The Reform's Typology: Treaty or Constitution?

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I. The Rhetoric of the European Council

In its mandate of June 2007, the European Council asked the IGC to draw up a 'Reform Treaty' "with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action". It continued: "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned".[1]

The astonishing contention in this phrase is that is equates the 'constitutional concept' with the creation of a single text named 'Constitution'. To put it bluntly, this is a caricature of every constitutional concept including the one at EU level, if we agree that calling a text a 'Constitution' must have something to do with its contents, not only with its name and uniformity of the text. In other words, it has much more to do with what the European Council spelt out as the agenda of the ICG in the sentence on efficiency, democratic legitimacy, and coherence of external action. The impression is that denying the constitutional character of the enterprise is downplaying the weight of the envisaged reforms.

The purpose of the 'repealing-phrase' in the Presidency Conclusions clearly is, as has already been pointed out,[2] non-analytical. Instead, it serves the political effort to find a convincing reason for avoiding dangerous referenda on the new Treaty.[3] The

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1 Presidency Conclusions, 21/22 June 2007, 11177/07, Annex I, 15.
At the time of writing, the text of the Draft Lisbon Treaty which is the outcome of this mandate can be found in OJ No 2007/C 306/1; a consolidated version of the Treaty on European Union (TEU) as amended and the Treaty on the Functioning of the European Union (TFEU) was published by the Council only in April 2008, 6655/08, 15 April 2008. The Draft Treaty Establishing a Constitution for Europe, the constitutional concept of which should be "abandoned", is to be found in the OJ No 2004/C 310/1.

2 *Ziller,* Il nuovo Trattato europeo, 2007, 115 et seq.

3 And indeed, the negative outcome of the Irish referendum on 12 June 2008 which took place despite this move might be seen as reassuring such skepticism. However, this political motivation is not at the centre of this contribution. Neither is the fact that the actual contents of the Treaty of Lisbon arguably played a minor role in the Irish campaign.

argument runs as follows: these referenda were needed because of the 'constitutional concept' of the Draft Treaty establishing a Constitution for Europe. Avoiding this concept makes future referenda unnecessary.

However, this is not convincing. It is certainly not correct to reduce the constitutional concept – and thereby implicitly also the reasons for national referenda – of the Draft Treaty on the Constitution for Europe to the creation of a single text called 'Constitution'. To a certain extent this flaw is acknowledged also by the European Council in the same document, a few lines later, when it is stressed that the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) "will not have a constitutional character". Here, it is not only confirmed that the term 'Constitution' should not be used. It is also announced that the 'Union Minister for Foreign Affairs' will be called 'High Representative of the Union for Foreign Affairs and Security Policy'; that the denominations 'law' and 'framework law' will be abandoned, the existing denominations 'regulations', 'directives' and 'decisions' being retained; that there will be no Article mentioning the symbols of the EU such as the flag, the anthem or the motto; and that the Article on the primacy of EU law should not be retained, and the IGC should instead adopt a Declaration recalling the existing case law of the EU Court of Justice. Even if, also in this passage, there is a certain thrust on terminology, it is clear that these are substantive issues, and it is equally clear that the effort is to avoid, as far as possible, the similarities to aspects of constitutionality we are very familiar with at the Member States' level. In other words: several parallels to the characteristics of a statal constitution should be avoided. The deletion of the symbols and the express spelling out of the primacy rule clearly go beyond terminological modifications.

Consequently, the first conclusion is: the suggestion offered by the European Council, that the reform Treaty (Lisbon Treaty) is, contrasting to the Draft Constitutional Treaty of 2004, no Constitution for the simple reason that it would not create a single text named "Constitution" is not convincing. Having said this inevitably raises the question of the concept of a "Constitution" and confront it with the contents of the treaties as they stand today and of the Lisbon Treaty.

