

The Constitutional Paradigm Revisited. Looking at the Lisbon Treaty with the Eyes of *Magritte*.

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I. The Constitutional Paradigm Revisited

Ceci n'est pas une constitution – constitutionalisation without a constitution? Alluding to the surrealist painting by *René Magritte* "La trahison des images: Ceci n'est pas une pipe" the topic of this year's conference of the European Constitutional Law Network in Sofia may at first view appear to be obscure or even Delphic.

However a closer look at the recent reform process in the EU reveals the underlying legal problem. After the failed ratification of the Treaty Establishing a Constitution for Europe in 2005¹ and the following period of reflection, the reform process of the Union's institutions and democratic foundations was revived in 2007. In the first half of 2007 the German presidency paved the way for a new Intergovernmental Conference (IGC). Being convened under the following Portuguese presidency and having concluded its deliberations by the end of 2007 the IGC carried out its work on "the exclusive basis and framework" of a detailed mandate provided in Annex I

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1 O.J. C 310 of 16 December 2004. For an analysis see the contributions in 1 *EuConst* (2005); *Pernice/Zemánek* (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (2005); *Burgogue-Larsen/Levade/Picod* (eds.), *Traité établissant une Constitution pour l'Europe*, Tome 1 (2007), Tome 2 (2005); *Amato/Bribosia/de Witte* (eds.), *Genèse et destinée de la Constitution européenne. Commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (2007); *Calliess/Ruffert* (eds.), *Verfassung der Europäischen Union – Kommentar der Grundlagenbestimmungen* (2006); *Beaud/Lechevalier/Pernice/Strudel* (eds.), *L'Europe en voie de constitution. Pour un bilan critique des travaux de la Convention* (2004); *Pernice/Maduro* (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention* (2003).

of the conclusions of the European Council of 21/22 June 2007 (Doc 11218/07).² This mandate stated in its general observations that the future amended treaties would *not* have a “constitutional character”.

This approach is quite remarkable. It is not only opposed to the concept of the Treaty Establishing a Constitution for Europe. Furthermore it dissents from the common belief that the process of European legal integration has – already today – a constitutional dimension. Conceptualizing the emerging European legal order in terms of “constitutionalisation” has particularly become an analytical cornerstone amongst legal scholars.³ The ECLN itself represents this school of thought. It aims at developing the concept of European constitutionalism by establishing a research network of leading academics and judges across Europe and the United States, bridging different national contexts and combining practical experiences with academic reflection. But not only major parts of academics agree in principle on the constitutional paradigm. The “constitutional” dimension of the development of European law has also been recognised by the judicial branch, namely the European Court of Justice and national constitutional courts.⁴

Against this background, one may ask – to use the words of *Evgeni Tanchev* – if we are now “back on the international *sui generis* treaty track and in the unwritten

- 2 For a first analysis of the mandate and the Lisbon Treaty see *Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?* (2008); *Mayer*, *Die Rückkehr der europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon*, 67 *ZaöRV=HJL* (2007), 1141-1191; *Craig*, *The Treaty of Lisbon, process, architecture and substance*, 33 *ELRev.* (2008), 137-166.
- 3 See *Weiler*, *The Constitution of Europe* (1999); *Pernice*, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, *CMLRev.* 36 (1999), 703-750; v. *Bogdandy/Bast* (eds.), *Principles of European Constitutional Law* (2006); *Lenaerts/van Nuffel*, *Constitutional Law of the European Union* (2005); *Peters*, *Elemente einer Theorie der Verfassung Europas* (2001), pp. 93 et seq. For counter-arguments see *Grimm*, *Does Europe need a constitution?*, 1 *ELJ* (1995), 282-302.
- 4 See *ECJ*, judgement of 23 April 1986 – case 294/83 – *Les Verts*, 1986 ECR, 1339 (1365); *ECJ*, avis 1/91, 1991 ECR I-6069, para. 21; German *Bundesverfassungsgericht (BVerfG)*, order of 18 October 1967 – 1 BvR 248/63 and 216/67 – EEC-regulations = BVerfGE 22, 293 (296).

For the constitutional implications of EU-membership in the national legal order cf. Italian *Corte Costituzionale* judgment of 18 December 1973 – Nr. 183/1973 – *Frontini*; German *BVerfG*, Order of 29 May 1974 – BvL 52/71 – *Solange I* = BVerfGE 37, 271; German *BVerfG*, Order of 22 October 1986 – 2 BvR 197/83 – *Solange II* = BVerfGE 73, 339; French *Conseil constitutionnel (CC)* decision of 9 April 1992 – No. 92-308 DC – *Maastricht I* = Rec. S. 55; German *BVerfG*, judgment of 12 October 1993 – 2 BvR 2134, 2159/92 – *Maastricht* = BVerfGE 89, 155; Danish *Highest Court*, judgment of 6 April 1998 – Az. I 361/1997 – *Carlson/Rasmussen*; French *CC*, decision of 19 November 2005 – Nr. 2004-505 DC – *Treaty establishing a Constitution for Europe*; Spanish *Tribunal Constitucional*, Decl. of 13 December 2004 – DTC 1/2004 – *Treaty Establishing a Constitution for Europe*; Czech *Constitutional Court*, judgment of 8 March 2006 – Pl. US 50/04 – *Sugar Quota II*; Polish *Constitutional Court*, decision of 11 May 2005 – Az. K 18/04 – *Accession Treaty*; French *CC*, decision of 20 December 2007 – Nr. 2007-560 DC – *Lisbon Treaty*.

constitution train of academic thought?”⁵ Moreover, are we witnessing a fundamental shift in the way the Union’s legal development is going to be *prescribed* and therefore will have to be *described* after the coming into force of the Lisbon Treaty?

