each of the Member States, but also the ways of participation at the European level.

#### C. *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 organizations. The term “constitution” for many does confer the message that it is about a state, since traditionally it is assumed that only a state can have a constitution. On the other hand, the statutes of some international organizations, such as the United Nations Food and Agriculture Organisation (“FAO”), the UN Educational, Scientific and Cultural Organisation (“UNESCO”) and the International Labour Organisation (“ILO”) are each called a

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<sup>44</sup> Burgorgue-Larsen, *supra* note 2, at 98.

<sup>45</sup> ZILLER, *supra* note 1, at 148.

<sup>46</sup> Eijsbouts, *supra* note 41, at 207–11.

<sup>47</sup> For further discussion of this issue, see Pernice, *supra* note 41; ZILLER, *supra* note 1, at 149, (envisaging this for the Treaty of Lisbon but seeing no realistic way to have it in time).

“constitution,”<sup>48</sup> though 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 explain 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 give a brief explanation of the terms used.

### 1. Terminology

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

#### a. 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 with the specific authority to establish, organize, and define the government of a state on the basis of the rule of law.<sup>49</sup> Generally, it is related to a state. My proposition is to look more generally at its functions as an instrument of societies organizing their political arrangements and to unbundle it from the state. According to what I call a “postnational” concept, this would include all instruments—national, sub-national, and supranational—for the establishment, organization, and limitation of public authority, including the legislative, executive, and judicial powers of institutions, as defined by this instrument that was created by the people concerned and regarded by them as binding upon themselves. 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 the authors and the addressees of such authority.

What distinguishes this postnational concept from the classical idea of a constitution is twofold. First, it is not exclusive; that is, it does not comprise the entirety of powers and public authority exercised within a determined territory or society. This allows conceptualizing federal systems as systems based upon some sort of power-sharing among interrelated levels of public authority, each being based upon its own constitution. Second, it is not based upon the pre-existence of a state, the pre-defined people of which—as the constitution-making power—give the state

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<sup>48</sup> See Constitution of the Food and Agriculture Organization, Oct. 16, 1945, 12 U.S.T. 980, T.I.A.S. No. 4803, available at <http://www.fao.org/docrep/x5584e/x5584e0i.htm>; Constitution of the United Nations Educational, Scientific, and Cultural Organization, Nov. 16, 1945, T.I.A.S. No. 1589, 4 U.N.T.S. 275, available at [http://www.icomos.org/unesco/unesco\\_constitution.html](http://www.icomos.org/unesco/unesco_constitution.html); International Labor Organization Constitution, Oct. 9 1946, 15 U.N.T.S. 35, available at [http://training.ilo.org/ils/foa/library/constitution/indexconst\\_en.html](http://training.ilo.org/ils/foa/library/constitution/indexconst_en.html).

<sup>49</sup> See Mark E. Brandon, *Was an American Constitutional Order*, 56 VAND. L. REV. 1815, 1816 (2003) (characterizing a constitutionalist system by “(1) Institutions authorized by and accountable to the people . . . (2) some notion of limited government . . . and (3) rule of law”).

its constitution.<sup>50</sup> Instead, as Peter Häberle rightly puts it in his seminal *European Constitutional Theory*, in the present manifestation of the “constitutional state” there is no more state than the constitution “constitutes.”<sup>51</sup> And it may constitute political units of another kind or reach as well.<sup>52</sup>

Thus, the term constitution reflects the formal consent of individuals desiring to organize themselves into a polity with determined institutions, powers, and procedures for determined action and with determined rights and duties, who so define themselves as the citizens of a polity which may be a state but may also be 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 organization so established by what we may call a—certainly fictive—social contract.<sup>53</sup> 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 of its legitimacy by the vast majority of the citizens. 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 lies.

#### b. Elementary Characteristics of the State

The state has a monopoly on legitimate direct physical coercion. This is, according to Max Weber, its essential characteristic.<sup>54</sup> Notwithstanding the other elements recognized by Georg Jellinek for defining a state,<sup>55</sup> this power of direct physical coercion is something the Union definitely does not have. 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 in the Union is entirely voluntary and EU law has to be enforced against the citizens through national authorities. The European Court of Justice does not rule upon the validity of national law. But it has exclusive competence to rule upon the validity of European acts, and it may give preliminary rulings on the interpretation of European law when a national court requests one.<sup>56</sup>

There is another important feature: States are considered to be competent to provide themselves with whatever competencies their people may wish

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<sup>50</sup> E.g., CARL SCHMITT, *CONSTITUTIONAL THEORY* 60, 75 (Jeffrey Seitzer trans., Duke Univ. Press 2008) (1928) (this is true for what Schmitt calls the “positive concept” of constitution, while according to his “absolute concept of the Constitution,” state and constitution are identical: “the state *is* constitution”). For original German-language text, see CARL SCHMITT, *VERFASSUNGSLEHRE* 4, 21 (1928).

<sup>51</sup> PETER HÄBERLE, *EUROPÄISCHE VERFASSUNGSLEHRE* 35 (5th ed. 2008).

<sup>52</sup> For the theoretical foundation of the “postnational” concept of constitution, see Ingolf Pernice, *Europäisches und Nationales Verfassungsrecht*, 60 *VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER* 148, 155–63 (2001).

<sup>53</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968) (1762).

<sup>54</sup> MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT* 29 (1980) (1922).

<sup>55</sup> GEORG JELLINEK, *ALLGEMEINE STAATSLEHRE* 381 (2d ed. 1905) (defining the state by three elements: a people, a territory, and the power of government in more general terms, each of which is at least debatable in whether or not it applies for the EU).

<sup>56</sup> Treaty Establishing the European Community, art. 234, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

(“competence-competence”). This is more difficult for the EU, the powers of which are limited to what the provisions of the Treaties expressly confer upon its institutions. Only by an agreement of all the Member States and their peoples can new powers be conferred to the EU. It is due to the multilevel structure of the EU and the powers conferred to it that, however, the idea of “competence-competence” no longer applies to the Member States of the EU either. This limitation is essential both for the EU and its Member States. According to the EC Treaty, in particular, European legislation as a principle is implemented by the Member States. In sum, according to the principle of subsidiarity the Union acts only insofar as Member States are deemed unable to act effectively in pursuit of the determined goals, or are unable to act at all.

c. International Organizations

International organizations 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 organization may be binding upon the states themselves, but in order to be applicable within a state, special authorization by that state is needed.

In this light, the EU is not a classical international organization, but—if at all—a new and very special kind.<sup>57</sup> For example, it has real legislative powers with direct effect on its citizens and its legislation has primacy over any conflicting national law.<sup>58</sup> The citizens of the Member States—as citizens of the Union—directly 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 in municipal and in European elections in whatever Member States they may have taken residence.<sup>59</sup> 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 organization and hence more state-like features.

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<sup>57</sup> See Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1:

The conclusion to be drawn from this is that 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 nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

<sup>58</sup> See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 1251; see also, Ingolf Pernice, *Costa/ENEL and Simmenthal: Primacy of European Law*, in *THE PAST AND THE FUTURE OF EU LAW: REVISITING THE CLASSICS ON THE 50TH ANNIVERSARY OF THE ROME TREATY* (Miguel Poiars Maduro & Loïc Azoulay eds., 2009) (forthcoming). The principle has been confirmed by Declaration 17 to the Treaty of Lisbon. *Declaration Concerning Primacy*, 2007 O.J. (C 306) 256.

<sup>59</sup> EC Treaty, art. 18; see also Case C-304/02, *Comm'n v. France*, 2005 E.C.R. I-6263.

d. Conclusion: Voting on an Unknown Subject “Sui Generis”

For the reasons noted above, there is no standard pattern that adequately describes the Union and its functioning, and it is often and meaningfully characterized as a *sui generis* organization. People do not understand what it really is, what it is for, or what it does. When mentioned by the media or politicians, they talk about excessive bureaucracy, large amounts of wasted money, and measures taken which do not meet the concerns and expectations of the people. If things turn badly, politicians claim the EU was responsible, while success is always to their own credit.<sup>60</sup> How could people agree upon a Constitution for, or even a reform of, such an unknown subject as the European Union? 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 why others would tend to—vote no: the treaty is too complicated, too long, and too abstract, and most people just don’t understand it. It is surprising, then, that under such conditions so many voters nevertheless said yes.

2. Laeken and the “Constitutional Confusion”

If there was little clarity on the terms, then the political handling of the reform in 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 reorganizing 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.<sup>61</sup> After this change was 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.

With all due respect, my view is that they got it wrong at each of the three relevant stages. The initial hypothesis was wrong, since the existing primary law already has a constitutional character.<sup>62</sup> It was wrong, therefore, to sell the Constitutional Treaty as a major act of constitution-making.<sup>63</sup> 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:

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<sup>60</sup> This has been identified as a great mistake by the Luxemburg Prime Minister, Jean-Claude Juncker. See Jean-Claude Juncker, *Die Denkpause Nutzen*, Strategien zur Verfassung für Europa 2 (Nov. 21, 2005), available at <http://whi-berlin.de/hre>.

<sup>61</sup> Draft Const. Treaty, *supra* note 21.

<sup>62</sup> This does not mean that the EU has a Constitution in the traditional meaning. See HÄBERLE, *supra* note 51, at 37, 273–599, 632.

<sup>63</sup> See also Weiler, *supra* note 28, at 650 (pointing to the fact that the relationship between the EU, its Member States, and the European citizens had already “followed for decades a constitutional rather than an international law sensibility and discipline,” and criticizing the pretention that “the legal mongrel produced by the Convention was a Constitution.”).

a. The Constitutional Character of European Primary Law

Legally speaking, it was clear from the outset that the 1957 EEC Treaty, like the 1951 ECSC Treaty before it, established a special, supranational organization of a constitutional character.<sup>64</sup> The explanatory memorandum to the 1957 German law ratifying the EEC made this very clear when it described the Community as a “European body of constitutional nature.”<sup>65</sup> The German Federal Constitutional Court recognized that the EEC Treaty represented something like a Constitution as early as 1967<sup>66</sup> and, eventually, the European Court of Justice took the same view in the 1984 *Les Verts* case.<sup>67</sup> Confirming its established case law it stated in *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.<sup>68</sup>

The Court also referred to the “constitutional architecture of the pillars” of the EU,<sup>69</sup> and to the “constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights.”<sup>70</sup>

Thus, for the ECJ, the European Treaties and the fundamental principles of European law have a constitutional character already. This is not the result of a “constitutionalization” of the Treaties by the Court’s jurisprudence,<sup>71</sup> but rather 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, the regulations also

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<sup>64</sup> Official explanation of the Federal Government on the ECSE- and the EEC-Treaties: “europäisches Gebilde verfassungsrechtlicher Gattung,” BTDrucks I/2401 annex 3 (BRDrucks 470/51), 4; BTDrucks II/3440, at 108; see also KARL OPHÜLS, JURISTISCHE GRUNDGEDANKEN DES SCHUMANPLANS, NEUE JURISTISCHE WOCHENSCHRIFT 289 (1951).

<sup>65</sup> See Federal Law of 27.7.1957 on the Treaties of 25.3.1957, Deutscher Bundestag, 2. Wahlperiode 1953 Drucksache No. 3440, Anlage A, at 108.

<sup>66</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] BVerfGE 22, 293, 296

<sup>67</sup> Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339.

<sup>68</sup> Case C-402/05 P, *Kadi v. Comm’n & Council*, 3 C.M.L.R. 41 (2008), ¶ 281 (with reference to *Les Verts*, 1986 E.C.R. 1339, ¶ 23).

<sup>69</sup> *Id.* ¶ 202.

<sup>70</sup> *Id.* ¶ 285; see also *id.* ¶ 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 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*, 46 COMMON MKT. L. REV. (forthcoming 2009).

<sup>71</sup> This is the view of many authors interpreting the jurisprudence of the ECJ itself as having the effect of constitutionalizing what, at the beginning, was a simple international treaty. See, e.g., Eric Stein, *Lawyers, Judges and the Making of Transnational Constitution*, 75 AM. J. INT’L L. 1 (1981); JOSEPH H. H. WEILER, *THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 224 (1999) (referring also to other actors, such as the Commission and national Courts). If we talk about “constitutionalization” 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.

“shall have general application. [They] shall be binding in [their] entirety and directly applicable in all Member States.”