II. The Draft 'Constitutional Treaty' of 2004 – a Misnomer?

An alternative evaluation of the developments from the Constitutional Treaty to the Lisbon Treaty could be called the 'classical' stance on constitutionalism: namely that an international treaty is to be strictly discerned from a 'Constitution' and that even the Draft Constitutional Treaty of 2004 in substance is an international treaty. Consequently, calling this Treaty a 'Constitution' had been a misnomer at the outset. Even in the title of the Draft Treaty itself this becomes obvious by the fact that it is still, by explicit self reference, both a Constitution *and* a Treaty.

The borderline between a treaty under international law and a Constitution would

only be transgressed if future amendments would no longer be a prerogative of the Member States as the masters of the treaties, but a competence of the Union organs. Thus, the Treaty would only have 'established' a Constitution if future amendments could be enacted by the Union itself. However, this would not have been the case: also under the Constitutional Treaty, the ratification of proposed amendments by all Member States in accordance with their respective constitutional requirements would have remained mandatory.[4] Also, and as a consequence, no *Kompetenz-Kompetenz* – the right of the Union to define its own competences – would have been included in this text.[5] The Union should not be transformed into a State.[6] Removing the name 'Constitution' from such a text consequently appears as a sort of rectification. Such rectification would probably not provide good reasons for avoiding referenda. But it would nevertheless clarify the limited constitutional impact both of the Constitutional Treaty and the Treaty of Lisbon. Both of them would be devoid of any constitutional character.

Some commentators obviously tend to look at the Draft Constitutional Treaty this way.[7] Arguably this is also the position taken by the French *Conseil Constitutionnel*[8] when it scrutinised the draft Treaty in 2004.

Frequently, the rationale behind such reasoning is that the term 'Constitution' should be reserved for the legal fundament of States and be avoided for international treaties. This is often combined with the proposition that a 'constitutional moment', that is the creation of a new State, or the loss of sovereignty, would be reached only if the capacity to define its own competences (*Kompetenz-Kompetenz*) would be shifted to the 'common organs' of a community of States, which is closely related to the amendment mechanism. Conversely, this would immunise most substantive changes of a common legal fundament from the label 'Constitution', as long as the amendment mechanism follows the traditional pattern of international treaties.

Indisputably, the argument is valid insofar as also the Lisbon Treaty is a Treaty under international law, and also future amendments of the TEU, the TFEU, and the Treaty establishing the European Atomic Energy Community (TEAEC) can only be changed by consent of all Member States. This is not only true with regard to the ordinary but also regarding the newly introduced simplified revision procedure.[9]

4 Articles IV-443-445 Draft Constitutional Treaty.

5 Article I-11(1) Draft Constitutional Treaty.

6 All of these points are rightly stressed e.g. in *Piris,* The Constitution for Europe: A Legal Analysis, 2006, at 131 and 186.

7 Compare e.g. *Triantafyllou*, Les procedures d'adoption et de revision du traité constitutionnel, in: *Amato/Bribosia/de Witte* (eds.), Genesis and Destiny of the European Constitution, 2007, at 242 et seq.

8 Decision n. 2004-505, 19 novembre 2004, §§ 9 and 10.

9 Article 48 TEU (as amended by the Lisbon Treaty). The '*passerelle*' in Article 48(7) TEU might be seen differently, allowing for the introduction of qualified majority voting in the Council by unanimous decision of the European Council. However, this is a very limited power. Making use of it would more be a measure implementing that Article than amending

Furthermore, there is certainly also no transfer of *Kompetenz-Kompetenz*. Quite the contrary: What is now called the 'principle of conferral' is designed to ensure that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[10] Consequently the contention could be that due to those most relevant features both the Lisbon Treaty and the Draft Constitutional Treaty do not give rise to call them a 'Constitution'.

Nevertheless, and in order to make things short: both contentions are not convincing. Regarding terminology, it is well known that the term 'Constitution' in practice is not reserved for States.[11] On the contrary, it often captures the basic legal fundaments of an international organisation, even if it is beyond any doubt that this is a 'Treaty' under international law.[12] In general, what is covered by this notion is the founding treaty leading to the establishment of an organisation, including its legal personality, as well as amendment and termination procedures. Furthermore, legal theorists often refer to the 'constitutions' of confederations.[13] Moreover, several founding instruments of traditional international organisations are expressly titled as 'constitution'. This is so in the case of UNESCO, the WHO, the ILO and the FAO. However, it should be clear that this is only a matter of terminology, while the substantive issue of transforming an international community to a State is thereby not addressed.