A legal analysis of the substantial changes provided by the reform leads us to the conclusion that the assumption of a declining or even vanishing constitutional dimension of the European legal integration cannot be affirmed. On the contrary, constitutional key elements will be even strengthened by the new regime. In this respect *Stefan Griller* concludes that the Lisbon Treaty “is a further and very important step in the constitutional development of the EU.”⁶

One has to admit of course that the legal qualification of the reformed treaties as being “constitutional” depends on the (pre-)definition of constitution itself. Such theoretical premises are shaping, if not predetermining, the analytical perspective. In this respect the discussion during the conference demonstrated that the constitutional paradigm in the EU-context is indeed based on a specific notion of constitutionalism. However there is a variety of arguments speaking in favour of this theoretical approach. The following considerations and remarks in the light of the ECLN-conference may illustrate this. They also confirm that there are no grounds for a paradigm shift, which would lead to a renunciation of the constitutional paradigm.

The conference opened by analyzing the typological and methodological foundations of European constitutionalism. Subsequently the discussion turned towards the basics of the European legal order, aiming particularly at the question of fundamental rights protection. In the following, institutional challenges were in the focus of the debate, followed by the analysis of major changes in policy fields. In this respect special regard was given to the social dimension of European constitutionalism. Further, developments in two of the most dynamic policy areas, namely the external action of the Union and the Area of Freedom, Security and Justice have been examined. Before finally reflecting on future perspectives, the question of ratification and future constitutional amendment was stressed. It should be noted that the ECLN-conference followed a round-table-concept, which aimed at providing a direct communicative link between the participants as well as enough time for discussion and exchange of ideas.

5 *Tanchev*, The Lisbon Treaty Within and Without Constitutional Orthodoxy, in this volume, p. 18.

6 *Griller*, conference-abstract, p. 2. See also *idem*, The Reform’s Typology: Treaty or Constitution?, in this volume, p. 49.

II. Typological and Methodological Foundation

1. The Reform's Typology

Concerning the first topic, that is to say the question of typology and methods of European constitutionalism, the discussion revealed a major consensus among the participants concerning the constitutional character of the Lisbon Treaty.⁷ This assessment of the recent reform process was specifically based on a post-national notion of the term "constitution".⁸ Thus, the supranational connotation of constitution has been clearly contrasted to the classical meaning of constitution in a nation state based setting.

In that respect, underlining the dynamic evolvement of legal terms, *Evgeni Tanchev* pointed out the necessity of overcoming the "orthodox" approach towards constitutionalism: "Leaving the legal dogmatic ground aside, the Lisbon Treaty is an international instrument in form but according to its substance has a constitutional character. (...) A supranational constitution is not a clone or replica of a nation state constitution at least for the difference of the object of their regulation, difference in the constituent power they originate from and the difference of their authors – a sovereign state or non state entities."⁹ Also *Stefan Griller* distinguished sharply between the various theoretical approaches towards constitutionalism, pointing out that the qualification of the treaties as being constitutional would neither imply that the Union actually is a State nor that it should become one. The constitutional debate therefore had to be separated from the perspective of state-theory.¹⁰

The dissociation of the concept of constitutionalism from a state-centred perspective is not only in coherence with the juridical approach attributing to the European primary law a constitutional character. It also has the advantage of focusing on the functional criteria of a constitution. In this respect the contribution of *Ana Martins* highlighted the reform's impact on the reinforcement of democracy, the rule of law and the protection of fundamental rights, concluding that especially the axiological basis of the Union in the shape of its written values as well as the legally binding

7 Cf. *Calliess*, Mitverantwortung der Rechtswissenschaft für die Verwendung des Verfassungstopos – Die Europäische Verfassung als Opfer der symbolischen Tragweite des Begriffes?, in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung? (2008), pp. 49-74.

8 For a postnational concept of constitutionalism see *Pernice*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), 148-193 (155 et seq.); *idem*, note 3 supra (708 et seq.); *Peters*, note 3 supra, pp. 93 et seq.; *Kumm*, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty, 11 *ELJ* (2005), 262-307 (281 et seq.).

9 *Tanchev*, note 5 supra, in this volume p. 49.

