THE TREATY OF LISBON:
MULTILEVEL CONSTITUTIONALISM IN ACTION

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Introduction

Talking about the Treaty of Lisbon may seem equivalent, for some, to talking of an endless story of failures to reform the European Union substantially and to enhance its constitutional foundations. For others it may mean talking about the—so far—last of several attempts by the governments of the European Union Member States to overrule democratic decisions of the peoples of Europe. Again for others, like me, it is reflecting upon one of many steps in an extremely complex process of constitution-making for a political institution whose character does not fit within our familiar categories.

Again, the European Union is facing political difficulties again. After the Irish rejection of the Treaty of Lisbon, it now finds itself attempting to salvage a treaty that is deemed to be itself a salvaging of the reform promised by the Treaty Establishing a Constitution for Europe. Having some distance now from day-to-day EU politics, my intention in this article is to find out how the Lisbon Treaty fits into the ongoing constitutional process in Europe..¹ I understand this process of constitution-making and amending to go hand in hand with the process of European integration involving both the European Treaties which constitute the European Union and the national constitutions. This process is in my view:

revolutionary in that it breaks with traditional concepts about the political organization of societies;
challenging to the theories of state and constitutions, or, in short, of constitutionalism at the diverse levels of government; and
promising as a model of supranational arrangements for the pursuit of goals in the public interest common to the peoples concerned.

Regardless of how undesirable it may seem to many commentators, the Treaty of Lisbon is where we are in European integration today, and we should endeavor to understand its place in that process. As such, this Article will first comment on the issues of failure, democracy, and the process of constitution-making. The second part deals briefly with the particular nature of the European Union, which is not a state but a supranational polity based upon states and binding their respective constitutions together into what I would call a composed constitutional system (“Verfassungsverbund”).

2. Multilevel constitutionalism is a theoretical approach to conceptualize the “constitution” of this system as an interactive process of establishing, organizing, sharing, and limiting powers—a


process which involves national constitutions and the supranational constitutional framework as two interdependent elements of one legal system. The European constitution, thus, is the progressive establishment and development of this multilevel system composed of the national constitutions as a basis and the evolving European primary law as a complementary constitutional layer. In this light the Treaty of Lisbon, including the efforts to bring it into force, can be understood as a case of multilevel constitutionalism in action. I will try to demonstrate this in the third part of this article with some examples of the amendments to the EU Treaty (TEU) and the EC Treaty (TEC) as agreed upon in the Treaty of Lisbon.4

I. Failures, Democracy and Constitution-making

Given the negative referendum in Ireland, the Treaty of Lisbon seems to be the most recent and—so far—last incident in a series of failures in European constitutionalism. But democracy also seems to be at stake inasmuch as the popular vote in some Member States seems to be simply ignored, while the parliaments of other Member States reach a degree of consensus without a popular mandate—something we may associate more with times of dictatorship. To what extent are such methods inherent in a process of constitution-making in a multilevel polity? My claim is that the process as a whole demonstrates the complexity of progressively establishing a functioning supranational framework for action on behalf of the citizens concerned. Moreover, it shows the need for continuous discussion, reconsideration, and flexibility in this joint venture—including more and more peoples—to find its appropriate, and ultimately successful, constitutional shape.

1. A story of Failures?

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

4 The acronyms for the Treaties as amended by the Treaty of Lisbon I will use TEU-L (EU-Treaty after Lisbon) and TFEU (Treaty on the functioning of the EU).
a. Spinelli and the Single European Act (SEA)

It started after the first enlargement and the accession of Greece. In 1984, the European Parliament adopted a proposal for a real European Constitution drafted by Altiero Spinelli, but the governments of the then ten Member States did not like it. Instead they signed the Single European Act of 1986, which made some important amendments to the existing EEC Treaty. The SEA confirmed the qualified majority voting method in the Council in the areas where it was already in place, but not practiced since the De Gaulle-policy of the empty chair in 1966 and the Luxembourg compromise. The SEA also extended qualified majority voting to new policy areas like the harmonization of legislations for the establishment and functioning of the Single Market. It associated the European Parliament to that legislation by the “co-operation” procedure and so permitted the completion of the Single Market by 1992. This procedure applied particularly to a special provision on the completion of the Single Market by harmonization of national legislations. In addition, the SEA added new legislative powers in fields such as the environment and consumer protection policies. Thus, the abolition of barriers to trade would go along with complementary European policies securing a high level of protection at the European level for such public goods and interests as are the subject of national legislations. As restrictions of trade resulting from differences of the national solutions found in each Member State to meet these interests would continue to be justified under the exception-clause to the Treaty-provision on free trade. With the new powers the Community could achieve the goal of completing the Internal Market until the end of 1992.