One could feel tempted to stop here and put the issue aside by simply pointing to the fact that the ECJ addressed the TEC as the basic 'constitutional charter' of the Community.[14] However, obviously the ECJ referred to something more substantial than just the founding instrument as such. It emphasised that the EC "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[15] And it is not by

the Treaty. Also, it is not really new: a similar '*passerelle*' already exists today in Article 42 of the pre-Lisbon TEU.
The Draft Constitutional Treaty contained the very same provisions in Articles IV-443-445.
The simplified amendment procedures in Article 48(6) and (7) TEU as amended by the Lisbon Treaty are not available for the TEAEC.

10 Article 5(2) TEU as amended.

11 For a comprehensive discussion of the detachment of "Constitution" and "State": *Peters,* Elemente einer Theorie der Verfassung Europas, 2001, 93 et seq.

12 See *Schermers/Blokker,* International Institutional Law, 2003, § 1146.

13 Compare *Kelsen,* General Theory of Law and State, 1949, 319: "[t]he constitution of the central community which is at the same time the constitution of the total community, the confederacy ....".

14 Case 294/83, *Les Verts*, 1986 ECR, 1339, para. 23. See also Opinion 1/91, *EEA I*, 1991 ECR, I-6079, para. 21.

15 Case 294/83, *Les Verts*, 1986 ECR, 1339, para. 23.

chance that the Court stressed the common features of the Community and the Member States which begs the question to what extent the 'Constitution' of the EU resembles that of States and qualifies the Union itself as something similar to a State?

Connected and more complex is the issue of *Kompetenz-Kompetenz*.[16] It shall suffice to point out that the critical yardstick under international law for the delimitation of States is self determination, not centralisation. Thus transferring the right to amendments to common organs is certainly a very important feature. However, decentralised amendment procedures giving a decisive say to the members of the community (like in the EU) do not necessarily entail that the respective community is *not* a State. A number of federal States such as the US, but also Germany and Switzerland retain a decisive influence to their component States when it comes to amendments of the constitution. Conversely, rules allowing for the amendment of Treaties by a majority of ratifications of the Member States or even by a decision of an organ of the organisation are quite common and far from automatically transforming the organisation into a State.[17] Thus, not transferring the *Kompetenz-Kompetenz* to the 'central level' is no guarantee that the Union would not turn into a State.

To put it differently: Transferring the *Kompetenz-Kompetenz* to the Union would probably create a new State – as soon as the clause it is filled with life and used for a substantive array of areas. But reserving a decisive say to the Member States might not be a guarantee against the creation of a State; what might emerge is a decentralised State where the component States might nevertheless be qualified as organs of the new entity. This is far from being grey theory in a Union which already today on the grounds of transferred powers and without *Kompetenz-Kompetenz* impacts on almost every national competence. So why should it need *Kompetenz-Kompetenz*? Furthermore, majority decision taking on amendments is not at all an unambiguous criterion for a distinction. So even if the term 'Constitution' would be reserved for States we are still not on safe grounds for avoiding it with regard to the EU.

Consequently, neither the qualification of the EU as based on an international Treaty both on the grounds of the Constitutional Treaty and the Lisbon Treaty, nor the ratification requirement for amendments provide a good reason for avoiding or discarding the term 'Constitution'.[18] Moreover, it is at that point not clear what it means to address the current and the future Treaties as 'Constitution' This invites for some basic reflections on constitutional concepts.

16 See, most notably *Lerche,* „Kompetenz-Kompetenz" und das Maastricht-Urteil des Bundesverfassungsgerichts, in: *Ipsen* et al. (eds.), Verfassungsrecht im Wandel, Festschrift zum 180jährigen Bestehen des Heymanns Verlags, 1995, 409.

17 *Schermers/Blokker,* note 12 supra, § 1173 ff.