10 *Griller*, note 6 supra, in this volume, p. 45, 49.

charter of fundamental rights do speak in favour of European constitutionalism.¹¹ This line of argument is further strengthened by the fact that the revised treaties intend to create a more open and closer Union to its citizens, as well as a more efficient and transparent one, in order to respect the value of democracy. *Jo Shaw* qualifies citizen empowerment as a “*leitmotiv*” (guiding theme) of the Lisbon Treaty, even if its textual improvements may not be as fundamental as the recent case-law of the ECJ concerning the scope and effects of Union citizenship.¹² In this context it becomes clear that the Reform Treaty concerns basic *constitutional* matters at least in a material sense as it deals with key questions of the founding, exercise and legitimacy of public authority. This conclusion is also accessible to a broader public as it focuses primarily on the substance rather than the theoretical details of European constitutionalism which may be “far from being univocal and unambiguous” as *Ana Martins* put it.¹³

In this context the mandate of the IGC 2007 appears to be rather a misleading tool as far as it highlights the non-constitutional character of the reformed treaties. The term “constitutional character” as it is used in the mandate, seems to be limited to terminological and symbolic aspects, such as the abandon of notions as “constitution”, “Minister for Foreign Affairs” and “law” as well as the excise of the references to the flag, the anthem or the motto. In the language of the mandate, the “constitutional” concept itself consists in a purely formal approach of repealing all existing treaties and replacing them by a single text called “Constitution”.

The idea of abandoning the concept of a classical constitutional structure, terminology and symbolic can be well explained by the strategy of avoiding the political risk of referenda in the ratification process. How seriously this concern has to be taken into account has regrettably been proved again by the failure of the Irish referendum on 12 June 2008. However from a legal point of view, using the felicitous words of *Paul Craig*, “the arguments set out as to why the Reform Treaty was not to have a constitutional character were, in analytical terms, weak to say the very least.”¹⁴

To pick up the idea of *Magritte*’s paintings again we are insofar dealing with a *trahison du mandat*.

11 *Martins*, The Treaty of Lisbon – After All Another Step Towards a European Constitution?, in this volume, p. 58.

12 *Shaw*, The Treaty of Lisbon and Citizenship, in this volume, p. 114 . Cf. ECJ, judgments of 12 September 2006, case C-145 /04 – *Spain v. United Kingdom (Gibraltar)*, 2006 ECR I-7917 and case C-300/04 – *Aruba*, 2006 ECR I-8055. See also *Shaw*, The political representation of Europe’s citizens: Developments, 4 *EuConst* (2008) 162-186.

13 *Martins*, note 11 supra, in this volume, p. 55.

14 *Craig*, The Detailed Mandate and the Future Methods of Interpretation of the Treaties, in this volume, p. 83.

2. Methodological Aspects

Concerning the methodological aspect, *Paul Craig* addressed specifically the possible implications of the reform process on the future methods of interpretation.¹⁵ Underlining the prognostic character of his assessment, he identified three main areas that could be affected by the reform process.¹⁶

First, regarding the future modes of Treaty interpretation by the political institutions, interpretative challenges could arise in terms of competence, hierarchy of norms and the role of the European Council President. Second, concerning the activity of the courts, an interesting interpretative issue could be the extent to which the ECJ chooses to draw on abstract constitutional principles enshrined in the EU-Treaty, especially in relation to the existence or absence of specific provisions enshrined in the TFEU. Third, “the fact that the Charter of Rights is rendered binding by the Lisbon Treaty may well alter the profile of judicial review within the EU” in terms of an expansion of “claims having strong rights-based component”.¹⁷ According to *Paul Craig* this assumption is underpinned especially by the judicial experiences made in the UK after the coming into effect of the Human Rights Act in 2000. This parallel to British constitutional development reveals again the substantial constitutional dimension of the Lisbon Treaty.

III. Basic Fundamentals of the European Legal Order

1. Primacy

The national perspective on European constitutionalism was also fundamental to the contribution of *Emilia Drumeva*. She exemplified the question of primacy of EU law¹⁸ in the national constitutional sphere by referring to the constitutional setting in Bulgaria.¹⁹

The abandon of an express supremacy-clause in the Lisbon Treaty was another aspect that could be used as an argument against the constitutional character of the

15 Cf. *Wendel*, Vertragsauslegung nach Lissabon. Methodische Implikationen des Reformprozesses am Beispiel des detaillierten Mandats und der Erläuterungen zur Charta der Grundrechte, in: *Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?* (2008), pp. 152-162. For an analysis of the impact on the relevance of the historical method of interpretation see *idem*, *Renaissance der historischen Auslegungsmethode im europäischen Verfassungsrecht?*, 68 *ZaöRV=HIJL* (2008), forthcoming.

16 See for details *Craig*, note 14 supra, in this volume, p. 87 et seq.

17 *Ibid*, p. 88.