The ECJ referred to this directly binding character as early as 1964 in order to establish the primacy of Community law in *Costa v. ENEL*.<sup>72</sup> It shows that the concept of the direct effect of Community law, as recognized more generally by the Court in *Van Gend & Loos*, was already inherent in the founding treaty of 1957.<sup>73</sup> For the simple reason that under the EEC Treaty such direct legislative powers are vested with the EU 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 the institutions established by this treaty.<sup>74</sup>

A comparative analysis of these “integration clauses” in the constitutions of the EU Member States makes clear that almost every one of them requires that special majorities and other conditions must be met in order to bring into effect this kind of treaty, a reform of it, or accession to the Union. The new Article 23 of the German Basic Law, for example, requires that the procedure for the amendment of the constitution (two-thirds majority in both chambers) be applied; under Article 29, paragraph 4 of the Irish Constitution, Union membership and each of the reform treaties are authorized by an express clause to be introduced in the Constitution under the amendment procedure of Article 46. It follows that from the perspective of the national constitutions, the EU is not only different from traditional international organizations but is also of a specific constitutional character.

b. The Convention: Putting on Constitutional Clothes

The 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.<sup>75</sup> The constitutional debate was reopened when the German Minister of Foreign Affairs, Joschka Fischer, gave his famous Humboldt Speech of May 12, 2000 entitled *From Confederacy to Federation: Thoughts on the Finality of European Integration*.<sup>76</sup> The idea was echoed in the Laeken Declaration, and the Convention took it up in deciding to produce a historical milestone in giving the EU a Constitution in the form of an international treaty, called the Treaty Establishing a Constitution for Europe.<sup>77</sup> The draft of the Convention was slightly modified by the

<sup>72</sup> *Costa*, 1964 E.C.R. 1251, ¶¶ 8–13.

<sup>73</sup> *Van Gend & Loos*, 1963 E.C.R. 1, ¶ 10.

<sup>74</sup> See Basic Law for the Federal Republic of Germany, art. 24(1). For other references, see Grabenwarter, *supra* note 2, at 95. See also MONICA CLAES, THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION (2006); European Constitutional Law Network, [http://www.ecln.net/index.php?option=com\\_content&task=view&id=29&Itemid=52](http://www.ecln.net/index.php?option=com_content&task=view&id=29&Itemid=52) (last visited Mar. 31, 2009) (collecting not only the national constitutions of the EU Member States but also important decisions of the Constitutional Courts and other highest national courts).

<sup>75</sup> Laeken Declaration, *supra* note 19.

<sup>76</sup> Joschka Fischer, Speech at the Humboldt-University, *From Confederacy to Federation: Thoughts on the Finality of European Integration* (May 12, 2000) (English translation available at [http://www.jeanmonnetprogram.org/papers/00/joschka\\_fischer\\_en.rtf](http://www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf)).

<sup>77</sup> Draft Const. Treaty, *supra* note 21.



Intergovernmental Conference, adopted by the European Council, and signed by all the Member States in Rome on October 29, 2004.<sup>78</sup>

This treaty was intended to be a substitute for the existing Treaties. While it took over most of their provisions, a number of important amendments in substance have nevertheless been added, and they have been restructured and given new clothes. The Treaty of Rome II chose 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 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 much in substance, the Constitutional Treaty allowed a little more understanding of what the EU really is and does. In the end, eighteen of the then-twenty-five Member States, including two popular votes, Spain and Luxembourg, and the two latest newcomers, Bulgaria and Romania, approved the Treaty establishing a Constitution for Europe. The peoples of two Member States, France and the Netherlands, voted against. Five governments did not proceed to take steps for ratification after the process was stopped by the two negative referenda.

c. Dismantling the Constitution

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 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,”<sup>79</sup> no hope was left of bringing the Constitutional Treaty into effect.

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 desired reform would still be achieved and in the end the Treaties would remain, ironically, what they were from the beginning: the

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<sup>78</sup> See Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1 (rejected 2005) [hereinafter Eur. Const. Treaty].

<sup>79</sup> See generally EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (Joseph H. H. Weiler & Marlene Wind eds., 2003); WEILER, *supra* note 71; Pernice, *Multilevel Constitutionalism*, *supra* note 2, at 703; Paul Craig, *Constitutions, Constitutionalism and the European Union*, 7 EUR. L.J. 125 (2001); PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 281, 314–29 (Armin von Bogdandy & Jürgen Bast eds., 2006); ANNE PETERS, *ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS* (2001); HANS PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 64 (1972); ULRIKE LIEBERT & JOSEPH FALKE, *POSTNATIONAL CONSTITUTIONALISATION IN THE NEW EUROPE* (2006).

constitutional charter of a Community of law.<sup>80</sup> 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 explained 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.<sup>81</sup>

### III. 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 new structure of political organization to ensure peace and stability in Europe. It was given new impetus each time that a further enlargement came into sight, and the visible economic benefits of a functioning internal market spurred on the efforts to deepen the legal framework of integration. Constitutional enthusiasm, on the other hand, was dampened by considerations of preserving national sovereignty and meaningful statehood. Moreover, with the continuing progress of integration and the referenda on several reform treaties, it became increasingly clear that the development of the European Union—or more specifically the progressive constitution of the European Union—touches upon both the daily life of individuals and the constitutions of the Member States, including the constitutional rights and duties of the citizens.

The concept of multilevel constitutionalism focuses on the correlation of national and European law from the perspective of both states and citizens. On the assumption that in modern democracies the citizens are the basis and origin of public authority and decision-making power, whether vested with national, European, or possibly even global institutions,<sup>82</sup> we reach an understanding that the two levels of

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<sup>80</sup> Armin Hatje & Anne Kindt, *Der Vertrag von Lissabon—Europa Endlich in Guter Verfassung?*, 61 NEUE JURISTISCHE WOCHENSCHRIFT 1761, 1768 (2008) (also seeing in this regard 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 Hans-Jürgen Papier, *Europas Neue Nüchternheit: Der Vertrag von Lissabon* (Walter Hallstein Institute for European Constitutional Law, FCE 1/08, Feb. 21, 2008) (speech by the President of the German Federal Constitutional Court given at the Humboldt University's *forum constitutionis europae* on January 18, 2008 on Europe's new sobriety), available at <http://whi-berlin.de/documents/Rede-Prof.Dr.Papier.pdf>. Weiler, *supra* note 28, at 652, criticizes the process ironically, however: "Take the Treaty which masqueraded as a Constitution, do some repacking, and now it is a Constitution masquerading as a Treaty."

<sup>81</sup> Jan-Werner Müller, *A European Constitutional Patriotism? The Case Restated*, 14 EUR. L.J. 542, 554 (2008). 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, Burgorgue-Larsen, *supra* note 2, at 99, speaks about a "démocracie 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)."

<sup>82</sup> For a possible extension to this level, see Ingolf Pernice, *The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation*, in COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF CHRISTIAN TOMUSCHAT 973–1005 (P.M. Dupuy et al. eds., 2006) (VÖLKERRECHT ALS WERTORDNUNG: FESTSCHRIFT FÜR CHRISTIAN TOMUSCHAT).

government are complementary elements of one system serving the interest of their citizens, both national and European.

A. *National Constitutions and European Law*

The failures and intensive debates surrounding 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 the term “multilevel constitutionalism” to describe this specific kind of constitutionalism,<sup>83</sup> primarily with a view to developing a comprehensive perspective for the analysis of a process affecting national and 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 law to private and criminal law—are affected by the Treaties and EU secondary law and are thereby Europeanized. The European level, in turn, is influenced by national law, in particular through the general principles of law—including human rights as referred to in Article 6(2) of the EU Treaty and developed by the ECJ case law from national constitutional traditions.<sup>84</sup>

Powers assigned to European institutions are not to be exercised by the Member States individually. Where the Council is vested with legislative powers, the respective national ministers, together with the European Parliament, act as European legislators; they perform a function which is traditionally reserved to the parliaments. National parliaments, in turn, may be bound to act as European executive authorities when transposing and implementing directives of the Council by national legislation.<sup>85</sup> On the other hand, they do not only legitimize, 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.

The above observations concerning the institutions at both levels can also be seen in the relationship between national and European law. According to the

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<sup>83</sup> Pernice, *Multilevel Constitutionalism*, *supra* note 2, at 703.

<sup>84</sup> This was established case-law of the ECJ, beginning with Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, and was most recently confirmed in Case C-402/05 P, *Kadi v. Comm'n & Council*, 3 C.M.L.R. 41 (2008), ¶ 283: “In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures.” For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance. *See, e.g.*, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v. Conseil des Ministres*, 2007 E.C.R. I-5305, ¶ 29 (and case-law cited); *see also* Christian Walter, *History and Development of European Fundamental Rights and Fundamental Freedoms*, in *EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS 1* (Dirk Ehlers ed., 2007).

<sup>85</sup> *See* EC Treaty, art. 249 (providing that directives adopted by the Council and the European Parliament according to the procedure of Article 251 of the EC Treaty are binding for the Member States as to the objective but leave the choice of the form and means of the transposition to the national authorities). As far as legislative acts are necessary, at the national level, to bring national law in conformity with the objectives of the directive, the task of the national parliaments, thus, is to execute faithfully the provisions of the European directive.

principles of the primacy and direct effect of European law, in cases of conflict between national and European law, national administrations and courts must 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 aid, and the management of structural funds—implementing European legislation is their responsibility and their duty under Article 10 EC,<sup>86</sup> and in doing so national authorities act as European agencies.

The Member States of the European Union, consequently, have changed their character. Though their sovereign equality within the meaning of Article 2(1) of the UN Charter remains untouched, the “constitutional culture” of EU membership means that the process of European integration is “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.”<sup>87</sup>

Thus, the constitutions of the EU Member States, no less than the character of these states themselves,<sup>88</sup> have undergone some important mutations. In addition to their character as founding instruments of the states, they have become foundational components of the European multilevel constitutional system. Yet only a few of the substantial changes flowing 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 for processes such as changing electoral rights at the local level or for the establishment of the European Monetary Union—these changes can be recognized only when their constitutions are read together with the European Treaties, legislation, and case law. As mentioned above, some national constitutions subject membership of, or changes to, the Union’s Founding Treaties to special requirements, sometimes in the same way as for amendments of the national constitution.<sup>89</sup> In viewing the European constitutional process as encompassing both national constitutions and European primary law—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.

#### B. *European Citizens and New Sovereignty*

Creating a functioning internal market and, in close relation to this, conferring exclusive competencies to the Union for commercial and monetary policy, as well as creating shared legislative powers for environmental and consumer protection,

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<sup>86</sup> This is the established case-law of the ECJ. See Case 205/82, *Deutsche Milchkontor and Others v. Germany*, 1983 E.C.R. 2633, ¶ 17.

<sup>87</sup> See Müller, *supra* note 81, at 552 (referring to Jean-Marc Ferry for the “constitutional culture” as being “about taming raw sovereignty, and establishing a politics of compromise, civilized confrontation and mutual learning.”).

<sup>88</sup> See Burgogue-Larsen, *supra* note 2, at 88, 95. For the use of the term “mutation” in this context, see Hans-Peter Ipsen, *Als Bundesstaat in der Gemeinschaft*, in *PROBLEME DES EUROPÄISCHEN RECHTS—FESTSCHRIFT FÜR WALTER HALLSTEIN ZU SEINEM 65-GEBURTSTAG* 248, 264 (Ernst von Caemmerer et al. eds., 1966). See also Ingolf Pernice, *Commentary on Article 23*, in 2 *GRUNDGESETZ-KOMMENTAR* 325 (Horst Dreier ed., 2d ed. 2006).

<sup>89</sup> See *supra* note 74 and accompanying text.

transport and other policies, has impacted more than the Member States' constitutions and the powers and functions of their national institutions, as described above. The provisions of the Treaties and of European legislation and decision-making also directly affect the daily lives of European citizens.

This empowerment of common institutions at the European level is often understood as a loss of autonomy and sovereignty for the state, as well as a threat to democracy and the rights of individuals. However, one must remember that the principle of subsidiarity, in a larger meaning, governs not only the attribution of these powers to the Union, but it governs particularly their exercise by its institutions.<sup>90</sup> This means that European powers are limited to what the Member States cannot effectively achieve individually. Thus, the creation of European institutions to implement such policies results not in a loss of sovereignty for a Member State's citizens, but rather in a gain in the form of new opportunities available to promote their interests.<sup>91</sup> Yet this is not national sovereignty in the traditional sense, but another kind of sovereignty. It is not so much autonomy or autarchy (which, thanks to globalization pressures and dependencies, does not exist anymore), but rather the "capacity to participate in transgovernmental networks of all types . . . sovereignty as participation."<sup>92</sup> In this sense the Czech Constitutional Court has recently rejected classical concepts of sovereignty:

In the globalized world the centers of power are regrouped according to factors other than simply the power and will of individual sovereign states. There is a spontaneous, undirected process of increasing intensive integration of the world's countries in a single economic system. This process, with contributions from the key communication technologies of the mass media, internet, and television, subsequently influences relationships outside and inside individual states in the areas of politics, culture, social psychology and others, including the area of law.

102. The character of integration, in this regard also in the case of the European Union, can ultimately lead to protection and strengthening of the sovereignty of member states vis-à-vis external, especially geopolitical and economic factors; for example, also vis-à-vis newly emerging world superpowers, where it is difficult to guess the future priority of values to which they will be willing to subordinate the building of a new order in the globalized world . . .

and after further developments on a modified concept of sovereignty the Court concluded

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<sup>90</sup> This is what is laid down in Article 5(2) EC and in the new provisions on subsidiarity in Article 5(3) TEU-L.

<sup>91</sup> For the concept of "cooperative sovereignty," see Samantha Besson, *Sovereignty in Conflict*, 8 EUR. INTEGRATION ONLINE PAPERS 18 (2004), available at <http://eiop.or.at/eiop/texte/2004-015.htm#4.4>.