18 Similarly, *Ziller,* The European Constitution, 2005 at 35.

III. Thin and Thick Concepts of a Constitution

Let us begin with some fundamental issues of constitutions and constitutionalism, irrespective of whether or not we are dealing with States, International Organisations, or International Law.

A legal norm may be defined as the meaning of an act of will posited from man and aiming at the behaviour of man. This is the starting point of a positivist concept. A legal order may thus be conceived as a system of norms which is effective and can, to that end, principally be enforced by coercion.[19]

To determine whether any specific norm is part of a legal system – valid or binding law in a given situation – it is essential to identify what is commonly called a 'rule of recognition'. This is a rule authorising the enactment of the norm in question. The identification of such authorisation may lead to a chain of such rules of recognition. In principle such a chain might be infinite, in other words: it is not self explaining which ultimate rule of recognition should be accepted as binding. But the answer is essential in order to determine which norms govern which situations, or whether we are dealing with morals, wishful thinking, the command of gangsters, or an attempt of a revolution. Many answers are given. Some claim that justice is the ultimate yardstick and at the same time the decisive authorisation rule;[20] a variation of this might be the 'we the people rule'.[21] Others say that there it is an epistemic necessity to postulate a basic norm, even if this should be fictitious.[22] This is connected to the proposal to only assume such a basic norm with regard to effective legal systems while the content of those rules might be irrelevant. However, such a basic norm might be superfluous. It might be sufficient to qualify every effective system of norms as a legal order.[23]

On the grounds of such a definition of a legal order a second step might be to identify the *constitution* of that order. Not every norm within the system deserves to

19 *Kelsen,* Reine Rechtslehre, [English version cited: Pure Theory of Law, translated by *Max Knight*, 1967 at 4 et seq.]. It shall be stressed that relying on this starting point does not necessarily include, and in fact does not include in the case of this author, accordance with other features of *Kelsen*ianism; especially not with the contention that a basic norm (*Grundnorm*) is an epistemological necessity in the *Kant*ian sense, and also not that only enforceable norms can be considered as norms (which creates difficulties for permissions and authorisations).

20 E.g. *Alexy,* The Argument from Injustice, 2002.

21 In essence this means that only democratically legitimate legal systems can be qualified as 'law'.

22 *Kelsen*, note 19 supra, at 198 ff.

23 *Hart,* The Concept of Law, 2nd ed. 1994. A legal system consequently might be qualified as (extremely) unjust – like e.g. that of the "Third Reich" – but nevertheless it would constitute law, as long as it is effectively enforced.

be qualified as constitutional. More than one concept is conceivable,[24] and in fact many different proposals are made, to a certain extent reflecting the differences in the underlying conceptions of law. While any positivist approach would avoid prescriptive elements aiming at specific contents, this is different especially with the concept of European Enlightenment and related conceptions. The latter would introduce rights based 'justice' as an essential feature of a constitution.

Only some, however important types shall be introduced. One might distinguish 'thin' and 'thick' concepts of constitutions and constitutionalism depending on the properties required to call a set of rules a 'Constitution' or a legal system 'constitutional':

The *minimalist concept* which one might also call *formal or positivist*:[25] 'Constitution' in a *material sense* is the positive norm or norms which regulate the creation of general legal norms (legislation). This might be a written or unwritten constitution brought about by custom. It necessarily includes the determination of the organs authorised to create general legal norms. A "constitution" in the *formal sense*, by contrast, is the set of norms in the legal system which is more stable in terms of alteration procedures than the (subordinate) rest of the legal order. The core purpose of these rules is to entrench the Constitution in the material sense. The formal constitution could also include other rules, e.g. fundamental rights limiting the powers of the legislator, the rule of law, democracy, separation of powers etc. However, none of these would be a constitutive element of a 'Constitution'. In principle, such a concept can be applied to State law and also to International law as a legal order.[26]

The *concept of European Enlightenment*,[27] coined in Article 16 of the French declaration of the rights of men and of the citizen (1789): "Any society in which the guarantee of rights is not secured, and in which the separation of powers is not determined, has no constitution at all."[28] According to this approach, which is of

24 Compare only *Craig,* Constitutions, Constitutionalism, and the European Union, 7 ELJ (2001) at 126 et seq; *Grey* Constitutionalism: An Analytic Framework, in: *Pennock/Chapman* (eds.), Constitutionalism, 1979, 189-209.