18 For a comprehensive analysis see *Alter*, *Establishing the Supremacy of European Law* (2001).

19 *Drumeva*, *Primacy of EU Law in the National Constitutional Space*, pp. 96 et seq., 99, in this volume.

reformed treaties. Instead of stipulating the primacy of EU-law expressly in a specific norm as the Constitutional Treaty would have done in Article I-6, the new regime provides a declaration (no. 17) recalling the well settled primacy case law of the ECJ to which an Opinion of the Council Legal Service of 22 June 2007 is annexed. This opinion is so short that it can be quoted here in full length:

"It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

Even if the excise of a legally binding norm and the simple acknowledgment of the ECJ's jurisprudence by the way of a declaration are regrettable in terms of transparency, these circumstances do not mean however that the Reform Treaty would not have a constitutional character. Primacy of EU-law is often erroneously mistaken for hierarchical superiority, a key element of national constitutions in the national legal order.²⁰ In contrast, primacy of EU-law does not imply a hierarchical relationship between the European and the national constitutional sphere, but is far better described as a rule of conflict presupposing a pluralistic, heterarchical relationship between the respective legal orders. In this respect *Emilia Drumeva* highlighted the conceptual difference between hierarchical *supremacy* and non-hierarchical *primacy in application*, a distinction that has already been drawn by the Spanish Constitutional Tribunal in its declaration 1/2004 on the Spanish ratification of the Constitutional Treaty.²¹

The following intense discussion concerning the possible approaches towards the constitutional and juridical acknowledgment of primacy in the national legal order revealed another key factor: European Constitutionalism cannot be conceptualized only by assessing the level of primary law in constitutional terms. Furthermore, the context of national constitutional development and the relationship of European and national constitutional sphere must be taken into consideration within the conceptual framework.

In other words, the question of European Constitutionalism is a question not to be conceptualized alone on the European, but on multiple – European and national – constitutional levels that are functionally, normatively and institutionally inter-

20 In this respect see *Kirchhof*, The Balance of Powers Between National and European Institutions, 5 ELJ (1999), 225-242 (229).

21 Spanish *Tribunal Constitucional*, Decl. of 13 December 2004 – DTC 1/2004 – *Treaty Establishing a Constitution for Europe*.

woven, a theoretical concept described by *Ingolf Pernice* as “multilevel constitutionalism” (*Verfassungsverbund*).²²

2. Fundamental Rights

This normative interconnection of different constitutional levels in the EU leads directly to another major topic of the symposium, namely the question of fundamental rights protection. *Jacqueline Dutheil de la Rochère* pointed out the parallelism between constitutionalisation and the development of fundamental rights in the tradition of European Enlightenment.²³ In this respect the Charter of Fundamental Rights appears to be an important element in the constitutional process of building a Union closer to its citizens. Indeed, the Charter may be seen as only repeating and merging existing rights. But its substance reveals in any case a community of values with a high potential of influence on the European level.

According to the Lisbon Treaty the Charter will not be an integral part of the treaties but shall have the same legal value (Article. 6 par. 1 TEU). Being insofar part of the primary law it will – within the scope of application of EU-law – prevail over the national law of the Member States, including their constitutional provisions.

However, the Charter is not established by the Lisbon Treaty as an exclusive source of fundamental rights in the Union. It is rather shaped as one of “three pillars” within the system of fundamental rights protection in the EU. The other two pillars are the European Convention for the Protection of Human Rights and Fundamental Freedoms on the one hand, and the fundamental rights as they result from the constitutional traditions common to the Member States as general principles of EU-law on the other. According to *Jacqueline Dutheil de la Rochère* this approach of rejecting a single and universal catalogue of fundamental rights valid for all Member States could mean in consequence that the “benefit expected for the EU citizens in terms of clarity and certainty of rights will only partly be obtained”.²⁴

22 *Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: *Bieber/Widmer* (eds.), *The European constitutional area* (1995), p. 225 (261 et seq.); *idem*, *Die Dritte Gewalt im Europäischen Verfassungsverbund*, *EuR* 1996, pp. 27 et seq.; *idem*, note 3 supra; *idem*, note 8 supra; *idem*, *Multilevel Constitutionalism in the European Union*, 27 *ELRev.* (2002), pp. 511-529; *idem*, *Theorie und Praxis des Europäischen Verfassungsverbundes*, in: *C. Calliess* (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*. (2007), pp. 61 et seq. For a critical approach see *Jestaedt*, *Der Europäische Verfassungsverbund – Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation*, in: *Gedächtnisschrift Blomeyer* (2004), pp. 638 et seq.

23 See *Dutheil de la Rochère*, *The protection of Fundamental Rights in the EU: Community of values with Opt-Out ?*, in this volume, p. 116.

24 *Ibid.*, p. 126.

On the other hand *Jacqueline Dutheil de la Rochère* supposed that the more flexible system with three pillars could be “better adapted to the moving frontiers and perspectives of the Union”.²⁵ Indeed, the existence of general principles as one of the sources of fundamental rights makes the system more open and dynamic and allows the ECJ to develop new fundamental rights case by case. Furthermore, from the perspective of the citizen it might be easier to invoke rights enshrined expressly in the Charter, a point already raised by *Paul Craig*. Another advantage of the Charter was highlighted by *Ingolf Pernice*: The separate and autonomous position of this constitutional document outside the treaties could facilitate references to it, even if the treaties shouldn’t be ratified.²⁶ Today, not only Advocates General, the Court of First Instance and national constitutional courts, but also the ECJ refer to the Charter as a source of human rights.²⁷