<sup>92</sup> For this concept, see ANNE MARIE SLAUGHTER, *THE NEW WORLD ORDER* 34, 266 (2004). Slaughter calls this idea "disaggregated sovereignty."

that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the "loss" of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world.<sup>93</sup>

This new understanding of sovereignty is reflected in new provisions included in the EC Treaty as amended by the Treaty of Lisbon and renamed Treaty on the Functioning of the EU (TFEU), such as the new provisions on European solidarity in the event of severe difficulties "in the supply of certain products, notably in the area of energy,"<sup>94</sup> or in the framework of environmental policies for "combating climate change."<sup>95</sup> In the face of certain threats from Russia in the case of Ukraine, another example is the conferral of new EU competency for a "Union policy on energy," introduced under Article 194 TFEU with the objectives to "(a) ensure 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 would be more effectively served by common action than by each Member State alone, and the EC Treaty was amended accordingly.

This is the rationale behind the European Union, which is about citizens and their concerns rather than about abstract sovereign states. This is why I believe that the more that institutions representing their citizens at the national level come to view their European function as an opportunity to pursue certain policies by common action, and the more their 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 effective reform.

Multilevel constitutionalism, thus, encourages conceptualizing the European Union from the perspective of its citizens. On this view, instead of being a threat to the national sovereignty and statehood of the Member States, as again the applicants to the German Federal Constitutional Court have put forward recently in their case against the ratification of the Treaty of Lisbon,<sup>96</sup> the EU is an instrument of the states and their peoples for meeting new challenges and for achieving certain common political goals at the European level through European institutions, which are

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<sup>93</sup> náleží Ústavního soudu [Constitutional Court] čj. 19/08 / 2008 / Sbírka nálezů a usnesení Ústavního soudu (Cz.); available at [http://angl.concourt.cz/angl\\_verze/doc/pl-19-08.php](http://angl.concourt.cz/angl_verze/doc/pl-19-08.php) (in English, with the specific text at paragraphs 101, 102, 108).

<sup>94</sup> TFEU, *supra* note 4, art. 122.

<sup>95</sup> *Id.* art. 191.

<sup>96</sup> BVerfG Oct. 10, 2008, 2 BverfGE 2/08, 2 BvR. For the application, see <http://www.petergauweiler.de/pdf/Klage-Lissabon-Vertrag.pdf>. See also *Is the European Union Constitutional?* DER SPIEGEL, Feb. 10, 2009; *Europe is Suffering from Too Little Democracy*, DER SPIEGEL, Feb. 11, 2009; *Germany Considers Putting Brakes on EU Power*, DER SPIEGEL, Feb. 16, 2009.

formally autonomous, but are in reality interacting and interwoven with national institutions, largely depending on them for their proper functioning.

Moreover, 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 municipal levels, eligibility for important positions in the European civil service or political institutions, and even diplomatic protection by fellow Member States in third countries.<sup>97</sup> Any modification of the Treaties, and 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, the powers conferred upon the European Union—just like 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—the power comes from the will of the citizens of the respective Member State. For policies implemented through European institutions, the power comes from 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 stated very clearly when explaining the federal division of powers, that “[t]he federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>98</sup>

I borrow from this great insight to demonstrate that the concept is also applicable to the European Union, notwithstanding all the differences. As representatives of the citizens of their respective countries, the governments of the original six Member States established the European Communities and negotiated with the candidates for enlargement and with the new Member States about the successive reform treaties for the European Union. Representing the people of their countries, the respective national parliaments brought all these treaties into effect, except for where this was done by direct referendum. The specific powers and procedures for such accessions and amendments 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 says, about “States which have freely chosen to exercise some of their powers in common,”<sup>99</sup> should we not admit that the sovereignty in question is that of the people? In other words, how can we deny that the citizens of the Member States have established—according to their respective constitutional procedures and on their behalf—the European Union? The concept of Union citizenship consequently

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<sup>97</sup> See the provisions on non-discrimination, on market freedoms, and on Union citizenship. EC Treaty, arts. 12, 17–20, 28–32, 39–62. There is no special provision, however, on the eligibility for the European civil service or political institutions. Article 28 of the Staff Regulations of Officials of the European Communities, however, points out that “an official of the EU may be appointed only on the condition that: (a) he is a national of one of the Member States of the Communities, unless an exception is authorized . . . and enjoys his full rights as a citizen.” Council Regulation 259/68, art. 28, 1968 O.J. SPEC. ED. (L 56) (EC), available at [http://ec.europa.eu/dgs/personnel\\_administration/statut/tocen100.pdf](http://ec.europa.eu/dgs/personnel_administration/statut/tocen100.pdf).

<sup>98</sup> THE FEDERALIST NO. 46 (James Madison).

<sup>99</sup> 1958 CONST. 88–1, available at <http://www.assemblee-nationale.fr/english/8ab.asp>.

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 in their daily lives, 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 to be implementing policies, which, so far, are regarded as internal policies of the Member States. If the referenda on the Treaties of Maastricht and Nice, and the work of the Convention on the Treaty establishing a Constitution for Europe and the subsequent debates have had any positive effect, it is the rising awareness of the citizens that this European joint venture really matters for each of them.

People may reject the Union as being beyond comprehension and out of control, but this is short-sighted. Others take ownership and constructively work on it as an opportunity to meet common challenges and achieve shared goals. Pursuing such projects through supranational institutions could well reflect an emerging European constitutional patriotism<sup>100</sup> which embraces more than just the benefit of new rights and freedoms that the European Treaties provide for the individual and that the national courts, in dialogue with the European Court of Justice, are required to protect effectively. While the policies which are of the most immediate concern for citizens, like social security, taxation, education, internal law and order, national security, and defense, continue to rightly remain in national competence,<sup>101</sup> there are other important goals that Member States individually may not be able to achieve. Peace among the Member States—between France and Germany in particular—was the first and most obvious of these goals after World War II. Others are the benefits of a common market, effective environmental policies, and energy security, as well as combating climate change, organized 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.

Some of these European policies are certainly less salient for citizens and may not provide as much of a basis for sustained political learning, allegiance, cleavages, organization, and voting behavior as is common in the national democratic process, so that European citizens do not exploit the opportunities of participation they have.<sup>102</sup> What is needed, however, is a broader awareness that the Union is an efficient level of action for policies of common concern where state action would remain ineffective, and that it necessitates stronger involvement of citizens in the decision-making processes whenever salient political questions arise.<sup>103</sup>

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<sup>100</sup> See Müller, *supra* note 81, at 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.”

<sup>101</sup> See Andrew Moravcsik, *In Defence of the “Democratic Deficit”—Reassessing Legitimacy in the European Union*, J. COMMON MKT. STUD. 603, 607 (2002), available at <http://www.princeton.edu/~amoravcs/library/deficit.pdf>.

<sup>102</sup> *Id.* at 605, 615; see also Moravcsik, *supra* note 26, at 40.

<sup>103</sup> The Treaty of Lisbon offers better opportunities for involvement than the existing law. See TEU-L, *supra* note 4, arts. 10, 11 (in particular the citizens’ initiative under Article 11(4)). Also, the inclusion of the national parliaments as listed in Article 12 TEU-L and the publicity of the Council when



### C. *Dimensions of Multilevel Constitutionalism*

As noted above, the national constitutions and the European constitutional level are closely interwoven and interconnected in both their institutions and their substantive law. In addition to this vertical bond between the EU and its Member States, horizontal bonds are developing between Member States under the roof of, and stimulated by, the EU framework. Although this is happening at all levels of administration, in the judiciary, and even in democratic representation, this horizontal dimension has not yet been described and analyzed sufficiently.<sup>104</sup> 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 on both the vertical as well as the horizontal dimensions of the EU-constitutional network and so allows for a comprehensive understanding of this complex system.

#### 1. The Vertical Dimension

In the vertical relationship between the EU and its Member States, the citizens are the source of democratic legitimacy for both levels of government, as well as the focal point for all levels of policy considerations. Guided by the principle of subsidiarity, responsibilities are assigned to the regional, national, and European levels of government with the goal of ensuring that each task is implemented most effectively in the interest of the citizens concerned. There is a strong preference for taking action at the lowest possible level in order to safeguard the highest degree of self-determination of the citizens and 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 rather complementary and reciprocally supportive. Thus, in terms of the vertical balance of powers, the principle of subsidiarity is closely linked to the democratic principle in that it ensures efficiency and is the basis for the justification and legitimacy of all action at the European level. As a key element of the composed constitutional system of the EU, it governs the relationship between the two levels of public authority and is as essential for its unity and functioning as the principle of the primacy of EU Law.<sup>105</sup>

Multilevel constitutionalism thus helps explain that the different levels of government are formally autonomous components of what is, 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. Because they are each serving the same people, these components are closely interdependent and interwoven. For example, where the EU has exclusive competencies, Member States depend on effective institutions and procedures at the European level to

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it meets as a legislative body offer more opportunities for the citizen to take part in the political life of the EU. See, e.g., *id.* art. 16(8) (on transparency); *id.* art. 15 (on public access to files).

<sup>104</sup> For a form of horizontal networks, see SLAUGHTER, *supra* note 92, at 19, 122. For the example of the EU arrest warrant and other horizontal arrangements, see Ingolf Pernice, *Die horizontale Dimension des Europäischen Verfassungsverbundes. Europäische Justizpolitik im Lichte von Pupino und Darkanzali*, in FREIHEIT, SICHERHEIT UND RECHT, FESTSCHRIFT FÜR JÜRGEN MEYER 359–93 (Hans Jörg Derra ed., 2006), available at <http://www.whi-berlin.de/documents/whi-paper0305.pdf>.

<sup>105</sup> See *Costa*, 1964 E.C.R. 1251, ¶¶ 8–13; see also *infra* Part IV.F.3.

achieve their goals.<sup>106</sup> On the other hand, the policies of European institutions generally become effective within the Member States only through their implementation by national parliaments, administrations, and judges.

## 2. The Horizontal Dimension

The other dimension of the European multilevel system of governance is the horizontal cooperation and mutual recognition between the Member States.<sup>107</sup> Effective and coherent implementation of European policies and equal treatment of all Union citizens throughout the Member States requires cooperation and networking at all levels of national administrations,<sup>108</sup> such as for the implementation of environmental legislation,<sup>109</sup> the proper conduct of competition policies,<sup>110</sup> or for exercising regulatory functions in the telecommunications or energy markets.<sup>111</sup> In addition, it also requires cooperation among the courts and judges in all Member States.

Article 197 TFEU stresses that effective implementation of Union law is “a matter of common interest.” It gives the Union the power to support horizontal cooperation among national authorities in various forms, with a view to improving their capacities for better implementing European law.<sup>112</sup> A specific provision will be introduced in Article 70 TFEU providing the Council with the power to lay down “arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies . . . by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition.”

<sup>106</sup> This is also the case in areas of shared competency where national actors consider the EU to be the appropriate level to take action and therefore cooperate with its institutions for specific political issues of European reach.

<sup>107</sup> For this concept, see Pernice, *supra* note 104, at 372.

<sup>108</sup> See Slaughter, *supra* note 92, at 19, 135.

<sup>109</sup> Europa.eu, Environment—Implementation—About IMPEL, <http://ec.europa.eu/environment/impel/introduction.htm> (last visited Mar. 24, 2009) (providing IMPEL text); see also Elizabeth Hattan, *The Implementation of EU Environmental Law*, 15 J. ENVTL. L. 273, 287 (2003).

<sup>110</sup> See Council Regulation 1/2003, On the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, ch. VI, arts. 11–16, 22, 2003 O.J. (L 1) 1 (EC); see also *Commission Notice on Cooperation within the Network of Competition Authorities*, 2004 O.J. (C 101) 43, rec. 15–18; Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, available at [http://ec.europa.eu/competition/ecn/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/ecn/joint_statement_en.pdf).

<sup>111</sup> See David Coen & Mark Thatcher, *Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies*, in 28 J. PUB. POL’Y 49, 49–71 (2008) (providing an overview of the regulatory networks in the diverse policy areas at 57). For an elaboration on the European regulatory compound (*Regulierungsverbund*), see Ingolf Pernice, *Soll das Recht der Regulierungsverwaltung übergreifend geregelt werden? Europarechtliche Aspekte* 41 (Humboldt-University of Berlin, WHI, paper 3/06, 2006), available at <http://www.whi-berlin.de/documents/whi-paper0306.pdf>.

<sup>112</sup> TFEU, *supra* note 4, art. 197:

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 harmonization of the laws and regulations of the Member States.

These kinds of “mutual evaluation mechanisms,” which are inspired “by the examples of mutual evaluation already conducted within the Council,”<sup>113</sup> have the triple advantage of better ensuring implementation, institutionalizing 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.<sup>114</sup>

Even where the new Treaty expressly excludes any European action—for example, concerning the “maintenance of law and order and the safeguarding of internal security”<sup>115</sup>—Article 73 TFEU nevertheless invites them to cooperate, by making clear that “it shall be open to Member States to organize 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.”<sup>116</sup>

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,”<sup>117</sup> 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.<sup>118</sup> For example, Title II of

<sup>113</sup> Clemens Ladenburger, *Police and Criminal Law in the Treaty of Lisbon: A New Dimension for the Community Method*, 4 EUR. CONST. L. REV. 20, 33 (2008).