25 E.g. *Kelsen*, note 19 supra, 221 et seq; see also *Hart*, note 23 supra, 71 et seq.

26 Regarding the latter compare *Verdross,* Die Verfassung der Völkerrechtsgemeinschaft, 1926. It might be seen as a variation to address the UN-Charter as the constitution of international community: *Fassbender*, The United Nations Charter as Constitution of the International Community, 36 Columbia JTL (1998), 529-619.

27 E.g. *Ziller*, note 18 supra, 2 et seq. Some reservation regarding the authorship as expressed in the term "European" is appropriate, though: *Lafayette* drew in his proposals mainly from the bills of rights of the individual North American States which themselves cannot simply be traced back to the well known English sources, the latter lacking higher rank and enforceable individual rights; compare *Jellinek,* The Declaration Of The Rights Of Man And Of Citizens: A Contribution To Modern Constitutional History, 1901, 13 et seq, 43 et seq.

28 "Toute société, dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution."

course very much related to statal systems, the Constitution has to fulfil three essential functions: the recognition of the rights of citizens; the organisation of the relations between the government and the governed; the establishment of a system of checks and balances among the branches of the government, especially between the legislative and the executive branches.

There are many variations to this concept, some of them detailing the approach further.[29] Summing up in sober language one might coin the core subject of a Constitution – and omitting certain controversies – in defining and authorising certain organs to enact (and to enforce) law which is directly binding on the citizens, to define the law making procedures, and to establish limits to the powers of the authorised organs, especially limits flowing from rights of citizens and requirements of checks and balances.

The analytical framework of a constitution in the material and in the formal sense can be combined with such an approach. This 'thicker' concept of a constitution relates mainly to the constitution in the material sense which usually would be entrenched (but not necessarily so).

The *optimisation concept* or *international constitutionalism*:[30] more or less well defined notions of national constitutions such as the rule of law, checks and balances, human rights protection, and democracy, are being developed, detected, and/or advocated for mostly with regard to international law. Striving for the realisation of such concepts can be addressed as 'constitutionalism'.[31] In the context of the development of the international legal order such development is seen as a chance to compensate for the deficiencies resulting from 'globalisation' and/or the transfer of

Jellinek, see above, 40 et seq points to the Bills of Rights of New Hampshire and of Massachusetts as models for Article 16. The latter, however, is much shorter and clearer in language (as are many of the French stipulations).

29 Compare only *Craig*, note 24 supra, 126 et seq, and *Pernice,* Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), 158; *Streinz/Ohler/Herrmann,* Der Vertrag von Lissabon zur Reform der EU, 2008, 8 et seqq, with further references.
What is deliberately not included in the above concepts is the contention that a 'true' constitution must contribute to the shaping of collective identity. This may be desirable for a 'good' constitution. This author holds that such ambition should be kept apart from the conceptual debate. Even more problematic is the stance – emphatically voiced not the least in the German debate – that the 'relative homogeneity' of a polity (a people, a nation) might be an indispensable *prerequisite* for the existence and / or the establishment of a constitution. On the author's view on these issues compare *Griller*, note 18 supra, 237 et seq, 243 et seq.

30 Compare for the following *Peters*, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, 19 LJIL (2006), 579-610. It is not that *Peters* would advocate the concept sketched out in the above text which is very much a simplification. But she excellently coins the most important "ingredients" as emerged during the last decades. Compare also *Schorkopf,* Grundgesetz und Überstaatlichkeit, 2007, 187 et seqq., esp. at 197 et seqq.; *de Wet,* Constitutional Order, 55 ICLQ (2006), 51-75.