Concerning the limitations of its scope of application – particularly the specific limitations imposed by Protocol No. 7 – *Jacqueline Dutheil de la Rochère* argued that the Charter is perceived by the Member States as a threat to national sovereignty.²⁸ This context also explains the rather unusual semantic of the so called “opt-out-protocol”. Focusing primarily on the political nature and function of the protocol, *Mirosław Wyrzykowski* examined its implications from a Polish perspective. He pointed out that the Polish debate about this text was also a dispute between supporters of an authoritarian state – implementing moral directives of a particular wing of the Catholic Church – and supporters of a constitutional and secular country of a liberal democracy.²⁹ Insofar the Charter exemplifies how particular political features in one or two Member States can influence the process and the outcome of the negotiations.

Concerning the legal consequences of the “opt-out-protocol”, the participants agreed on its marginal normative impact.³⁰ A major reason for this lies in the fact that the limitations of the protocol do not apply to the fundamental rights as general principles of EU-law. Also the diction used by the protocol shows no intention of derogating the legal effect of the Charter. Still it has to be seen how the judges will decide on the legal status and effects of the protocol. Despite this problem, the Char-

25 *Ibid*, p. 126.

26 See already *Pernice*, *The Treaty of Lisbon and Fundamental Rights*, in: *Griller/Ziller* (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, 2008, p. 235 at 241.

27 ECJ, judgment of 3 May 2007 – Rs. C-303/05 – *Advocaten voor de Wereld* = ECR 2007 I-3633, para. 46.

28 For a comprehensive and comparative analysis of the concept of sovereignty within the context of EU see the contributions in *Walker* (ed.), *Sovereignty in Transition* (2003).

29 This contribution could not be published in this volume.

30 See already *Mayer*, *Schutz vor der Grundrechte-Charta oder durch die Grundrechte-Charta? Anmerkungen zum europäischen Grundrechtsschutz nach dem Vertrag*, in: *Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?* (2008), p. 81 (89).

ter was qualified concordantly as a major achievement of the *constitutional* development of the EU and as a basic cornerstone of the reform.

IV. Institutional Changes and Challenges

1. Role of National Parliaments

Regarding institutional innovations, the debate focused primarily on the functions of national parliaments³¹ and on the principle of subsidiarity in particular.³² The Lisbon Treaty explicitly acknowledges for the first time the role of national parliaments. Though the new Article 12 TEU is of more symbolic than normative value, it sums up colourfully and descriptively the ways in which national parliaments will affect EU-matters.

With a detailed analysis of the so-called „early warning system“ – outlined in the Protocol on the Role of National Parliaments and the Protocol on the Application of the Principles of Subsidiarity and Proportionality – as well as comments on the possible future effects of the subsidiarity control for the legislative process in the EU, *Jean-Victor Louis* set the stage for an intense debate. He emphasised that in view of the various options for an institutionalisation of the subsidiarity scrutiny (control by the Court of Justice, by a special court in charge of competence control, by a special Chamber of the Court on subsidiarity or by a committee, composed by national parliamentarians) the early warning system of the Lisbon Treaty seems to be a well acceptable compromise solution. Its merits were twofold: “finding a technical response to the question of the subsidiarity control and increasing the role of national parliaments, without further complicating the institutional structure and burdening the legislative procedure“.³³

In this context the idea of establishing a veto-mechanism for national parliaments (so called „red card“) doesn’t seem to be preferable as it would infringe on the initiative monopoly of the Commission.

However, the implementation of the early warning system could face numerous practical problems in the future. In the course of a comparative analysis of the control mechanisms concerning the federalism principle in the USA and the subsidiarity principle in the EU, *George Bermann* called to attention the insufficient reaction-

31 For the role of national parliaments cf. *Maurer/Wessels* (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (2001).

32 Cf. *M. Hailbronner*, *Die Justiziabilität des Subsidiaritätsprinzips im Lichte der Subsidiaritätsprotokolle*, in: *Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?* (2008), pp. 129 et seq.

33 *Louis*, *National Parliaments and the Principle of Subsidiarity. Legal Options and Practical limits*, in this volume, p. 132.

period of eight weeks for the national parliaments – questioning legislative proposals with the principle of subsidiarity – as well as the high majority-requirement of 50% which is needed to trigger the „orange light“.³⁴

Considering the necessity of consultations at national level and the co-ordination with other Member State-parliaments, the implementation of control mechanisms within the allotted time appears difficult. Indeed, *Bermann's* proposal to start the process of scrutiny in the pre-legislative period at the stage of green papers, white papers etc. is more appropriate, even though a thorough check of each legislative proposal would be practically impossible due to their sheer number. Another hurdle for the implementation of the scrutiny mechanism will be the lack of resources and knowledge in some Member States. Hence *Louis* is right in saying that it might be “too early to speak in terms of a change in paradigm“.³⁵

The success of subsidiarity control as a collective action of national parliaments will depend especially on the quality of inter-parliamentary cooperation. Safeguarding a close and fast coordination of 27 parliaments will not be an easy task. But the increasing cooperation effected within the framework of COSAC in recent years prompts hope. *Bermann* for example sees in the activity of COSAC a kind of „subsidiarity-monitoring monitoring“.³⁶ The effectiveness of subsidiarity control by national parliaments is safeguarded by their right to file an action before the ECJ in case of infringement of the subsidiarity principle (Article 8 Protocol on the Application of the Principles of Subsidiarity and Proportionality). Here the legal form of an efficient proceeding in each Member State to institute legal proceedings will be very important.