<sup>114</sup> See TFEU, *supra* note 4, arts. 77–81 (border controls, asylum and immigration); *id.* arts. 82–86 (judicial cooperation in criminal matters); *id.* arts. 87–89 (police cooperation).

<sup>115</sup> *Id.* art. 72.

<sup>116</sup> Ladenburger, *supra* note 113, at 36, interprets this “carve out” as applying “merely to member state intelligence services, provided that they do not carry out any law enforcement measures.”

<sup>117</sup> TEU-L, *supra* note 4, art. 5(3)(2) and the new Protocol on Subsidiarity. For details, see *infra* Part IV.C.1.

<sup>118</sup> COSAC is the Conference of the Community and European Affairs Committees. 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.” For Germany, see draft of Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Begleitgesetz, [Gesetzentwurf BTDrucks 16/8489, Beschlussempfehlung und Bericht, BTDrucks 16/8919]). In particular, the COSAC (see Article 10 of Protocol 1 to the Treaty of Lisbon, 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, Ninth Bi-annual Report on EU Procedures and Practices, at 29 (May 7–8, 2008), available at <http://www.cosac.eu/en/documents/biannual/>. IPEX is the new Interparliamentary EU Information

Protocol No. 1 on the Role of National Parliaments in the European Union expressly addresses “Interparliamentary Cooperation.”<sup>119</sup> Such networks are tying the diverse institutions of the Member States together to develop an ever more coherent system of interchange and cooperation.

Common values, such as those laid down in Article 6(1) of the EU Treaty still in force and in more detail in Article 2 of the EU-Treaty as amended by the Treaty of Lisbon,<sup>120</sup> are contributing to this process. This can also be seen in the procedure for sanctioning Member States violating these common values, such as that set up by Article 7 of the EU Treaty<sup>121</sup> and the European Charter of Fundamental Rights. These common values and, in particular, respecting the rule of law and the principle of democracy at the national level are not only important for the functioning of the Union as such; they also 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 of the internal market<sup>122</sup>—and formally acknowledged for the areas of freedom, security, and justice.<sup>123</sup> Without the mutual trust based upon the recognition of these common values in all Member States, new instruments for combating cross-border crime and terrorism like the European arrest warrant<sup>124</sup> could not properly function.<sup>125</sup>

The implications of this horizontal effect, furthermore, trigger new kinds of interest by the people in one country for policies of the others. For example, whenever the 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 the politics and legal culture of the others. To this end, academic networks are

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Exchange System. More information about IPEX is available at [http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/jrobot/public/IPEX\\_leaflet\\_EN.pdf](http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/jrobot/public/IPEX_leaflet_EN.pdf).

<sup>119</sup> Article 9 of the Protocol reads: “The European Parliament and national Parliaments shall together determine the organization and promotion of effective and regular interparliamentary cooperation within the Union.”

<sup>120</sup> The 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.

TEU-L, *supra* note 4, art. 2. This provision was carried over from Article I-2 of the Constitutional Treaty.

<sup>121</sup> Art. 7 TEU has been taken over without major amendment by art. 7 TEU-L.

<sup>122</sup> It is the basis of the famous “*Cassis-de-Dijon*” jurisprudence of the ECJ. *See* Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649. Also the EC program on the completion of the Internal Market as set out in the Commission’s White Paper, BULL. EC 12-1982, 1.2.3, is based upon the principle of mutual recognition. For a thorough study, see Kalypso Nicolaodis, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects* (Jean Monnet Working Paper No. 7/97, 1997), available at <http://www.jeanmonnetprogram.org/papers/97/97-07.html>.

<sup>123</sup> *See* TFEU, *supra* note 4, arts. 67(3), 82(1) (concerning the mutual recognition of judgments and judicial decisions in the area of criminal justice). Powers for harmonization of laws are provided in Article 82(1) and (2) in order to “facilitate” mutual recognition.

<sup>124</sup> *See generally* Council Framework Decision 2002/584/JHA, 2002 O.J. (L 190) 1.

<sup>125</sup> *See* Pernice, *supra* note 104, at 12.

established and strive for horizontal exchange of knowledge and understanding of the law, which is common to the citizens of the Union.<sup>126</sup>

*D. 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.<sup>127</sup> 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 a hierarchy does not follow as a theoretical necessity.

Rather, the relationship between the two levels of law is functional and flows 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, and should be complementary to national law; it is not meant to jeopardize the validity of national law or, in particular, the fundamental principles of the diverse national constitutions. Mutual consideration and regard for the functioning of the European system, as well as for the basics of national constitutional law, is therefore required—as is cooperation between the relevant actors at both levels.

Accordingly, Member States and their constitutional courts have acknowledged the primacy of European law even over their national constitutions, but this is not an unconditional primacy.<sup>128</sup> In the view of multilevel constitutionalism, this is to be expected because there is no hierarchy between the two components of the European legal system.<sup>129</sup> Rather, the relationship is pluralistic and cooperative,<sup>130</sup> as it is based upon the general recognition that European law is given precedence above

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<sup>126</sup> See, e.g., the European Constitutional Law Network (ECLN), <http://www.ecln.net> (last visited Mar. 31, 2009). For the methodological implications, see Ingolf Pernice, *Europawissenschaft oder Staatsrechtslehre? Eigenarten und Eigenständigkeit der Europarechtslehre*, in STAATSRECHTSLEHRE ALS WISSENSCHAFT, DIE VERWALTUNG, BEIHEFT 7, at 225, 233, 242, 250 (Helmuth Schulze-Fielitz ed., 2007).

<sup>127</sup> HANS KELSEN, GENERAL THEORY OF LAW AND STATE 123 (Anders Wedberg trans., 1999) (1945) (explaining the “hierarchy of norms” derived from a (hypothetical) “basic norm” which gives validity to all norms on all levels). For a critique of multilevel constitutionalism based on the theoretical terms of Kelsen, see Jestaedt, *Der Europäische Verfassungsverbund*, in CALLIES, *supra* note 2, at 100, 120–24, and my reply, *supra* at 78–84.

<sup>128</sup> For an excellent overview, see Frank Hoffmeister, *Constitutional Implications of EU Membership. A view from the Commission*, 3 CROAT. Y.B. EUR. L. & POL’Y 59 (2007), available at <http://www.whi-berlin.de/documents/whi-paper1008.pdf>.

<sup>129</sup> For the basis of legal pluralism, see Besson, *supra* note 91, at 13, 22.

<sup>130</sup> Clearly so defined by the German Federal Constitutional Court, in BVerfGE 89, 155, 156. For the pluralistic approach, see Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 339–40 (2002).

national law—including constitutional provisions. On this view, 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.<sup>131</sup> This distinguishes the European model of multilevel constitutionalism from most federal states, where federal law trumps state law in the event of a conflict.<sup>132</sup> This is not what Carl Schmitt and those who apply his theory of a federation to supranational or international contexts understand when talking about a federation.<sup>133</sup> Instead of monism as for Kelsen and Schmidt there is constitutional pluralism;<sup>134</sup> instead of hierarchy and supremacy of federal law, there is functional primacy<sup>135</sup> based upon mutual consideration, recognition, and cooperation between the courts.<sup>136</sup> There is no *ius belli* of the federation,<sup>137</sup> and no “right of supervision” over the member states or right to intervene.<sup>138</sup> Thus, national courts generally respect the primacy of European law, except—so far theoretically—for particular situations where basic values, rights, or structures of the national constitutions are in question.<sup>139</sup>

<sup>131</sup> TEU-L, *supra* note 4, art. 6(1). With references to the case law of several national supreme and constitutional courts, see Ingolf Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* 43, 53 (Humboldt University of Berlin, WHI, paper 5/07, Dec. 2005), available at <http://www.whi-berlin.de/documents/whi-paper0507.pdf>.

<sup>132</sup> *E.g.*, Basic Law for the Federal Republic of Germany, art. 31 (“Bundesrecht bricht Landesrecht” (federal law trumps Land law)); U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.”).

<sup>133</sup> SCHMITT, *supra* note 50, at 397 (maintaining that from the public law character of every federation follows that “federation law always [has] precedence over Land law . . .”). For the application of the concept of federation to International Law, see Jean L. Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, 15 CONSTELLATIONS 470 (2008).

<sup>134</sup> For “constitutional pluralism,” see Walker, *supra* note 130. See also Miguel Poiars Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 74, 88 (2003) (proposing that lawyers talk about “conterpunctual law”); Halberstam & Stein, *supra* note 70, at III.C.2 (discussing the “Kadi” jurisprudence of the ECJ in light of constitutional pluralism).

<sup>135</sup> For the distinction between *supramacía* and *primacía* made by the Spanish Constitutional Court with regard to the relation between the national constitution and European law, see TC, Dec. 13, 2004 (Declaración DTC 1/2004), available at [http://www.ecln.net/index.php?option=com\\_content&task=view&id=61](http://www.ecln.net/index.php?option=com_content&task=view&id=61).

<sup>136</sup> See also nálež Ústavního [Constitutional Court] soudu cj. 19/08, ¶ 197, Sbíрка nálezů a usnesení Ústavního soudu:

In any case, we can also agree with the government’s opinion that, even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of member states will not be placed in a hierarchy in any way; it should continue to be a dialog of equal partners, who will respect and supplement each other’s activities, not compete with each other.

<sup>137</sup> This is argued to be a typical feature of the federation by Schmidt. See SCHMITT, *supra* note 50, at 396.

<sup>138</sup> These two elements are characterizing the federation in the theory of Schmitt. *Id.* at 386.

<sup>139</sup> For more details, see Pernice, *supra* note 131, at 49. For the materialization of these terms by new provisions of the Treaty of Lisbon, see Cohen, *supra* note 133, at 477 (proposing that in view of the rights of the individuals to challenge acts at the European and on the national level, that this element of

## IV. MULTILEVEL CONSTITUTIONALISM IN ACTION

To what extent does the Treaty of Lisbon embody this idea of multilevel constitutionalism? Can it be understood as a case for multilevel constitutionalism in action?<sup>140</sup> To summarize, this expression points to the idea of citizens organizing or reorganizing political power and responsibilities at various levels in order to best achieve the political goals of their common public interest.

Though the designation of being “constitutional” and the 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 the EC Treaty seem to confirm and strengthen the Union as a multilevel form of political association and governance. Various aspects elaborated above as signifying multilevel constitutionalism have been further developed by the terms of the new EU Treaty and the Treaty on the Functioning of the EU: for example, the central position of the citizens, the transparency and democratic legitimacy of its actions, the role of national parliaments, the subsidiarity and complementarity of its tasks and powers, the efficiency of its decision-making procedures, its legal personality and foreign representation, the rule of law, and voluntary membership. Let me deal with each of these separately.

A. *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 in the European Union. More than ever before since the introduction of European citizenship in the primary law of the EU,<sup>141</sup> the amendments envisaged by the Treaty of Lisbon refer to the position and rights of the individual and, in particular, develop the political status of Member State citizens in their additional identity as citizens of the Union.

As the Lisbon Treaty scrubbed much of the “constitutional” language of the Constitutional Treaty, the latter’s references to the “will of the citizens and States” reflected in “this Constitution” have also not been taken over.<sup>142</sup> Nevertheless, the status and rights of the citizens as the source of legitimacy for European policies is 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(2) EU, according to which

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“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.)

<sup>140</sup> For summaries and comments, see Dougan, *supra* note 37; RUDOLF STREINZ ET AL., *DER VERTRAG VON LISSABON ZUR REFORM DER EU* (2d ed. 2008); Terhechte, *supra* note 24. See also a series of articles in *REVUE DU MARCHÉ COMMUN ET DE L’UNION EUROPÉENNE* beginning in edition 518 and continuing in subsequent editions. Of particular interest are articles by Ekaterina Sabatakakis, Cécile Rapoport, and Muriel Le Barbier-LeBris.

<sup>141</sup> For comments on this important amendment made by the Treaty of Maastricht (1993), see Jo Shaw, *Citizenship of the Union: Towards Post-National Membership?*, in VI COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 245 (1995).

<sup>142</sup> Eur. Const. Treaty, *supra* note 78, art. I–1(1).

“[t]his 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.”