31 *Peters*, note 30 supra, at 582 et seq., 599 et seqq.; but compare also *Craig*, note 24 supra, at 127 et seq.; *Weiler,* The Constitution of Europe, 1999, at 221 et seqq.

powers from national constitutional systems to international organisations and bodies. As a consequence it might be justifiable to talk about constitutional principles originally derived from national law which are equally to be found and optimised in (mainly) international law (EU law, WTO law, or the international legal order as such). Consequently it would be justified to isolate 'constitutional elements' in that development, and/or to develop a scale of more or less 'constitutional' systems or subsystems of law.

There is no categorical difference to the concept of the Enlightenment. Optimisation can also be pursued within the latter. However, the focus is different in that this had been developed for nation states while what is here called international constitutionalism is mainly targeted at international law or subsystems of international law.

It is conceivable that constitutions as sketched out above do also exist within subsystems of legal orders. This may be so even on the grounds that such a subsystem may be seen as a delegated legal order, not as a legal order of its own. In this sense there can be constitutions of component states of federal states as well as constitutions of international organisations like those mentioned,[32] but also of organisations without an explicit self reference of that kind like the WTO.[33] This is important with regard to the EU insofar as it is consequently conceivable that the Union has a constitution not only on the grounds of the prevailing view developed by the ECJ that it constitutes an "independent source of law",[34] but also on the grounds of the earlier contention differing slightly but importantly in that "...the Community constitutes a new legal order *of international law*".[35]

IV. Conclusions and Remarks

1. Yes, It's a Constitution

If we agree that sets of norms fulfilling the criteria presented above should be captured by the notion of a 'Constitution', the result is obvious: the EU already today has a Constitution, it would have had one under the Treaty establishing a Constitution for Europe, and it would have a Constitution on the basis of the Lisbon Treaty. This is true not only on the grounds of the 'thin' positivist concept but also on the

32 Compare in the above text after fn 13.

33 For the respective dispute see only *Dunoff,* Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law, 17 EJIL (2006), 647-675; *Simma/Pulkowski,* Of Planets and the Universe: Self-contained Regimes in International Law, 17 EJIL (2006), 483-529; *Trachtmann*, The Constitutions of the WTO, 17 EJIL (2006), 623-646.

34 Case 6/64, *Costa v ENEL*, 1964 ECR, 585 at 593 f; Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR, 1125, para. 3.

35 Case 26/62, v*an Gend en Loos*, 1963 ECR, 1 at 12 (emphasis added).

grounds of the 'thicker' concept of European Enlightenment and international constitutionalism.

The Treaties as they currently stand define legislative organs –mainly the Council or the Council together with the European Parliament, and the Commission having the monopoly of initiative whenever the 'Community Method' applies. Sources of primary and secondary law are binding not only upon the Member States but also on citizens, as far as direct application is foreseen. Limits of legislation result, amongst others, from fundamental rights as guaranteed by the ECJ which is relying on the common constitutional traditions of the Member States and draws from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[36] Separation of powers is foreseen not only vertically – through the division of competences between the EU and the Member States – but also horizontally between the institutions and organs of the EU – mainly through what is called the 'institutional balance'.[37]

Consequently, and even against the background of substantially differing concepts of constitution and constitutionalism, it can safely be said, even claiming that this is the prevailing view today: "The 'constitutional law' of the European Communities consists of all the rules of Community law relating to the general objectives, the allocation of competences and the way in which the legislative, executive and judicial functions are performed within the Community... the constitutional law of the *European Union* extends the analysis to cover the areas in which the Union does not act as the Community".[38]

The Union and the European Community would be merged by the Treaty of Lisbon. This makes things clearer but does not change the substance of the 'constitutional issue'. Furthermore, in all of the above mentioned fields the Lisbon Treaty, once ratified, entails minor or major changes if compared to the status quo.[39] They relate mainly to the protection of individual rights (through making the Charter of Fundamental Rights binding law), democratic aspects of law making both regarding the procedures and the organs involved, and the separation of powers (both vertically and horizontally). This means that the Constitution of the EU would be

36 Article 6 TEU.

37 Compare only *Lenaerts/Verhoeven,* Institutional Balance as a Guarantee for Democracy in EU Governance, in: *Joerges/Dehousse* (eds.), Good Governance in Europe's Integrated Market, 2002, 35-88; *Jacqué ,* The Principle of Institutional Balance, 41 CMLRev. (2004), 383-391.