The new rights of national parliaments on the one hand entail new responsibilities for them on the other. Parliaments will take on more active and self-contained role, in which they may affect the proceedings and decisions of EU-institutions much more strongly and directly. According to *Bermann* the national parliaments have to fulfil a „double duty“ – to advance both subsidiarity and democratic legitimacy.³⁷

The position of national parliaments will also be enhanced through their future participation in the evaluation of the mechanisms for the implementation of EU policies in the area of freedom, security and justice (Article 70 TFEU) as well as through their involvement in the political monitoring of Europol and Eurojust (Articles 88 and 85 TFEU). Last but not least national parliaments will also become more powerful in the framework of the revision provisions of the Treaties and in respect of the applications for accession to the Union, factors that lead to a democratisation of the Union. Once again it becomes clear that the fundamental constitutional impli-

34 *Bermann*, National Parliaments and Subsidiarity: an Outsider's View, in this volume, p. 227.

35 *Louis*, note 33 supra, in this volume p. 148.

36 *Bermann*, note 34 supra, in this volume, p. 153.

37 *Ibid*, p. 153.

cations of the Lisbon Treaty are not exclusively playing on the EU-level but do also deeply affect the constitutional structure of the Member States.

2. Other Institutional Questions

The further debate focused also on other institutional questions. A consensus was reached that the main objectives of the institutional reform – namely the enhanced ability to act and the democratic legitimacy of the Union – could be accomplished with the Lisbon Treaty. Above all, the new voting weight in the Council as well as the system of double majority³⁸ was evaluated as an important step forward.

The European Parliament appears to be the main beneficiary of the reform. Due to its new budgetary powers and the broadened scope of the co-decision procedure, it can be expected to become a major player in European policy. The participation of the European Parliament in the election of the President of the European Commission, in which the results of elections to the European Parliament must be taken into consideration, could lead to an increased parliamentarisation of the Commission as well as to a better establishment of the political parties at European level. Thus, it is reasonable to hope that the European political parties will play a more crucial role as instruments for creation of a real European publicity in the future.

At the same time the imprecise regulation of the relationship between the future President of the European Council, the President of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy were judged to be problematic by the participants of the conference. It is expected that this could lead to conflicts and tensions, especially in the field of European Foreign Affairs policy. The creation of new bodies and posts itself would lead to a welcome personalisation of the European policy, which could in turn bring about the positive long-term effect of the institutional reform.

V. Major Changes in Policy Fields

Besides the institutional questions, also major changes in policy fields have been discussed intensively. Of specific interest were three areas. First, following the concerns of the population in France and the Netherlands in 2005, the question of an appropriate balance between social coherence and market economy; second the developments concerning the external action with special regard to the Common

38 Cf. *Lenski*, Rat und Europäischer Rat nach dem Vertrag von Lissabon, in: *Pernice* (ed.), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?* (2008), pp. 93 et seq.; *Craig*, note 2 supra, pp. 153 et seq.

Foreign and Security Policy (CFSP); third the Area of Freedom, Security and Justice.

A short summary shall suffice in this context in order to highlight the most important impacts on the EU's constitutional architecture.

Concerning the balance between market-orientated and socially-orientated values³⁹ *Roberto Miccù* detected a “twofold type” of “asymmetric constitutionalisation” tending to materialise in the Treaty of Lisbon. According to him this asymmetry consisted in “the deviation, or the apparent distance, between the enunciation and the recognition of fundamental rights, on the one hand, and the ambivalence of policies and soft laws, on the other. Thus, while fundamental rights finally achieve full legal recognition in the Treaty of Lisbon, there seems to be a growing gap between soft law procedures, which are increasingly important in community approaches, and the constitutional stance on rights.”⁴⁰ *Siniša Rodin* added the specific problem of judicial protection of social rights within the context of market economy, especially within the constitutional framework in Croatia.⁴¹

In the field of external action⁴² major changes have taken place. Besides the suppression of the pillar structure in principle and the express legal personality of the EU, a key issue concerned the future institutional balance. In this respect *Christine Kaddous* highlighted the (re-) creation of the High Representative for Foreign Affairs and Security Policy as one of “the most striking amendments” of the constitutional reform.⁴³ The following debate focused especially on the functional multipolarity of this institutional invention as well as the future interaction between the High Representative and other actors. The High Representative will not only conduct the CFSP under the Council's mandate and chair the Foreign Affairs Council – combining powers of initiative, representation and implementation in the CFSP –, but will simultaneously be one of the Vice-presidents of the Commission. If this “double-hat” approach enables the High Representative to ensure the consistency of the Union's external action is highly questionable. In addition, the relationship and separation of competencies between the High Representative and the President of the European Council could be problematic.