Article 2 TEU-L includes “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” among the values common to—and binding upon—the EU and its Member States. This makes it clear, from the outset, that the individual is the focal point of the Union in its broadest sense, comprising the European institutions and the Member States. The inclusion of these stated objectives in the Lisbon Treaty brings to mind the idea of a social contract,<sup>143</sup> which, through diverse new provisions on solidarity among the Member States,<sup>144</sup> would embrace citizens individually as well as their respective countries. Furthermore, the protection of citizens is mentioned among the aims of the Treaty in Article 3(3) and (5) TEU-L, and Article 13 TEU-L states that the institutional framework shall serve not only the interests of the Union and its Member States, but also those of its citizens.<sup>145</sup>

Along the same line, the new reference to the Charter of Fundamental Rights in Article 6(1) TEU-L as a legally binding instrument “which shall have the same legal value as the Treaties” underscores that these values are not only political promises, but have turned into concrete, binding law to be respected by European institutions as well as 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.<sup>146</sup> In addition, the Lisbon Treaty carries over Article 6(2) of the existing EU Treaty, saying that “[f]undamental 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 general principles of the Union’s law.”<sup>147</sup> The protection of the individual fundamental rights of the citizens, thus, is becoming a prominent feature of the new constitutional framework of the European Union.<sup>148</sup>

Furthermore, the central political status of the citizen is explained in a particularly clear manner in the new “Provisions on Democratic Principles.”<sup>149</sup> All citizens are equal under European law;<sup>150</sup> the citizens—no longer referred to as the peoples of the Member States—are directly represented at Union level in the European Parliament,<sup>151</sup> while the national governments representing the Member

<sup>143</sup> See also MÜLLER-GRAFF, *supra* note 24, at 126; *supra* Part II.C.1.a.

<sup>144</sup> See, e.g., TEU-L, *supra* note 4, art. 3(3)(3); TFEU, *supra* note 4, arts. 122(1), 194(1), 222.

<sup>145</sup> For the provision of rights to the citizens and their role in the Union, see Annette Schrauwen, *European Citizenship in the Treaty of Lisbon: Any change at all?*, 15 MAASTRICHT J. EUR. & COMP. L. 55 (2008).

<sup>146</sup> TEU-L, *supra* note 4, art. 6(2).

<sup>147</sup> *Id.* art. 6(3).

<sup>148</sup> For the “three pillars” of European fundamental rights protection, see Ingolf Pernice, *The Treaty of Lisbon and Fundamental Rights*, in *THE LISBON TREATY* 240 (2008).

<sup>149</sup> TEU-L, *supra* note 4, arts. 9–12.

<sup>150</sup> *Id.* art. 9.

<sup>151</sup> *Id.* arts. 10(2), 14(2).



States at the Union level are “democratically accountable either to their national Parliaments, or to their citizens.”<sup>152</sup>

The fact that this accountability of national governments to their respective parliaments and citizens is now recognized as a “democratic principle of the Union,”<sup>153</sup> not only confirms that the citizens are the source of the democratic legitimacy of the Union, but also makes national constitutional arrangements regarding accountability for European politics a concern of the European Union. Thus, Article 10 TEU-L may be understood as embodying the Treaty’s references to the Union’s common values, including democracy.<sup>154</sup> Indeed, both provisions operate as a basis for ensuring the functioning of the symbiotic system of multilevel constitutionalism, in that by promoting the Union’s common values, citizens will preserve the constitutional stability in their own countries too.<sup>155</sup>

The Treaty of Maastricht fashioned one mode of expressing the newly created European citizenship by granting electoral rights for the European Parliament and local elections within the Member States. The Treaty of Lisbon grants another expression of this political status with the introduction of a citizens’ initiative.<sup>156</sup> Under this new provision, if one million citizens from a significant number of Member States sign an initiative, they can “invite” the Commission to submit a proposal for a legal act. European citizens, thus, get the same rights as the existing law already confers to the European Parliament and the Council, though they may not only invite, but even “request” the Commission to submit an appropriate proposal on a specific issue.<sup>157</sup>

#### B. *Transparency of the Union and Democratic Legitimacy*

The new Treaty provisions not only strengthen the political status of European citizens, but also allow more efficient political control. Although it is arguable whether a democratic deficit in the Union can truly be detected,<sup>158</sup> the Treaty of

<sup>152</sup> *Id.* art. 10.

<sup>153</sup> *Id.* art. 10(2).

<sup>154</sup> *Id.* art. 2.

<sup>155</sup> For further development of this idea, see Ingolf Pernice, *Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung*, in L’ESPACE CONSTITUTIONNEL EUROPÉEN 225, 261 (1995). Cf. Armin von Bogdandy, *Constitutional Principles in PRINCIPLES OF EUROPEAN LAW* 3, 35 (2005); Ekaterina Sabatakakis et al., *À propos du Traité de Lisbonne et de l’Europe Sociale*, 520 REVUE DU MARCHÉ COMMUN ET DE L’UNION EUROPÉENNE 432 (2008) (considering the provisions on democratic principles, competencies like public health, human rights and the objectives of the Treaty (social market economy, cohesion etc.) as steps in promotion of the social dimension of Europe).

<sup>156</sup> TEU-L, *supra* note 4, art. 11(4).

<sup>157</sup> EC Treaty, arts. 192(2), 208; TFEU, *supra* note 4, arts. 225, 241.

<sup>158</sup> For the convincing argument against the “mainstream” in academic writing, see Moravcsik, *supra* note 101. Despite the improvements, Stephen Sieberson, however, still detects a democratic deficit and claims a right to initiate legislation of the European Parliament, more accountability and openness of the institutions, strict majority voting, and a popular election of the Commission. Stephen Sieberson, *The Treaty of Lisbon and its Impact on the European Union’s Democratic Deficit*, 14 COLUM. J. EUR. L. 445, 464–65 (2008). Roman Herzog and Lüder Gerken criticize the overriding power of the national executive in the EU law making process through the Council. Roman Herzog and Lüder Gerken, *Revise the European Constitution to Protect National Parliamentary Democracy*, 3 EUR. CONST. L. REV. 209, 213 (2007).

Lisbon nevertheless amends and reorganizes the existing EU and EC Treaties in order to increase transparency and enhance democratic legitimacy via several measures.

### 1. Reorganization of the Treaties

Though the Treaty of Lisbon does not abolish the separation between the EU and EC Treaties, 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<sup>159</sup>—but rather will contain a “constitutional umbrella” for the primary law of the EU. The new EU Treaty will be the repository of the common values, general objectives, and principles of the Union as a unified political unit; it will contain general provisions on fundamental rights, the institutional framework, and enhanced cooperation, as well as the final provisions on membership, amendments, and the Treaty’s entry into force. Except for the Common Foreign and Security Policy,<sup>160</sup> 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).<sup>161</sup>

This new arrangement largely follows the approach of the Constitutional Treaty in that most of the substance of Parts One and Four of the Constitutional Treaty will be integrated in the EU Treaty as amended,<sup>162</sup> while the technical provisions of Part Three of the Constitutional Treaty will be integrated into the TFEU,<sup>163</sup> which can now be understood as the more technical part of the primary law. 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, as the first provisions of both Treaties make quite clear.<sup>164</sup>

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<sup>159</sup> But for critical remarks, see Andrea Ott, “Depillarisation”: *The Entrance of Intergovernmentalism Through the Backdoor?*, 15 MAASTRICHT J. EUR. & COMP. L. 35 (2008) (discussing diffusion of pillars and an illusion of unity; intergovernmental elements spread over the entire Treaties).

<sup>160</sup> The provisions which actually form pillar II of the EU (Articles 11–28 TEU) have not been moved to the TFEU. With the amendments provided for in the Constitutional Treaty they remain in the EU-Treaty also after Lisbon (Articles 21–46 TEU-L). For an analysis of the amendments, see Christine Kaddous, *External Action Under the Lisbon Treaty*, in CECI N’EST PAS UNE CONSTITUTION—CONSTITUTIONALISM WITHOUT A CONSTITUTION?, *supra* note 1, at 172; Daniel Thym, *Außenverfassungsrecht nach dem Vertrag von Lissabon*, in DER VERTRAG VON LISSABON: REFORM DER EU OHNE VERFASSUNG? 173 (2008).

<sup>161</sup> For the lack of coherence in the repartition in TEU and TFEU, for example, because the CFSP is still in the TEU, see Cécile Rapoport, *Interrogations sur la Réorganisation du Droit Primaire de l’Union Européenne*, 518 REVUE DU MARCHÉ COMMUN ET DE L’UNION EUROPÉENNE 292, 293 (2008).

<sup>162</sup> Titles I-IV and Title VI TEU-L, while the definition of the categories of competences are now included in Part One, Title I (Articles 2–6) TFEU.

<sup>163</sup> Part One, Title II, and Part Two to Seven TFEU.

<sup>164</sup> *E.g.*, TEU-L, *supra* note 4, art. 1(1) (“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 hierarchization may be deduced, however, from the final provisions of Article 48(6) and (7) of the new EU Treaty.<sup>165</sup> These provide simplified procedures for amending Part III of the TFEU on European policies except where the competences conferred to the Union by the Treaties would be increased. In addition, the European Council may unanimously adopt legislation authorizing the Council to act by a qualified majority where, under the TFEU, unanimity is still required, and to apply the regular legislative procedure where, so far, the TFEU requires the application of a special legislative procedure. Interestingly, the simplified switch to majority voting in the Council will also apply to Title V of the EU Treaty outlining the Common Foreign and Security Policy, except for decisions with military implications and those in the area of defense.<sup>166</sup>

Nevertheless, the reform not only facilitates the oversight and understanding of European primary law,<sup>167</sup> but it can also be seen as recognizing its constitutional character implicitly, contrary to what was explicitly denied by the Brussels mandate.

## 2. Public Sessions of the Legislative Council

The provisions for public sessions of the Council when it is acting in its legislative capacity will be an important step towards EU transparency,<sup>168</sup> and will have the effect of facilitating and enhancing democratic control of European policies. The European Council had already concluded that opening these sessions to the public was necessary and began putting this into practice even before the Treaty's entry into force.<sup>169</sup> To include the provision for public control in the Treaty, however, gives it the necessary constitutional authority. Public access to legislative deliberations is a basic condition for the democratic accountability of the governments acting in the Council. Indeed, only when national parliamentarians and the public can observe how ministers argue and come to decisions can democratic control be exercised more effectively. Though this provision for publicity only affects European institutions, it is closely related to the requirement of Article 10(2) TEU-L that national governments acting as European legislators in the Council make constitutional arrangements for accountability to their home constituencies.<sup>170</sup>

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<sup>165</sup> Rapoport, *supra* note 161 (discussing "hierarchisation politique").

<sup>166</sup> TEU-L, *supra* note 4, art. 48(7)(1).

<sup>167</sup> See also Sieberson, *supra* note 158, at 448; Dougan, *supra* note 37, at 690.

<sup>168</sup> TEU-L, *supra* note 4, art. 16(8).

<sup>169</sup> Presidency Conclusions, Brussels European Council (July 17, 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.

<sup>170</sup> Sieberson rightly says, however, that non-legislative acts are not covered by this mechanism. Sieberson, *supra* note 158, at 548. And he further suggests that the accountability of the Commission and the Council to the European Parliament should be improved by mechanisms of institutional control. *Id.* at 452.

### 3. The European Parliament's New Powers

More transparency in the Union's legislative activities and, consequently, more democratic legitimacy, also follows from the various provisions enhancing the powers of the European Parliament. Article 14(1) TEU-L highlights 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(1) and 294 TFEU, which will apply to an increased number of policies in the future—for example the agricultural policy, common commercial policy, and in many parts of the Area of Freedom, Security and Justice. Eventually this procedure will apply in most of the areas where the EU is given legislative powers.<sup>171</sup>

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 European Parliamentary elections and to hold "the appropriate consultations."<sup>172</sup> The more that political parties can come to an agreement at the European level on their political agendas and their respective top-candidate for the European elections, the more the citizens' wills—as expressed by their electoral vote—will impact the policies 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 at the same time supporting the political function of the European Commission.<sup>173</sup>

### 4. 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 EU's institutional setting is now explicitly recognized in the text of the Treaties.<sup>174</sup> This is contrary to the traditional approach of the "unitary state," under which the Community communicated with the Member States only through their permanent representatives in Brussels. The express inclusion of national institutions and their horizontal cooperation in the governance-structure of the EU is an example of what Anne Marie Slaughter describes as the "disaggregated state." It is a new form states are taking in a world where governmental, judicial and even parliamentary networks are playing an increasingly important role,<sup>175</sup> an innovation by which the EU also deviates from the classical model of international organizations and underlines its peculiar multilevel constitutional structure.

Article 12 TEU-L summarizes the various forms in which "national Parliaments contribute actively to the good functioning of the Union." One of the most striking of these is the "early warning system" instituted for the protection of subsidiarity. In

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<sup>171</sup> 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. *Id.* at 456.

<sup>172</sup> TEU-L, *supra* note 4, art. 17(7)(1).

<sup>173</sup> Dougan, *supra* note 37, at 635–36 (discussing 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").

<sup>174</sup> *See supra* Part IV.A.