38 *Lenaerts/van Nuffel,* Constitutional Law of the European Union, 2005, para. 1-020, with further references. Compare also not only the title of the book but also the arguments in *Weiler,* note 31 supra, esp. at 3-101, and 221-237.

39 The substance of these changes is addressed in other contributions to this volume.

changed considerably by the Lisbon Treaty. But it does not mean that there is no Constitution.[40]

2. Disclaimers

It might be worth reflecting that, as a matter of principle, specifying the contents of a definition as an element of scientific ambition is a matter of utility rather than truth. If we find it fruitful to conceptualise the term 'Constitution' as proposed, there is no strong argument against addressing both the Constitutional Treaty and the Lisbon Treaty as constitutions, to be more precise: as a draft for the replacement of and a draft for an amendment to the actual constitution respectively. We could also discuss whether the explicit self reference or 'explicit' avoidance meets the usual delimitations of scientific language. Even if this would not be the case, the title 'Constitution' would not simply be wrong, but would probably change the use of the term in what we might call a legal '*Sprachspiel*', a language-game in the sense of *Wittgenstein*. Also avoiding such denomination is a meaningful 'move' within that game involving academics, politicians and citizens, not the least also organs of Member States and of the EU. As already mentioned, an important component of that 'move' in the Lisbon Treaty is to avoid similarities to constitutions of nation states.

However, several things should be kept apart from such analysis: first there is the issue of the eventual transformation of the Union into a state.[41] By accepting that the Treaties do fulfil the mentioned functions of all of the presented constitutional concepts we acknowledge the state-like appearance of the Union. This neither implies that the Union actually is a State nor that it should become one. Admittedly, there is a point in assuming that it was the suspicion or fear that using the term 'Constitution' would entail or at least promote the future creation of a European State which triggered the opposition against such terminology. And it is to be conceded, even, that using the same term as for the legal fundaments of states for an entity which comes near a State in terms of its legal functions might indeed induce such development. On these grounds there might even be a point in assuming that concerns of this type influenced the negative outcome of the referenda in the Netherlands and in France on the Constitutional Treaty. In turn it might be 'rational' to avoid the term in the Lisbon Treaty. However, avoiding the term does neither mean that, legally

40 Compare also *de Búrca,* Preparing the European Union for the Challenges of the Third Millenium: From the TECE to the Lisbon Treaty. General Report, in: *Koeck/Karollus* (eds.), Preparing the European Union for the Future? Necessary Revisions of Primary Law after the Non-Ratification of the Treaty establishing a Constitution for Europe, Féderation Internationale pour le Droit Européen (FIDE), XXIII Volume 1, 2008, 385 – 406, at 391 et seq – with a slightly more cautious evaluation.

41 This important issue is not deepened here. For a discussion compare *Griller,* Is this a Constitution? Remarks on a Contested Concept, in: *Griller/Ziller* (eds.), The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?, 2008, 21 – 56.

speaking, the Treaty should not be qualified as a 'Constitution' nor that this would eliminate the substantive reasons for the negative referenda outcomes.

Second, regarding the debate on constitutionalism in general, calling the existing and the future amended Treaties a Constitution does not include a specific evaluation of its contents, neither a negative nor a positive one. It goes without saying that everywhere in the world we can observe deficient constitutions, or at least constitutions with a potential to be improved. By calling the Treaties a Constitution and the Lisbon Treaty an important constitutional amendment we do not necessarily imply that they establish sufficient limits to power, an optimal expression of the European polity, or that the guarantees for a system of deliberation (democracy) at European level would be satisfactory.[42] We are simply saying that this is the fundament of the normative order of the EU which regulates law making and also addresses these issues.

42 To mention some of the most popular elements of constitutionalism: compare *Poiares Maduro*, The importance of being called a constitution: constitutional authority and the authority of constitutionalism, 3 ICON (2005), at 333.