

Introduction: Multilevel Constitutionalism in Action

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“Ceci n’est pas une constitution...”¹ What do we expect of a treaty for which the contracting parties – as the EU Member States did in the Brussels Mandate of 2007² – explicitly underline that it shall not have a constitutional character? Thus, the Treaty of Lisbon is not, nor shall the Treaty on European Union and the Treaty on the Functioning of the EU as they result from it, become a Constitution for Europe. And indeed, the former primary law was not substituted by a complete set of rules establishing institutions, procedures and basic conditions for the European supranational public authority, as the Treaty establishing a Constitution for Europe was supposed to do. It was merely modified by being made more systematic, more transparent and more effective. Does it not have a constitutional character?

A negative answer seems to result from a first look at the texts: The preambles of the Treaty of Lisbon, and also of the amended Treaty on European Union (TEU) start by listing – like the existing treaties – all the heads of state and government representing their countries with the words: “His majesty, the King of the Belgians, Her Majesty, the Queen of Denmark...”, and ending with: “...her Majesty the Queen of the United Kingdom of Great Britain and Northern Ireland”, having designated their respective Plenipotentiaries who, as the preambles conclude, “having exchanged their full powers, found in good and due form, have agreed as follows...”. What follows is the text of the treaties.

This is not how a Constitution traditionally looks like. But also for the contents some peculiarities can be noted: Like the Treaty establishing a Constitution for the European Union in its Article I-60, the amended EU-Treaty provides for the “voluntary withdrawal from the Union” of a Member State desiring to withdraw (Article 60). No constitution actually in force contains such a provision. And also the other final clauses of the amended treaties are typical for international treaties and do not seem to correspond to final clauses of a classical constitution.

What could lead the European Constitutional Law Network (ECLN) and its Bulgarian hosts to exploring, nonetheless, at its Seventh International Conference (2008) in

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1 This title was kindly suggested by *Mattias Wendel* alluding to the painting of *René Magritte*, see for more detail: *Wendel/Belov/Angelov*, *The Constitutional Paradigm revisited*. Looking at the Lisbon Treaty with the eyes of *Magritte*, the concluding contribution to this volume.

2 IGC mandate, Brussels European Council of 21/22 March 2007, Presidency Conclusions Annex I, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf.

Sofia, whether or not the new primary law of the European Union might be qualified as “constitutional” and discussing some of its basic constitutional issues?

The ECLN has organised this Conference in the capital of one of the youngest Member States with a view to appreciate the accession of Bulgaria, to encourage the European-wide discourse on constitutionalism beyond the state³ and in particular to exchange views and learn from each other what the character and impact of the Treaty of Lisbon might be. With the outcome of its discussions, the present collection of contributions is striving to enhance the understanding of this treaty and to facilitate national parliaments and the citizens of all the EU Member States to agree upon it. So far, the conclusion of the Treaty of Lisbon seemed to be a major achievement on a long way aiming at a meaningful reform of the EU; it is indeed the result of more than ten years of debates and negotiation in and between the original fifteen, now twenty-seven Member States. The aim was threefold:

- To make Europe fit for enlargement – the “left-overs” of Amsterdam had to be settled – and in particular to give the European Union the instruments needed for efficient action to meet the challenges of our post-national societies;
- To enhance democratic legitimacy of the European Union through strengthening the European Parliament, involving national parliaments, and giving the citizens a right of popular initiative,
- To enhance transparency of the founding treaties of the European Union, make it more understandable for the citizens and to clarify for what the Union is responsible and what shall remain a matter for the Member States.