<sup>175</sup> Slaughter, *supra* note 92, at 31–33, 131.

terms of multilevel constitutionalism it seems to be particularly remarkable that this Article includes the participation of national Parliaments in the procedures for amending the Treaty and for the 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 is more about information than intervention<sup>176</sup> (and the benefits of this procedure are questioned by practitioners<sup>177</sup>), the formal constitutional status of national parliaments in the European decision-making processes is an important innovation.<sup>178</sup> The terms of the provisions to which Article 12 refers are without parallel in international law insofar as they involve the institutions of the EU in the process for amending the Treaty and enlarging the Union. Moreover, the inclusion of representatives of both the European Parliament and the national parliaments, in addition to those of the national governments and the European Commission,<sup>179</sup> and the early information of the national parliaments on any application for accession to the Union,<sup>180</sup> clearly demonstrate that the national parliaments are becoming a constituent part of the multilevel European institutional system.<sup>181</sup> In addition, these innovations should work to enhance the general legitimacy of the Union itself.<sup>182</sup>

### C. Conferral, Clarification, and Subsidiarity of EU Powers

One of the major constitutional problems for any multilevel system of governance is creating an appropriate and clear division of powers. Notwithstanding this, provisions on competencies—like fundamental rights or the institutional setting—clearly have a constitutional character. Here again, the Treaty of Lisbon provides for major progress in transparency and legal certainty by giving procedural teeth to the principle of subsidiarity, clarifying the guaranty for the respect of

<sup>176</sup> Cf. Philipp Kiiver, *The Treaty of Lisbon: The National Parliaments and the Principle of Subsidiarity*, 15 MAASTRICHT J. EUR. & COMP. L. 77, 78 (2008).

<sup>177</sup> Sven Hölscheidt, *Formale Aufwertung—Geringe Schubkraft: die Rolle der Nationalen Parlamente Gemäß dem Lissabonner Vertrag*, 31 INTEGRATION 254, 261 (2008).

<sup>178</sup> Muriel Le Barbier-LeBris, *Le Nouveau Rôle des Parlements Nationaux: Avancée Démocratique ou Sursaut Étatiste?*, REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 494, 498 (2008) (describing the national parliaments as accessing the “rang d'acteurs institutionnels de l'Union”); see also Papier, *supra* note 80, at 5; Brok & Selmayr, *supra* note 30, at 490 emphasize that the national parliaments are mentioned (in Article 12 TEU-L) even before the European Parliament is mentioned (Articles 13 and 14 TEU-L).

<sup>179</sup> Article 48(3) EU provides for representatives of national governments and the European Commission to be members of the European Convention, established for preparing amendments to treaties, which are adopted by the Intergovernmental Conference and ratified by the Member States.

<sup>180</sup> TEU-L, *supra* note 4, art. 49.

<sup>181</sup> Barbier-LeBris, *supra* note 178, at 498 (referring to J. Maja, *La contrainte européenne sur la Loi, POUVOIRS: REVUE TRIMESRIELLE: LA LOI* 53, 68 (2005) (stating that the Lisbon Treaty confers them a “forme nouvelle de diplomatie parlementaire distincte de la conduite des relations internationales du resort du pouvoir exécutif”). See also the reference to E. DE PONCINS, *LE TRAITÉ DE LISBONNE EN VINGT-SEPT CLÉS* 216 (2008) (describing 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).

<sup>182</sup> See also Sabatakakis et al., *supra* note 155, at 438.

Member States' national identities, and spelling out the system of conferred competencies.

#### 1. Making the Principles of Conferral and of Subsidiarity Effective

Articles 4(1) and 5(2) TEU-L establish the principle of conferral. These provisions reiterate that “competences not conferred upon the Union in the Treaties remain with the Member States.” An increasing number of negative delimitations in the Lisbon Treaty work to clarify the division and balance of powers between the Union and the Member States. Examples of such negative delimitations are the provision for the “sole responsibility of each Member State” over “national security,”<sup>183</sup> and the general exclusion of any “harmonization 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.”<sup>184</sup> This can also be seen in specific provisions such as the competency of the Member States over the geographical demarcation of their borders,<sup>185</sup> the Union’s respect for national competency over employment policies<sup>186</sup> or the guarantee that the provisions adopted in the area of social policy “shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof.”<sup>187</sup>

On the other hand, for the Union’s exclusive competencies—which are now defined and listed in Articles 2(1) and 3 TFEU—the principle of conferral is reversed, meaning that Member States have no power to legislate except where expressly so empowered. Despite the new clarity in some areas, however, in areas of shared competencies the limits for European action still need to be clarified. This is where Article 5 TEU-L, 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.”<sup>188</sup>

Bringing this system into effect, Article 5(3) TEU-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.

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<sup>183</sup> TEU-L, *supra* note 4, art. 4(2).

<sup>184</sup> TFEU, *supra* note 4, art. 2(5).

<sup>185</sup> *Id.* art. 77(4).

<sup>186</sup> *Id.* art. 147(1).

<sup>187</sup> *Id.* art. 153(4).

<sup>188</sup> For a thorough discussion, see Jean-Victor Louis, *National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits*, in CECI N’EST PAS UNE CONSTITUTION—CONSTITUTIONALISATION WITHOUT A CONSTITUTION?, *supra* note 1, at 132. For a comparison with the U.S., see George Bermann, *National Parliaments and Subsidiarity: An Outsider’s View*, in *id.* at 155–61.

Protocol Number 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 any draft legislative act, stating why they believe that the draft does not comply with the principle of subsidiarity. Express provision is made for them to consult their “regional parliaments with legislative powers.”<sup>189</sup> The reasoned opinion must be taken into account by the institutions and, depending on the number of national parliaments raising questions, the proposal must be formally reviewed. Should the Commission nevertheless decide to maintain the draft act, it must give a reasoned opinion for why it considers that its proposal does, in fact, conform with subsidiarity. The European Parliament and the Council have to consider all these opinions, knowing that each national parliament—or even a chamber thereof—has the right in the end to bring the case to the Court of Justice if a legal act is still considered to be incompatible with the principle of subsidiarity.

There are doubts about the effectiveness of this procedure, particularly because national parliaments will only have eight weeks to consider their position and there is no veto right.<sup>190</sup> Notwithstanding the vagueness and political character of the criteria of subsidiarity, this procedural solution nevertheless may develop into a powerful instrument for protecting the competencies of the national legislators, because it gives a voice on the—potentially excessive—use of European competencies to those institutions, which would be the first to lose power.

While it is true that under the European system it is the responsibility of the national governments sitting in the Council to make sure that national sovereignty and discretion are not exceedingly restricted by European measures, they may nevertheless tend to (ab)use the “European path” for pushing through legislation that is unpopular at home,<sup>191</sup> and so agree on measures in violation of the principle of subsidiarity. Where the national parliaments—and even more importantly the political minority in the national parliaments<sup>192</sup>—have the right to intervene in cases of doubt, it will be more probable that the principle of subsidiarity is taken seriously.<sup>193</sup> What is more important in the present context, however, is that the use of these new national powers will trigger a political debate about legislative

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<sup>189</sup> Protocol on the Application of the Principles of Subsidiarity and Proportionality, art. 6(1), Dec. 16, 2004, 2004 O.J. (C 310) 207 [hereinafter Subsidiarity Protocol].

<sup>190</sup> See Dougan, *supra* note 37, at 658 et seq. For further comments and discussion, see Gavin Barrett, *A New Improved Formula? The Treaty of Lisbon and National Parliaments*, in NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: THE CONSTITUTIONAL CHALLENGE FOR THE OIREACTAS AND OTHER MEMBER STATE LEGISLATURES (Gavin Barrett ed., 2008). See also Bermann, *supra* note 188, at 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).

<sup>191</sup> Such strategies are criticized by Herzog & Gerken, *supra* note 158, at 211, as “Spiel über die Bande.”

<sup>192</sup> This is the case in Germany, at least, for the right to bring the case to the ECJ. See Entwurf eines Änderung des Grundgesetzes, Mar. 11, 2008, BTDrucks 16/8488, at 4–5 (proposing to amend Article 23 of the Basic Law to allow the same; this bill was approved on April 24, 2008).

<sup>193</sup> 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 THE TREATY OF NICE AND BEYOND. ENLARGEMENT AND CONSTITUTIONAL REFORM, OXFORD AND PORTLAND 121–45 (Mads Andenas & John Usher eds., 2003).

activities at the European level. It may also get the parliamentarians as well as the public in the Member States more actively involved in European politics and raise awareness of the opportunities the EU offers for using its institutions for proactive politics outside the normal reach of national legislation.

## 2. Protection of National Identity

In addition to adding provisions clarifying the division of powers between the Union and the Member States, it was also of great importance that the Treaty give specific and precise expression to the Union's respect for national identity. To that end, the amended EU Treaty reads:<sup>194</sup>

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.

The major innovation here is the provision for the respect for the internal structure of each Member State, including the regional and local levels of self-government. It signals that the Union is no longer *landesblind*—blind as regards the existence and interests of the sub-state components of some Member States<sup>195</sup>—and underlines the fact that the regions are indeed considered to be a part of the European multilevel construction. In that vein, they are now respected,<sup>196</sup> their parliaments may be consulted when questions of subsidiarity arise,<sup>197</sup> and they are represented by the Committee of the Regions<sup>198</sup> which now will also be given the right to bring cases of violation of the principle of subsidiarity to the ECJ.<sup>199</sup> The Treaty of Lisbon thus sets up and improves the conditions for meaningful representation of the interests of the respective authorities at the European level through the Committee of the Regions,<sup>200</sup> and makes more explicit the multilevel structure of the European system of government.

## 3. Distribution and Delimitation of Competencies

It has never really been clear who in the EU is responsible for what. The new systematic definition of the categories of EU competencies introduced by the Treaty

<sup>194</sup> TEU-L, *supra* note 4, art. 4(2).

<sup>195</sup> This blindness has been referred to and criticized by Hans Peter Ipsen, *Die Europäische Integration in der Deutschen Staatsrechtslehre*, in *EUROPARECHT—ENERGIERECHT—WIRTSCHAFTSRECHT*, Festschrift für Bodo Börner 163, 176 (Jürgen F. Baur et al. eds., 1992). Cf. Ingolf Pernice, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?*, 17 *DEUTSCHES VERWALTUNGSBLATT* 909 (1993).

<sup>196</sup> TEU-L, *supra* note 4, art. 4(2).

<sup>197</sup> Subsidiarity Protocol, *supra* note 189, art. 6(1).

<sup>198</sup> TFEU, *supra* note 4, arts. 305–07.

<sup>199</sup> Subsidiarity Protocol, *supra* note 189, art. 8(2).

<sup>200</sup> TEU-L, *supra* note 4, art. 305 (as carried over from Article 263 EU).



of Lisbon—exclusive, shared, coordination, and support—and an exhaustive listing of the areas of action in each category<sup>201</sup> can therefore 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 “communitarizing” 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.<sup>202</sup> Compared to Articles 73 and 74 of the German *Grundgesetz* where exclusive and concurrent legislative competencies of the federal legislator in Germany are defined in a relatively general way, the attributions of powers to the Union are much more detailed, concrete, and limited.

There is a strong debate, however, about whether or not the unchanged Article 95 EC<sup>203</sup>—regarding harmonization of Member State legislation—and, in particular, the amended terms of the “flexibility” clause in Article 352 TFEU 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 excludes acting on this basis in the area of common foreign and security policies, Article 352(1) TFEU 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.

Some assume that this clause gives an unlimited “competence-competence” to the Union,<sup>204</sup> 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 ECJ.<sup>205</sup> My contention is that Article 352 TFEU’s limitation to the “framework of the policies defined in the Treaties” is more restrictive than the

<sup>201</sup> TFEU, *supra* note 4, arts. 2–6.

<sup>202</sup> For details, see Ladenburger, *supra* note 113, at 34 et seq. (explaining that this was “probably the most important precondition” for an agreement at the Convention to “communitarise the Third Pillar”).

<sup>203</sup> This will be TFEU, art. 114.

<sup>204</sup> This alleged power to define and extend its own competence is one of the major issues in the case against the Treaty of Lisbon pending before the German Federal Constitutional Court (*see supra*, note 96), with regard to the “flexibility-clause” in Article 352 TFEU. *See also* the judgment of the Czech Constitutional Court, *supra* note 93, ¶¶ 145, 149:

The ability to adopt such measures is limited to the objectives defined in Article 3 of the Treaty on EU (previously Art. 2), which thus also provides a sufficient guide for determining the limits of conferred competences that Union bodies may not exceed. The third and fourth paragraphs of Article 352 expressly narrow the field in which it can be applied. In addition, as the government of the Czech Republic correctly states in its brief, Declarations no. 41 and 42 on this article (attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon) further narrow the possibility for using Article 352 of the Treaty on the Functioning of the EU as a means for covert expansion of the competences of Union bodies.

<sup>205</sup> Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Al Bakarat Int’l Found.*, 3 C.M.L.R. 41 (2008), ¶ 203; *see also* Opinion 1/94, 1994 E.C.R. I-5267, ¶ 60.

reference to just the “framework of the Common Market” that the existing Article 308 of the EC Treaty refers to. More important are the new procedural safeguards requiring the consent of the European Parliament and the alert of the national Parliaments,<sup>206</sup> as well as the exclusion of harmonization in the policy fields where specific provisions of the Treaty do not allow harmonization, and the inapplicability of the flexibility clause to objectives pertaining to the foreign and security policies.<sup>207</sup>

On that basis, the new flexibility clause also 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.<sup>208</sup> No doubt, a restrictive interpretation will have to be given with regard to the principle of conferral which otherwise would be meaningless.