The refusal to base the Community on a Constitution according to Spinelli’s proposal, thus, was certainly a failure regarding the constitutional aspects, but it triggered an important reform of the Community in substance. On the other hand, the more European integration involved general policies, the more it was

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5 1973: Denmark, Ireland and the United Kingdom  
6 (1981)  
9 Reacting to a tough integrationalist policy of Walter Hallstein, the than French President Charles de Gaulle refused French participation at the Council of Ministers until the Luxembourg compromise was reached. The Luxembourg Compromise, signed on 30 January 1966, provides that “Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community“, see: [http://europa.eu/scadplus/glossary/luxembourg_compromise_en.htm](http://europa.eu/scadplus/glossary/luxembourg_compromise_en.htm). Almost no voting took place in the Council until the mid eighties. Declaration (no 7) to the Final Act of the Treaty of Lisbon on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union in some way perpetuates the idea of the Luxembourg Compromise.  
10 With the cooperation procedure (now Article 252 TEC) the European Parliament is not only consulted but it can reject a proposal of the Commission or propose amendments in which case the Council can only adopt the act unanimously and with qualified majority only as amended by the Parliament with the consent of the Commission.
felt that its democratic legitimacy was lacking, and the Member States looked for a more direct way of controlling what was decided in Brussels.

**b. Delors and the Treaty of Maastricht**

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

For French President François Mitterrand, speaking to the French people on the eve of the 1992 referendum on the Treaty of Maastricht, the fact that the “sovereigns” of Europe took back the power of Europe was the decisive achievement of this treaty. The French referendum passed, finally, with a very slight majority of 50.04%, while the Danish referendum failed with 50.7% voting “no.” Thanks to a declaration of the Edinburgh European Council of December 1992, the Danes were allowed to benefit from some derogations, including the Euro, and voted again in May 1993 with 56.8% voting “yes.” While the hurdle was overcome, the derogations and the creation of the EU three-pillar structure show that the Member States stepped back from a short and coherent, basic legal instrument which could be considered to represent a constitution. The Maastricht Treaty established the European Union, apart from the Community, without determining its legal capacity. Instead of generally applying the Community method under which decisions and legislation with direct effect to the individual is adopted by the Council in consultation or cooperation with the European Parliament and on the proposal of the Commission, the two special chapters on Common Foreign and Security Policies and on Judicial and Police Cooperation were governed by the intergovernmental method under which unanimity persists and no legislative acts can be adopted. The whole exercise made the structure of the Union more complex instead of clarifying its shape and functioning.

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c. The Herman-Report and the Treaty of Amsterdam

Maastricht was not a satisfactory solution for those who fought for an efficient and democratic Union based upon a “real” Constitution—a text that contains only the essentials normally contained in a constitution and which also is named “constitution” with all the legal and political implications of this term. Moreover, given the re-unification of Europe since 1989, Maastricht was not considered to be a sufficient basis for the enlarged Union that was sure to come.