Though not in the form of, and with the express terms of a constitution – the attempt to bring into effect the Constitutional Treaty has failed due to the negative referendums in France and the Netherlands – the Treaty of Lisbon well contains all the necessary reforms, on the lines indicated, with the form of an ordinary treaty amending the existing primary law: It is not a constitution and there is little reminding us of how constitutions classically look like. It is not establishing a European federal state or even a super-state, as some suggest and as the applicants in the case against the German law of ratification brought to the German Federal Constitutional Court claim⁴: Most – if not all – symbolism to this effect has been deleted and, what is more important, nothing in the Treaty of Lisbon can be interpreted as changing the limited and supranational nature of the European Union. The opposite is true: With more powers given to the European Parliament and national parliaments, with

3 For a first conference held on this issue in October 25th, 2007 in Berlin, see: *Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung? Kolloquium zum 10. Geburtstag des WHI*, 2008, for another conference held on April 11 and 12, 2008, see: *Griller/Ziller* (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, 2008.

4 German Federal Constitutional Court, cases no. 2 BvR 1010/08 and 2 BvE 2/08 – *Gauweiler*, pending.

more efficient decision-making procedures, with a more effective system of attributing, organising and limiting the European competences and their exercise in conformity with the principles of subsidiarity and proportionality under the “early warning system”, and with the legally binding character of the European Charter of Fundamental Rights, the European Union will better serve the consented common interests of the citizens of the Union through policies which are out of reach for the individual states or more effectively pursued at the European level as compared to any isolated action at the national level.

It is an open question, to date, whether or not as a result of the negative referendum in Ireland in June 2008 the Treaty of Lisbon will share the fate of the Constitutional Treaty. Its entry into force will need the “yes” of the Irish people as it requires ratification by all the Member States according to their respective constitutional conditions. Thus, as it was necessary to find a new solution after the French and the Dutch voters rejected the Constitutional Treaty, debates have started on what can be done in order to find an agreement of Ireland as well as of the remaining Member States who have not taken a decision yet. *Giuliano Amato* stresses in his “Humboldt-Speech” of July, 10th, 2008 “that voting ‘no’ has been a self defeating reaction, for the Treaty remedies some of the shortcomings due (also) to which it has been voted against”.⁵ It is clear that the solution will have to meet the worries of the Irish people, as it is also clear that the parliamentary ratifications of the other Member States are by no means less democratic than a referendum. Whatever may be the procedure at the national level, it seems to be useful for all who will be invited to take a position as it is for those who will have to apply and respect it, to understand what the Treaty of Lisbon is about and to evaluate its implications on the basis of sufficient information.

To this end, a selected group of specialists for European and constitutional law, including judges from Constitutional Courts of some Member States met at the New Bulgarian University of Sofia in April 2008 to analyse the terms of the Lisbon Treaty in its context, to see whether or not the amended EU Treaties have or have not a constitutional character and what are its most important constitutional features. On the first point it seems to be clear that in spite of the provisions in the Brussels Mandate the constitutional character of the primary law of the European Union has been maintained and even strengthened, though it is not a Constitution in the traditional sense used for a state.

The contributions to Part I of this book, titled “Typological and Methodological Foundations”, presented by *Tanchev, Griller, Guerra Martins, Curtin* and *Craig* are dedicated to elaborate – from their diverse perspectives – what the term “constitution” means and by which elements the Lisbon Treaty adds to what “constitutionalism without a constitution” might mean. It is a “material constitution without ambi-

5 *Amato*, *Ratifying Lisbon and Restoring Citizen’s Trust*, Humboldt-Speech of 10. 7. 2008, p. 5, see: <http://whi-berlin.de/hre>.

tion to be a democratic or political big C constitution”, as *Curtin* puts it, alongside which the “empirical constitution” continues to evolve as a consequence both of the ECJ case-law and the interinstitutional arrangements and other institutional practices. Thus, *Craig* explains that the treaty which was elaborated on the terms of the very detailed Brussels Mandate will not lead to a significant change of the methods of Treaty interpretation, except for the Charter of Fundamental Rights which gives claimants and their legal advisors more secure foundations for cases which they may be encouraged to bring before the courts.