#### D. *Efficiency of Decision-Making Procedures*

The design of the decision-making procedures—in particular, the balance of states’ and citizens’ representation—and the question of when the Council decides by qualified majority or takes unanimous decisions, is also of great relevance 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 procedure 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 needed to be maintained and where decisions by qualified majority were possible. A great number of areas were eventually transferred from unanimity to qualified majority, but with the “alarm bell system” and important opt-outs for the UK in the areas of criminal justice and police cooperation.<sup>209</sup> This alone is an important advancement in efficiency for a Union of twenty-seven Member States.

Another issue presented even more problems: what are the criteria for a qualified majority? The Nice system was thought to be impracticable and also unfair by most of the Member States, while the German proposal for a double majority—under which a qualified majority is reached if at least fifteen members of the Council having 55% of the votes and representing at least 65% of the population of the Union agree<sup>210</sup>—was strongly opposed by Poland and Spain, the countries who had the greatest advantage under the Nice system. Finally, an agreement was reached under which the double majority system will be introduced, but not before November 1, 2014.<sup>211</sup> A protocol regarding these provisions states that until May 31, 2017 any Member State can ask that the old method be applied in a particular

<sup>206</sup> TFEU, *supra* note 4, art. 352(1), (2).

<sup>207</sup> *Id.* art. 352(3), (4).

<sup>208</sup> BVerfG, Cases 2 BvE 2/08 and 2 BvR 1010/08 (Gauweiler, pending). For the application, see <http://www.peter-gauweiler.de/pdf/Klage-Lissabon-Vertrag.pdf>.

<sup>209</sup> Ladenburger, *supra* note 113, at 32 (calling 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).

<sup>210</sup> TEU-L, *supra* note 4, art. 16(4).

<sup>211</sup> See, e.g., Stefan van den Bogaert, *Qualified Majority Voting in the Council: First Reflections on the New Rules*, 15 MAASTRICHT J. EUR. & COMP. L. 97 (2008).

case.<sup>212</sup> Such constitutional dynamics are familiar in the EU system, as shown by the original provisions on the time frame for the abolition of customs among the Member States and the “passarelle” clauses like Article 42 of the existing EU Treaty or the future Article 48(7) TEU-L.<sup>213</sup> Though the transition period is extremely long for the double majority system to come into effect, this system is more democratic<sup>214</sup> and, above all, simpler and more transparent than the present voting system at the Council.

The intense struggle over these changes to the present voting system, under which the probability of the Council adopting an act would be lower than ever,<sup>215</sup> seems to be somewhat unnecessary since decisions of the Council are regularly made by consensus and without voting.<sup>216</sup> It does, nevertheless, show how sensitive the amount of influence in the Council is—particularly for new Member States having regained sovereignty not long ago.

#### E. *Legal Capacity and Foreign Representation of the Union*

The issue of national sovereignty was also relevant for the questions of the legal personality of the European Union and its external representation.

##### 1. The EU’s Legal Capacity and Unity

Although the EC was given legal personality from the outset,<sup>217</sup> the EU has not been expressly given a legal personality under international law. This decision was likely made with a view to preserving the undisputable sovereignty of the Member States. The result is that with the distinction between the supranational and the intergovernmental pillars, the Union appeared somewhat awkward—particularly because its legal nature was left open. Nonetheless, in practice the EU has acted as if it had legal capacity; it was recognized by its partners as an international player and has even concluded a great number of international agreements under Article 24 EU.<sup>218</sup> Notwithstanding the EU’s former activities, the mere fact that legal personality will now formally be recognized under Article 47 TEU-L simplifies its status and is an important step towards legal certainty.

<sup>212</sup> Treaty of Lisbon, protocol 36, art. 3(2). For a detailed description of the QMV, see Dougan, *supra* note 37, at 630 et. seq.; and Terhechte, *supra* note 24, at 166 et seq.

<sup>213</sup> These provisions contained transitional periods for the step-by-step completion of the internal market or allow to step forward with integration according to special conditions laid down in the respective provisions.

<sup>214</sup> MÜLLER-GRAFF, *supra* note 24, at 131, nevertheless criticizes this as not sufficient.

<sup>215</sup> See Dorothee Heisenberg, *Informal Decision-Making in the Council: The Secret of the EU’s Success?*, in *THE STATE OF THE EUROPEAN UNION: MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY* 67, 69 (Sophie Meunier & Kathleen R. McNamara eds., 2007) (quoting F. GIAVAZZI ET AL., *NICE TRY: SHOULD THE TREATY OF NICE BE RATIFIED?* (2001)).

<sup>216</sup> *Id.* at 82 (table showing an average of 83.17% of legislation adopted by consensus during the period from 1994 to 2005).

<sup>217</sup> EC Treaty, art. 281.

<sup>218</sup> See Daniel Thym, *Die Völkerrechtlichen Verträge der Europäischen Union*, 66 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 863 (2006).

## 2. Uniting Shared Competencies: The High Representative for CFSP

The recognition of its legal personality also underscores the character of the Union as a multilevel actor with competencies shared among itself and its Member States. Without regard to the question of whether a specific action is a matter of European or national competency, or both, for matters of common interest it will, after Lisbon, always be the Union who is acting.<sup>219</sup> 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, this is always the European Commission, while negotiations and representation for the other areas will be undertaken by the presidency of the Council.<sup>220</sup>

The new position of “High Representative of the Union for Foreign Affairs and Security Policy” will, in some respects, represent the unity of the two domains. This person will additionally play the double role of being the Vice-President of the Commission responsible for foreign affairs.<sup>221</sup> In the function of what the Constitutional Treaty called the EU “foreign minister,” he or she will also chair the Foreign Affairs Council,<sup>222</sup> make proposals for the shaping of the foreign and security policy,<sup>223</sup> and be responsible—together with the Member States—for putting these policies into effect.<sup>224</sup> This “double hat” and “double role” in some way mirrors the unity of the supranational (Commission) and intergovernmental (Council) logic of the Union; it combines in one person the European and the Member States’ lines of interest. The responsibility of ensuring the “consistency of the Union’s external action”<sup>225</sup> 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 be passed in their entirety 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 organizations and conferences, though they are meant to

<sup>219</sup> See TEU-L, *supra* note 4, arts. 24, 26, 28, 31.

<sup>220</sup> TFEU, *supra* note 4, arts. 15(5), 17(1), 22(2), 218(3).

<sup>221</sup> See in particular TEU-L, *supra* note 4, art. 18(4):

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. 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.

<sup>222</sup> *Id.* art. 18(2).

<sup>223</sup> *Id.* art. 26(3).

<sup>224</sup> *Id.* art. 27(1).

<sup>225</sup> *Id.* art. 18(4).

coordinate their actions, in order to defend the common positions of the EU and to inform each other of their actions. Article 24(1) TEU-L expressly states that “the adoption of legislative acts shall be excluded.” Although particular tensions may exist with the national security and defense policies, there is provision for ensuring consistency, and the amended EU Treaty provides that “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.”<sup>226</sup>

This seems to be contrary to Article 4(2) 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 can only be reconciled if national security is 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.<sup>227</sup> Yet, the distinction looks rather artificial. For example, Article 42(2) TEU-L envisages the possibility of a future inclusion of defense policies in the framework of coordinated or even common action, saying:

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. However, national security—remaining the responsibility of the Member States—would necessarily be an aspect, and become part of successful common security and defence policies. Autonomous but coordinated external policies of the Member States could produce synergies and benefits resulting from “the strength inherent in united action,”<sup>228</sup> and the common use of traditional special relations that each Member State may have with other non-EU countries. Common foreign and security policies in this sense may eventually represent the external dimension of the composed, or multilevel, European constitutional setting.<sup>229</sup>

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<sup>226</sup> *Id.* art. 24(1).

<sup>227</sup> 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 . . . .”

<sup>228</sup> JOSEPH H. H. WEILER, *The External Relations of Non-Unitary Actors*, in *THE CONSTITUTION OF EUROPE* 130 (1999).

<sup>229</sup> “Externe Dimension des Europäischen Verfassungsverbunds.” See Daniel Thym, *Auswärtige Gewalt*, in *EUROPÄISCHES VERFASSUNGSRECHT* ch. 5 (Armin von Bogdandy ed., 2d ed. 2009) (forthcoming).

### 3. 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,<sup>230</sup> the new position of President of the European Council is a significant advance. The President will be elected by a qualified majority of the European Council for a period of two and a half years, renewable once.<sup>231</sup> In this capacity, he or she will 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, as opposed to shared 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 realized 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.<sup>232</sup> Article 15 TEU-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 to its citizens and third countries. It would also allow for more direct democratic control of that person by the European Parliament.<sup>233</sup> Giving the highest representative of the Union a personal face and political responsibility—as 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.

#### F. Rule of Law and Voluntary Membership

Last but not least, is the respect for the rule of law, which the Treaty of Lisbon not only mentions, but also enhances in various aspects. It is, as the ECJ has again confirmed recently,<sup>234</sup> 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

<sup>230</sup> Cf. Sieberson, *supra* note 158, at 454 (emphasizing the significance of the European Council president and the High Representative as “recognizable public figures who might offer EU citizens a greater sense of shared identity”); see also Ingolf Pernice, *Democratic Leadership in Europe: The European Council and the President of the Union*, in *THE GOVERNMENT OF EUROPE, INSTITUTIONAL DESIGN FOR THE EUROPEAN UNION 57* (José María Beneyto Pérez ed., 2003), reprinted in Ingolf Pernice, *Democratic Leadership in Europe: The European Council and the President of the Union*, (Humboldt University of Berlin, WHI, paper 1/03, Jan. 2003), available at <http://www.whi-berlin.de/pernice-leadership.htm>.

<sup>231</sup> TEU-L, *supra* note 4, art. 15(5).

<sup>232</sup> See Giuliano Amato, *Preface to THE LISBON TREATY. EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?*, pt. V, at IX (Stefan Griller & Jacques Ziller eds., 2008) (pointing to the fact that from the proposal at the Convention, of joining the offices of the Commission’s President and the President of the European Council, “something of it has remained: while the two positions were initially defined as incompatible with each other, according to the final text and to the Lisbon Treaty, the President of the Council ‘shall not hold a national office.’ No other incompatibilities are set forth.”). For the advantages, see Pernice, *supra* note 230, at 47 et seq. See also Dougan, *supra* note 37, at 628 (critical).

<sup>233</sup> For a model of organizing a more democratic function of the President of the European Council, see Pernice, *supra* note 230.

<sup>234</sup> *Kadi*, 3 C.M.L.R. 41 (2008).

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 are of particular importance regarding multilevel constitutionalism. These are 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.

### 1. 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.<sup>235</sup> 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 was drafted by the first Constitutional Convention of the EU—which was established by the European Council of Cologne in June 1999<sup>236</sup>—and chaired by the former President of Germany, Roman Herzog. Its objectives are, as the Preamble of the Charter states, “to strengthen the protection of fundamental

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<sup>235</sup> Case 29/69, *Erich Stauder v. City of Ulm-Sozialamt*, 1969 E.C.R. 419, ¶ 7. For the subsequent jurisprudence, see also Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1974 E.C.R. 491, ¶ 13; Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, ¶¶ 14, 15; Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 1989 E.C.R. 2609, ¶¶ 19, 22; Case C-260/89, *Elliniki Radiophonia Tiléorassi AE & Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and others*, 1991 E.C.R. I-2925, ¶¶ 42-44; Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, 2002, E.C.R. I-6279, ¶¶ 34-45; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, 2003 E.C.R. I-5659, ¶¶ 65-94; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9609, ¶¶ 32-41; Case C-438/05, *International Transport Workers' Federation & Finnish Seamen's Union v. Viking Line ABP & OÜ Viking Line Eesti*, 2007 E.C.R. I-10779, ¶¶ 42-46, 77. Cf. Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945 (2002); Francis Jacobs, *Human Rights in the EU: The Role of the Court of Justice*, 26 EUR. L. REV. 331 (2001); Dirk Ehlers, *EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS* 371 (De Gruyter ed., 2007).

<sup>236</sup> Presidency Conclusions, Cologne European Council (June 6-7, 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. 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 *id.*, at annex IV. The term “body” is used here for what in fact developed to be the first Constitutional Convention.

rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.”<sup>237</sup>

Article 6(1) TEU-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,<sup>238</sup> and maintains the reference of Article 6(2) EU to “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”—the Charter, European Convention, and Member State constitutions—acting as the basis for the protection of fundamental rights in the Union, the Treaty of Lisbon makes it 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.<sup>239</sup> It confirms and strengthens, as stated above,<sup>240</sup> 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 its reference to national constitutional traditions as a basis for European fundamental rights, the treaty maintains not only the necessary dynamics of rights protection,<sup>241</sup> but also the necessary openness at the Union level for the continuous borrowing and trade-offs between national and the European standards of rights through the judicial dialogue between the two constitutional levels.