39 See already *Kotzur*, Die Soziale Marktwirtschaft nach dem Reformvertrag, in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung? (2008), pp. 191-198.

40 *Miccù*, conference-abstract (not published), p. 1.

41 See *Rodin*, Balancing Free Market and Fundamental Rights in a Post-communist European State – A Mission Impossible?, in this volume, pp. 205 et seq.

42 For a comprehensive study see *Eeckhout*, External Relations of the European Union. Legal and Constitutional Foundations (2004). For an analysis in the context of the Lisbon Treaty see *Thym*, Außenverfassungsrecht nach dem Lissabonner Vertrag, in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung? (2008), pp. 167-183.

43 For details see, while this evaluation is not in the written text: *Kaddous*, External Action under the Lisbon Treaty, in this volume, p. 174.

Besides the question of competencies in the field of external action, *Christine Kaddous* paid specific attention to the definition of common principles, values and objectives of the external policy of the Union, now enshrined in Article 21 of the reformed TEU.⁴⁴

Concerning the Area of Freedom, Security and Justice,⁴⁵ *Jiří Zemánek* underlined that in spite of the *de iure* end of the EU's pillar structure, the AFSJ is still "lacking coherency" while demonstrating "a fair balance between common standards and the respect to specific features of national legal traditions and judicial systems."⁴⁶ He also emphasized the still ongoing existence of structural irregularities like special opt-out-regimes.

Despite the attested lack of coherency within the legal framework of the Area of Freedom, Security and Justice, the underlying legal questions of citizen's rights and freedoms demonstrate the material dimension of European constitutionalism under the reformed treaties.

VI. Ratification and Future Amendments

The fifth main topic of the conference, alongside with the methodological foundations, human rights, institutional issues and changes in the EU policies was the ratification process.⁴⁷ The ratification became one of the hottest issues in European political life since the failure of the Treaty for a Constitution for Europe⁴⁸ and, recently, the negative Irish referendum on the Lisbon treaty. The ratification efforts accomplished through parliamentary or direct democratic procedures function as a crossing point where interests of national and supranational actors are counterbalanced. Consequently the discovery of an appropriate ratification method that could make possible a smooth treaty reform without sacrificing people and state interests and thus guaranteeing the persistence of the democracy on EU level is of great academic and practical importance.

44 Ibid., p. 172.

45 Cf. *Ruffert*, Der Raum der Freiheit, der Sicherheit und des Rechts nach dem Reformvertrag – Kontinuierliche Verfassungsgebung in schwierigem Terrain, in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung? (2008), pp. 163-166.

46 *Zemánek*, The criminal cooperation within the Area of Freedom, Security and Justice under the Treaty of Lisbon, in this volume, p. 163.

47 Cf. *Kadelbach*, Perspektiven der Ratifikation – Verfassung oder Vertrag?, in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung? (2008), pp. 75-80.

48 For an analysis of the crisis options see *de Witte*, The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective, EUI Working Paper LAW No. 2004/16; *Thym*, Weiche Konstitutionalisierung – Optionen der Umsetzung einzelner Reformschritte des Verfassungsvertrages ohne Vertragsänderung, *Integration* 2005, 307-315; *Mayer*, Wege aus der Verfassungskrise – Zur Zukunft des Vertrags über eine Verfassung für Europa, *JZ* 2007, 593-601.

The scope of discussion was very broad and not limited to the ratification of the Lisbon treaty itself. The most important issues, which attracted the focus of academic deliberation are the following. First, the future role of the Convention method within the procedure of treaty amendment; second, the ability of improving efficiency and legitimacy of the fundamental political decisions taken in the course of initiation, discussion and ratification of the amendment; third, the people's role in shaping the EU's institutional infrastructure; fourth, the idea of an evolutionary "sedimentary European Constitution".

Amending treaties that aim at the further development of the European integration is not just a technical matter. It concerns substantially the procedures' ability to permit a high degree of consensus between different actors and to ensure a more effective and democratically organized union. This was the core issue of *Arthur Benz*'s presentation. He explored whether the new rules concerning the Convention method could practically lead to such results.

An important factor in this respect is the influence of different institutional veto players – such as national parliaments, the European Parliament, national governments, the European Commission, the Council and the European Council – on the process of initiation, deliberation and ratification of treaty amendments. In this respect *Arthur Benz* focused specifically on the potential of the Convention method to contribute to the negotiation of more innovative, inclusive and fair rules that frame EU multilevel governance. According to him the inclusion of members of national parliaments as well as MPs of the European Parliament could enhance the openness of the deliberation in the Convention.⁴⁹

In this context it becomes clear that the institutional logic on EU level could make the Convention method one of the preferred instruments for treaty reform. The Convention method has the advantage of involving directly elected representatives in the treaty making and reform initiation. This is already an implicit link to the main concerns of *Tom Eijsbouts* who pleaded for a greater involvement of the people in the constitutional policy making in the EU mostly by the medium of elections.⁵⁰ The Convention method not only enhances the democratic legitimacy of constitutional reform but also creates a new role for national parliaments. However, according to *Arthur Benz*, the unanimity requirement for the ratification of a treaty amendment (re)shifts the balance from a supranational constitution making back to the intergovernmental bargaining.⁵¹

But what are the reasons for a possible deadlock in the ratification process and what remedies could be proposed? There have been two main aspects of the discus-

49 *Benz*, Amendment Procedure and the Future Importance of the Convention, in this volume, p. 231.