Part II of the present volume presents contributions on “Basic Fundamentals of the European Legal Order” under the Lisbon Treaty. In particular it deals with the principle of primacy, which according to *Drumeva*, should be clearly distinguished from what national constitutions mean when they claim to be the supreme law of the land. Another basic item are the status and rights of the citizens of the Union which, according to *Shaw*, are tending to have a more participatory meaning in a Union evolving towards a “protective polity”. For her, the democratic implications of the European citizenship are strengthened under diverse provisions, though the reference made in Article I-1 of the Constitutional Treaty to the will of the citizens as a basis for the Treaty, has been omitted in the Treaty of Lisbon. Talking about the “citizenisation” of the Union under the Lisbon Treaty, she stresses the change made to Article 17 EC on the citizenship of the Union being not “complementary” any more, but in future “additional”, thus avoiding the assumption that it may detract from the national citizenship. *Dutheil de la Rochère* recalls the origins of the Charter of Fundamental Rights to which the Lisbon Treaty will give legally binding force. It is indeed one of the Union’s new “three pillars” whereupon the protection of these rights will be based in future, and the express list of liberal and social rights will serve not only to protect individuals from infringements to their individual freedoms, but also as guiding principles and values for the policies implemented by the European institutions. Good reasons are given for the view that the “opt-out” for Britain and Poland is “without much consequences”.

Part III regards the “Institutional Changes and Challenges” covering, however, by far not all the important changes introduced by the Treaty of Lisbon. But the principle of subsidiarity and, in particular, the role of the national parliaments discussed by *Louis* and “from an outsider’s view” by *Bermann* certainly are of major importance. They did not only range among the central issues the Nice Declaration of February 2001⁶ but also can be regarded as two key elements preserving the balance of powers within the composed European constitutional system. The principle of subsidiarity reins the exercise of the powers conferred to the European institutions in all policy areas where European action may be possible and regarded necessary but the Member States remain competent to legislate as far as common policies are not

6 Declaration no. 23 on the future of Europe, attached to the Treaty of Nice of 26.2.2001, see: http://www.europa.eu.int/eur-lex/lex/en/treaties/dat/12001C/pdf/12001C_EN.pdf.

affected. And with the new rules on national parliaments they will become part of the European institutional structure insofar as, in addition to the control of their own governments acting at the Council, they are involved in the legislative procedure as guardians of their own powers regarding European policies. *Louis* not only describes the origin and main features of the “early warning system” but gives a very rich and thorough analysis of the present and future position of national parliaments within the European system, including their cooperation among each other and with the European Parliament through COSAC as a forum which could also serve as a forum for collective action under the “early warning system”. Though the national parliaments constitute, as *Bermann* puts it, “truly plausible guardians of subsidiarity” – indeed, they are the institutions at the national level, which would be affected mostly in case of violations – and the mere existence of the procedure may indeed increase their awareness and activity regarding European policies, both authors are sceptical about their capacity to form and coordinate their position within the short time limit. And *Louis* adds the question whether the ECJ will reconsider its self-restraint on subsidiarity when national parliaments will use their new powers to bring cases for violation of this principle.

Part IV of this volume deals with “Major Changes in Policy Fields”. One of the most discussed issues of the reform regarding policies, indeed, is the balance between liberal and social principles. The new EU-Treaty does not only contain an express reference to “highly competitive social market economy aiming at full employment and social progress” in Article 3 on the objectives of the Union, while the reference to a “system ensuring that competition is not distorted” was dropped and included into Protocol no. 27 in order to make clear that it is not a free, but a social market economy on which the Union is based. A number of other provisions on social policy and solidarity have been added consequently to the new primary law.⁷ Yet, it is a common understanding of many Member States that social security, employment policies, no less than economic policies, are basically a matter for the Member States and that there is no reason to assume that their objectives could be better served at European level. The opposite seems to be true for the Area of Freedom, Security and Justice. Given the multitude of European measures felt necessary here, probably the most important achievement of the Treaty of Lisbon is the communitarisation of the areas of judicial cooperation in criminal matters and police cooperation. *Zemánek* highlights the deficiencies of the current provisions and comments on the innovations with some enthusiasm. He rightly understands this reform as the formal abolishment of the divide between the intergovernmental and the supranational approach being so far characteristic for the Area of Freedom, Security and Justice, but also as ensuring more democratic legitimacy, transparency, efficiency and legal certainty. But he also draws attention to the „price for communi-