Obviously, though not intentionally, the protection of European fundamental rights at the national level, for which national courts must remain in close dialogue with the ECJ,<sup>242</sup> may set standards for a high level protection of fundamental rights within the Member States in matters which are not directly related to European action. At the very least, this would prevent confusion as individuals would not understand why fundamental rights which are included in the Charter or recognized by the ECJ as general principles of law were not protected in other cases, even if they were purely national. In short, the three pillars of human rights protection under Article 6 TEU-L not only ensure coherence between the two constitutional levels but also provide for considerable harmonization at a high standard of protection throughout the Union.

## 2. Judicial Review of Regulatory Acts

The EC Treaty establishes a system of effective judicial review of all legal acts of the Community,<sup>243</sup> though access to justice for individuals is limited to actions against a decision “addressed to that person or against a decision which, although in

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<sup>237</sup> Final version slightly amended by the 2007 ICG and signed by the Presidents of the Parliament, the Council, and the Commission on December 12, 2007. Charter of Fundamental Rights of the European Union, 2007 O.J. (C 303) 1.

<sup>238</sup> TEU-L, *supra* note 4, art. 6(3).

<sup>239</sup> *See also* Pernice, *supra* note 148, at 235–56.

<sup>240</sup> *See supra* Part IV.A.

<sup>241</sup> *See* Dougan, *supra* note 37, at 665 (“legal basis for a flexible evolution of the Union’s human rights jurisprudence”); *see also*, Pernice, *supra* note 148, at 240.

<sup>242</sup> TFEU, *supra* note 4, art. 267 (as carried over from Article 234 EC).

<sup>243</sup> EC Treaty, arts. 220–45.



the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”<sup>244</sup> 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.”<sup>245</sup>

This was contested in the *Jégo Quéré* case of 2002 regarding Regulation 1162/2001 Establishing Measures for the Recovery of the Stock of Hake.<sup>246</sup> 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(4) EC should be extended to cases where individual rights are directly affected by a regulation even though the applicant was not individualized in the regulation as required by the established ECJ case law. In line with the convincing arguments developed by Advocate General Francis Jacobs in another case,<sup>247</sup> the Court of First Instance—by giving the criterion of individual concern a larger meaning—held the application admissible.<sup>248</sup> However, This judgment was annulled by the ECJ, which held that this extensive interpretation was *contra legem*.<sup>249</sup> In the parallel *Unión de Pequeños Agricultores*, the Court had already explained that if there is a lacuna it was for the Member States to fill within the framework of the ongoing reform of the Treaties.<sup>250</sup>

This reform is included in the Treaty of Lisbon, under which Article 230(4)—which will become Article 263(4) TFEU—will be completed by a phrase giving the Court jurisdiction for applications of individuals “against a regulatory act which is of direct concern to them and does not entail implementing measures.”<sup>251</sup> Moreover, as advised by the Court in *Unión de Pequeños Agricultores*, Article 19(1)(2) of the new EU Treaty will underscore the fact that the Member States “shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”<sup>252</sup>

<sup>244</sup> EC Treaty, art. 230(4).

<sup>245</sup> Case 25/62, *Plaumann & Co. v. Comm’n*, 1963 E.C.R. 95, at 107; *see also* Case C-142/00, *Comm’n v. Nederlandse Antillen*, 2003 E.C.R. I-3483, ¶ 65.

<sup>246</sup> Commission Regulation 1162/2001/EC, 2001 O.J. (L 159) 4; Case T-177/01, *Jégo-Quéré & Cie SA v. Commission*, 2002 E.C.R. II-2365.

<sup>247</sup> Opinion of Advocate General Jacobs, Case C-50/00, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677, ¶ 59-103.

<sup>248</sup> *Jégo-Quéré*, 2002 E.C.R. II-2365.

<sup>249</sup> Case C-263/02 P, *Comm’n v. Jégo-Quéré & Cie SA.*, 2004 E.C.R. I-3425, ¶ 29-39.

<sup>250</sup> Case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, 2002 E.C.R. I-6677, ¶ 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.

<sup>251</sup> Concerning the problems in interpreting this provision, *see* Dougan, *supra* note 37, at 677. *See also* John A. Usher, *Direct and Individual Concern: An Effective Remedy or Conventional Solution?* 28 EUR. L. REV. 575, 599 (2003); Jürgen Schwarze, *The Legal Protection of the Individual Against Regulations in European Union Law*, 10 EUR. PUB. L. 285 (2004); Cornelia Koch, *Locus Standi of Private Applicants Under the EU Constitution: Preserving the Gaps in the Protection of Individuals’ Right to an Effective Remedy*, 30 EUR. L. REV. 511 (2005).

<sup>252</sup> *Unión de Pequeños Agricultores*, 2002 E.C.R. I-6677, ¶¶ 40, 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”).

Hence, the Treaty of Lisbon not only strengthens 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 ECJ as integral parts, the latter is to be regarded as *gesetzlicher Richter* (the competent judge determined by law) within the meaning of Article 101(1) of the Basic Law.<sup>253</sup> Where a national court, contrary to its obligation under Article 234 EC, arbitrarily refuses to refer a case to the ECJ for a violation of a fundamental right, the applicant is entitled to bring this case to the Constitutional Court for violation of this constitutional guarantee of "access to the right judge."<sup>254</sup>

### 3. Clarifying the Principle of Primacy

The rule of law in the EU also includes the principle of the primacy of European law over all national law. It is a condition both for the functioning of the European legal system as such, and for individuals to effectively benefit from the rights and freedoms granted under European law. In cases of conflict, courts must give precedence to the European rule and disapply the opposed national provision. The mere existence of this rule demonstrates that European and national law 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—which even includes a reference 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 . . . .<sup>255</sup>

<sup>253</sup> BVerfGE 73, 339 (368) (for an English translation, see 3 C.M.L.R. 225 (1987), noted by Frowein, 25 COMMON MKT. L. REV. 201 et seq. (1988)).

<sup>254</sup> The German Federal Constitutional Court has reiterated this guarantee, namely for alleged violations of fundamental rights by an EU regulation in the Order of January 9, 2001, ¶¶ 17, 18, case 1 BvR 1036/99, available at [http://www.bverfg.de/entscheidungen/rk20010109\\_1bvr103699.html](http://www.bverfg.de/entscheidungen/rk20010109_1bvr103699.html).

<sup>255</sup> Declaration 17 Concerning Primacy. It continues with a reference to the Opinion of the Council's Legal Service of June 22, 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." See The Lisbon Treaty, Final Act, 2007 O.J. (C 306) 257. 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 (See Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. (English Spec. Ed.) 585) 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

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 with regard to national constitutions that are regarded as the supreme law of the land, the national Constitutional Courts in countries such as in Spain and in Germany accept that the principle of primacy is part of European law.<sup>256</sup> Dialogue and close cooperation between the Constitutional Courts and the ECJ, guided by the principles of mutual respect and the guaranty of 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 occasional disregard or the Member State concerned may consider its withdrawal from the Union.

#### 4. The Right of Withdrawal

The case of a real conflict between the supreme courts at the two levels seems to be mostly academic, but the mere fact that it may occur, coupled with the fact that there is no clear legal hierarchy, demonstrates that Union membership and respect for the rule of law are voluntary, not imposed. There is no preceptor, no domination of one legal order or court on another, and no coercion. Though the concept seems outdated under the present conditions of globalization,<sup>257</sup> 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 TEU-L. It is made clear, thus, that for all the states, continued EU membership remains an option but is not a duty. This adds to the legitimacy of the Union, as no Member State is forced to participate.<sup>258</sup> Clearly the option of withdrawal is more hypothetical than a real political option for some Member States like Germany. But it is also unrealistic 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 the constitutional rights and freedoms of individuals, the more the option of withdrawal becomes unacceptable for both a Member State's own citizens as well as for the citizens of the other Member States, who increasingly see themselves as holding a stake in that one Member State. This, indeed, is a reason to rethink the concept of sovereignty again.

### V. CONCLUSION

The Treaty of Lisbon is neither a failure nor an overruling of democratic decisions of the people of some Member States. Before too quickly questioning the legitimacy of the process,<sup>259</sup> the political background of the referenda in France, the

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Community law and without the legal basis of the Community itself being called into question.

<sup>256</sup> The claim of Frédérique Michéa, *La primauté du Droit de l'Union à la Lumière du Traité de Lisbonne*, 520 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 446, 447 (July 2008), to mention the jurisprudence of the national Constitutional Courts, is therefore not comprehensible.

<sup>257</sup> See *supra* Part III.B.

<sup>258</sup> See Terhechte, *supra* note 24, at 153.

<sup>259</sup> Dougan, *supra* note 37, at 700.

Netherlands, and Ireland and 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 of ratification 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 common European values, making explicit Europe's fundamental rights, and enhancing European constitutional principles such as 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 that is complementary to the national constitutions of its Member States. If there has been no “constitutional moment” in the making of Europe,<sup>260</sup> then the conclusion and earlier revisions of the founding Treaties, the attempt to substitute them with the Treaty establishing a Constitution for Europe, and finally the submission of the Treaty of Lisbon to ratification and, under some new conditions, to a second Irish referendum, are certainly steps of a “constitutional process.” This is a process by which the European people, having learned from the horrible experiences of the past centuries—the Second World War in particular—are trying to find a legal framework for better organizing their common future.<sup>261</sup>

This process has resulted 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 that are in their common interest but which individual Member States are not able to meet effectively. Thus, the Treaty of Lisbon would not challenge sovereignty but rather strengthen it under a new, multilevel form. In this way, restructuring the Constitutional Treaty and bringing it in the traditional form of a treaty amending the European Treaties via parliamentary ratification—and even trying for a second referendum in Ireland—does not demonstrate a disregard for democratic decisions. Rather, it shows the legitimate determination of democratically elected governments, eventually including that of Ireland, to make the advantages and the necessity of this Treaty sufficiently understood by their citizens, and under the conditions that have been agreed at by the European Council of December 2008, to give them the opportunity to reconsider their position.

Analyzing the terms of the Treaty of Lisbon in the light of multilevel constitutionalism shows that this treaty represents an important step forward. It promotes the development of the Union as a composed system of multilevel governance, in which the Member States and their constitutions are the basis upon

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<sup>260</sup> Neil Walker, *After the Constitutional Moment*, in *A CONSTITUTION FOR THE EUROPEAN UNION: FIRST COMMENTS ON THE 2003-DRAFT OF THE EUROPEAN CONVENTION* 23 (Ingolf Pernice & Miguel Poires Maduro eds., 2003) (considering this for the Convention and its work). *But see* Dorio Castiglione, *Constitutional Moment or Constitutional Process*, in *CONSTITUTIONAL POLITICS IN THE EUROPEAN UNION—THE CONVENTION MOMENT AND ITS AFTERMATH* 26, 41 (Dario Castiglione et al. eds., 2007) (preferring to talk about a “processual constitution”); Christoph Möllers, *Pouvoir Constituant—Constitution—Constitutionalism*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 183, 225 (Armin von Bogdandy & Jürgen Bast eds., 2006).

<sup>261</sup> For the “process of constitutionalisation” in these terms, see Ingolf Pernice, *The Draft Constitution of the European Union. A Constitutional Treaty at a Constitutional Moment?*, in *A CONSTITUTION FOR THE EUROPEAN UNION: FIRST COMMENTS ON THE 2003-DRAFT OF THE EUROPEAN CONVENTION* 13, 15 (Ingolf Pernice & Miguel Poires Maduro eds., 2003).

which the supranational institutions are built, allowing them to do in common what would be impossible or ineffective if done individually. Instead of creating or developing the EU into a European super state which would replace the Member States,<sup>262</sup> the Treaty of Lisbon balances the supranational and intergovernmental elements of the Union<sup>263</sup> and underscores its subsidiary character as a complementary instrument of the citizens for pursuing 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 the more efficient action of the institutions when exercising their respective competences, which will be more systematically and clearly defined and delimited. It clarifies the principles of subsidiarity and proportionality and establishes procedural means to better ensure their respect. By creating the position of President of the European Council, it gives the Union a personal face and voice; this *de facto* 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 revalues 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 it 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 European integration, but also understands such processes as part of, and in close relation to, 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 organizations. 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 national citizenship and expresses ownership of the European Union as well.

In closing, to establish such a supranational union, to develop its democratic structures and procedures, and to organize 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, is as much a constitutional exercise as organizing the statutes of a state. It is much more complex, however, and more challenging, as a social and cultural process because it is a new and innovative

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<sup>262</sup> For more arguments against the thesis of a super-state, see Moravcsik, *supra* note 101, at 606 (“Yet the threat of a European superstate is a myth”).

<sup>263</sup> Dougan, *supra* note 37, at 692, states that there is a trend of balancing supranationalism with intergovernmentalism, that is, that greater supranational governance is counter-weighted by more effective checks and balances to protect Member States’ prerogatives.

venture for all concerned.<sup>264</sup> The Treaty of Lisbon, hence, is multilevel constitutionalism in action.

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<sup>264</sup> Neil Walker, *Not the European Constitution*, 15 MAASTRICHT J. EUR. L. 135 (2008).