50 See *Eijsbouts*, Let Elections do some work. On the Difference Lisbon Makes and the New European Public, in this volume, p. 196.

51 *Benz*, note 49 supra, p. 189.

sion pertaining to the causes for the failure of the Constitutional treaty as well as for the eventual setback of the Lisbon treaty. *Tom Eijsbouts* revealed the lack of involvement of the people in the creation of the European project as well as at the affiliation gap between them and the more or less elitist projects for EU law reform. Therefore he proposed to generate public support by means of binding the parliamentary elections on national and EU level with the issue of treaty amendment. Thus, according to him, a substantial relationship to the public could be established and the treaty reforms in general as well as the Lisbon treaty in particular would not be interpreted as an artificial construction imposed from above.⁵²

The second solution to the “dead end” problem was proposed again by *Arthur Benz*. His suggestion went into the direction of the founding fathers of the US Constitution. Roughly summarized, this system provided to put the constitution into force on the basis of a majority among the states while allowing the other states either to get involved in the common constitutional enterprise or to secede. In this respect ratification with opt out clauses could be a possible compromise solution in the European context.⁵³

However, what happens if an explicit major treaty reform cannot successfully be accomplished neither through a common European wide referendum or people’s involvement in parliamentary elections nor through parliamentary ratification? In that case one could rely on the evolutionary concept of *Deirdre Curtin*.⁵⁴ According to her idea of a “sedimentary European Constitution” the EU has an empirical as well as a material constitution. Not only a set of supreme norms creating the fundament of the political community on European level can be identified. Alongside there are also empirical political institutions that perform the main functions of a constitutional system. Hence the EU constitution could be described as “a living one”. It is composed not only from “hard law”, written down in the founding and amending treaties but comprises also the practice of the EU institutions, some legal traditions and the case law of the European Court of Justice. If we take this evolutionary or “constitutional geologists” approach, we could suggest that there is a chance for informal and step by step adaptation of the EU system to the new circumstances. Insofar the constitutional “reform” could be also accomplished by the evolving constitutional practice.⁵⁵ This approach explains basic elements of the history and the current status of European political integration. However it cannot solve two structural main problems of the EU, namely the need for simultaneously enhanced efficiency and democratic legitimacy.

52 *Eijsbouts*, note 50 supra, in this volume, p. 202.

53 *Benz*, note 49 supra, p. 191.

54 *Curtin*, *The Sedimentary European Constitution - The Future of ‘Constitutionalisation’ without a Constitution*, in this volume, p. 72 et seq.

55 *Ibid*, p. 81.

It is difficult to identify *in abstracto* the best way out of a “ratification impasse”. Possible solutions could be the holding of a European-wide referendum or the renegotiation of a new reforming treaty. In any case, a specific mode of people’s involvement and a broader deliberation and thus clarity on the project seem to be necessary.

VII. Conclusion

To sum up, the benefits of the ECLN-conference were not only to assess the scope of legal changes and innovations provided by the Lisbon Treaty, but also to set the reform within the analytical continuity of European *constitutional* evolution.

In the light of the conference it becomes clear that the mandate’s approach of negating the constitutional character does not imply a renunciation of the constitutional paradigm on European level. The underlying reason for abandoning the concept of a classical constitutional structure, terminology and symbolic was the political calculation to be able to avoid referenda in the ratification process. The mandate is a political tool in order to “get the ball behind the line” as *Paul Craig* put it. Deducing a future decline of the constitutional dimension of European integration from the mandate would be, against this background, a false conclusion. Moreover, the substantial changes provided by the Lisbon Treaty reveal clearly the constitutional dimension of the reform. In other words, revisiting the constitutional paradigm leads to the conclusion that its assumptions are still valid.

Not only fundamental questions such as the Charter of Human Rights or the institutional position of national parliaments illustrate the constitutional impact of the Lisbon Treaty. Also the analysis of the relationship between social coherence and market economy as well as the developments in policy fields such as the Common Foreign and Security Policy or the Area of Freedom, Security and Justice reveal an enhanced degree of constitutionalisation. It also becomes evident that within the interconnected system of Europe’s multilevel-constitutionalism the substantial changes in the Reform Treaty are not exclusively affecting the EU-level but also the constitutional structure of the Member States.

Concerning the question of future treaty amendments, the debate about the democratic impact of the Convention method is another example for the constitutional dimension of the recent reform. In this respect one might hope that the next ECLN-conference will not be confronted with the paralysis of a second “period of reflection”, but will rather be inspired by the positive impulse of a ratified constitutional Reform Treaty: Constitutionalisation by constitution.