⁷ See for more details: *Kotzur*, Die soziale Marktwirtschaft nach dem Reformvertrag, in: *Pernice*, note 3 supra, p. 191-198.

tarisation“, which he sees in the exceptions provided for the Member States’ responsibility for the maintenance of law and order and the safeguard of international security, as well as in the „institutional deviations“ still reminding the intergovernmental method, namely the right of initiative for a quarter of the Member States, the limitations on the scope of harmonising directives, the special legislative procedure applicable in sensitive policy areas, the „emergency brake“-system, the opt-out clauses and the new transition clause regarding measures taken in these areas under the existing EU-provisions.

No less important are the new provisions on the external action of the European Union under the Treaty of Lisbon. As we can learn from *Kaddous*, this treaty introduces numerous simplifications and clarifications, though the areas of Common Foreign and Security Policy (CFSP) and of the Common Security and Defence Policy (CSDP) are not communitarised. The CFSP will be subject to stricter rules of coordination and cooperation. The new role of the President of the European Council and the High Representative will improve the representation of the Union towards third countries and the Lisbon Treaty provides for more solidarity between the Member States. The new regime may be called “sui generis” but both pillars of foreign action basically remain within the national competence and there is no judicial review of the measures taken, except for restrictive measures and for the defence of the supranational competences of the Union.⁸ Only the third pillar including the foreign policy aspects of the internal policies and, more importantly, the common commercial and development policies is fully communitarised and, with the extended participation or even the consent of the European Parliament, subject to a more democratic regime. *Kaddous* draws the attention to the unique legal personality of the Union established by the Lisbon Treaty, to the new institutional arrangements and, in particular, to the new and extended list of principles and objectives which are common guidelines for the policies in all three pillars holding them all together and asserting the identity of the Union. Through different means, thus, the Treaty of Lisbon ensures that the EU will be seen from the outside as a single unit and that its external policies are more coherent, more effective and, regarding treaties concluded with third countries in areas of Community competences, more democratic.

Turning back to basic constitutional issues, Part V on “Ratification and Future Amendments” deals with the new procedural provisions regarding the amendment of the Treaties and the involvement of the European public. As successful the Conventional method seemed to be, as critically it is seen by *Benz* in particular in the light of the ratification experiences. While it is supposed to become the „ordinary” proce-

8 See Article 275 TFEU and Article 40 TEU*; for a recent case where the Court has annulled a Common Action under Article 14 TEU because the measure could have been taken under the provisions of the EC-Treaty see Case C-91/05 Commission and European Parliament/Council – ECOWAS, not yet reported.

sure he finds that it will rather come out to be exceptional: „As long as ratification follows national rules and requires unanimity, the transparent Convention method implies high risk of failure“, and he sees the irony in the attempt to democratize Europe leading to the return to intergovernmental bargaining „because national democracy increases decision costs“. The political scientist, therefore, proposes a way for ratification without unanimity which could even be applied already in the case of the Irish „no“. The advantage of his proposal would be that it would not limit but increase democratic responsibility of those who participate in the decision-making, an issue which is very thoughtfully dealt with by *Eijsbouts*. His concern is the better involvement and participation of the public in the processes of Treaty amendment. The mere history of the Constitutional Treaty and the attempt of the governments to remedy the deadlock by the Treaty of Lisbon, which itself was rejected meanwhile by the Irish people, is interpreted as having an important impact on its spirit and its future understanding. At least the Convention method has proved not to succeed „in involving the public“. What *Eijsbouts* suggests is not to follow the path of national referendums but, in order to involve the peoples or public, just to allow five years between a Treaties' signature and the deadline for its ratification. The elections at the national and European level would provide an opportunity for the citizens on both levels to make the amendments an issue in the elections, if felt necessary, to discuss and to vote upon them, as in the French case with Sarkozy, together with the political parties who may support or oppose the ratification.

Thus, the procedure for the amendment of the European Treaties will remain a major issue for the future of the Union. This includes the necessity of substantial reforms before further enlargement is considered. *Rodin* reports on the internal difficulties for Croatia as a new candidate Member State, to conform with the European standards regarding not only the definition of public interest and its relationship to fundamental rights and freedoms, but also the role of the judiciary vis-à-vis the legislator. This contribution shows how deeply the changes required as a pre-condition of membership to the EU concern national traditions. Actually, the work to be accomplished by the candidates wishful to accede does not seem to be less important than the efforts required for the Union to prepare itself for any new enlargement: bringing into force the reform considered to be conditional already for the accession of the youngest twelve Member States while the “left-overs” of Amsterdam still remain today.

The very ambitious subject and program of the Conference was implemented in a highly concentrated and stimulating manner. This can also be concluded from the general report given by *Wendel, Belov and Angelov*, the three young researchers who, through their intellectual input and organisational talent during the preparation and throughout the discussions not only made the Conference possible but also demonstrate how effective genuinely “European” cooperation can be. Titled “The Constitutional Paradigm revisited. Looking at the Lisbon Treaty with the eyes of *Magritte*”, this report reflects the lively exchange of views as well as how the next

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generation feels about an important attempt to set a new basis for the future constitutional development of the European Union – which will be part of their own future too.

In some respect, thus, the European Union can be seen as a joint venture of its citizens and its Member States, at least it is one of many possible ways in which multilevel constitutionalism may find concrete expression and form. But it is also a laboratory for the development of political systems beyond the State, able to meet the challenges of the new century. Yet, analysing new steps as proposed with the Treaty of Lisbon, discussing their constitutional and practical impact and developing ideas for how such a system should evolve in the future, as reflected in the present book, can be taken as a modest contribution to the process at stake: multilevel constitutionalism in action.

This seventh ECLN-Conference took place under the patronage of the Prime Minister of Bulgaria, and was honoured by the Bulgarian Minister for European Affairs, Mrs. *Gergana Hristova Grancharova* who in her speech at the opening ceremony in the Sofia “Palace of Culture” placed the integration of Europe and, in particular, its constitutional development among the great priorities of her country. I would like to express many great thanks to both of them for giving our work such encouraging attention! Special thanks are due also to my dear friend and colleague *Evgeni Tanchev* who, as a judge of the Constitutional Court of Bulgaria, was so kind as to share with me the responsibility for this Conference as a joint venture in the debate on multilevel constitutionalism, and to *Sergej Ignatov*, the Rector of the New Bulgarian University, who kindly hosted the event offering us a friendly atmosphere in an open-minded environment. I shall further express my deepest gratitude to the Konrad Adenauer-Foundation and, in particular to the Director of its Rule of Law Program South-East Europe, *Ricarda Roos*, who offered not only essential financial resources but also proved as a most experienced and competent partner in designing and setting up the Conference. We are deeply grateful, as well, to Mrs. *Zinaida Zlatanova*, Head of the Representation of the European Commission in Bulgaria, for further financial support, which finally made our gathering in Sofia possible. Finally, I would like to thank all those who have contributed with their analyses and reports, both orally and written, to the Conference including the present book, and in particular *Mattias Wendel*, *Martin Belov* and *Miroslav Angelov* not only for the abovementioned report, but above all for their great commitment and valuable help to make this Conference a success. *Ariane Grieser* and *Michael von Landenberg-Roberg* collected and prepared the contributions to this book for publication, an often underestimated amount of work and care for which I would like to express my deep gratitude.

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