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

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

The matter was taken up again soon after, when what were called the “leftovers” of Amsterdam became the subject of further intense negotiations in Nice. However, even the Treaty of Nice, signed in February 2001, could not settle the key-issues at stake. It almost failed because the Irish people rejected it in its first referendum. It was only with great effort that the Irish government secured a positive vote in a second referendum in October 2002. Yet the poor substance of the treaty, and the fact that the leftovers of Amsterdam could not be agreed upon, made it clear that diplomatic negotiation in an Intergovernmental
Conference was not any more an adequate method in the enlarged Union to come to satisfactory solutions on adapting the Treaties to the political needs. The Member States nevertheless agreed on four items to be resolved in the near future: the efficiency and democratic legitimacy of decision-making, a better delimitation of the competencies of the Union, the legal status of the Charter of Fundamental Rights, and the role of national parliaments. They envisaged also applying a new method for the preparation of the reform, with more deliberation instead of negotiation and bargaining, as well as more public debates and participation during what was called the “post-Nice process.” Both the key issues of the reform and the method were more precisely defined by the Laeken Declaration of June 2001. This declaration established the Convention, which was entrusted with the preparation of “options” or proposals for reform. More importantly, in considering the simplification and reorganization of the Union under the title Towards a Constitution for European citizens, the European Heads of State and Government broke a taboo and so paved the way for the Convention and its president, Giscard d’Estaing, to finally submit a draft Treaty establishing a Constitution for Europe to the European Council in 2003.

e. Constitutional Treaty and Treaty of Lisbon

After a few amendments, this Constitutional Treaty was adopted and signed in October 2004 at the Heads of State and Government of the Member States meeting in Rome. It was welcomed by both politicians and academia throughout the Union. Yet, after being vetoed in French and Dutch referenda, the EU was plunged into a deep crisis. The European Council ordered a “reflection-period” lasting about two years. This period was used to analyse the reasons of the failure and discuss solutions. It was brought to an end when the European Council of December 2006 asked the incoming German Presidency to come up with a report on solutions for salvaging the substance of the Constitutional Treaty. Instead of a report, the Brussels Council of June 2007 came up with a mandate which very precisely defined the form and the terms of a new treaty.

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18 Ibid., p. 604 et seq.
20 The Convention is a body composed of representatives of the national governments and the Commission on the one hand, and of the national parliaments and the European Parliament, on the other. The Convention will be part of the regular amendment procedure under Article 48 (3) TEU-L.
23 Presidency Conclusions of the European Council of 14/15 December 2006, para. 5: „...The Presidency provided the European Council with an assessment of its consultations with Member States regarding the Constitutional Treaty. The outcome of these consultations will be passed to the incoming German Presidency as part of its preparations for the report to be presented during the first half of 2007”.
Instead of substituting the existing Treaties on the EU, as it was envisaged by the Constitutional Treaty, this new treaty would simply amend them in the very traditional way under Article 48 EU. This more modest approach seemed to be successful when, after a short Intergovernmental Conference from July to October, the Treaty was signed on December 17, 2007 by all 27 Member States in Lisbon. Yet even this attempt seems to have failed, so far, after the negative vote of the Irish people in June 2008.

**f. Conclusion: Constitutional Character of the Process?**

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

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

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

Third, keeping in mind the four key issues defined by the Declaration of Nice, while also considering the new role of the Convention—which comprises European and national parliamentarians as well as representatives of the governments—to elaborate the terms on which reform shall be realized, it seems difficult to deny that this process of amending the founding Treaties of the Union is a constitutional process, even if the result is not given the name Constitution.

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25 - improved legislative procedures, power-sharing and subsidiarity, the status of the Charter of Fundamental Rights, and the role of the national parliaments.
Andrew Moravcsik holds that a declared goal of the exercise—apart from a substantial institutional reform—of trying to better legitimize the European Union in (re-)founding it, arguably, on (and by) a Constitution, was both a political and a scholarly failure. Nevertheless, the very process of drafting a Constitution in a manner as open as that of the Convention, the preparing and debating of ratification in national parliaments and referenda, and the process of reflecting upon the consequences of the rejection of the Constitutional Treaty and the Treaty of Lisbon, has raised public awareness, stimulated discourse, and formed minds about the Union, its institutional framework, its powers, and its goals, more than any amendment of the Treaties in the past. This is not only important for the acceptance of the constitutional character of its foundations, but will also give the European Union as such—and European policies through improved transparency and enhanced involvement of the European and national parliaments—more democratic legitimacy than the Union has ever seen before.

2. Issues of Democracy

Notwithstanding the above, some constitutional questions have arisen regarding the procedures used. Does it conform to our democratic principles that after the French and Dutch voters said “no” to the Constitutional Treaty, their governments proceeded to “repack” the substance of the reform into the traditional form of an international treaty amending the EU and EC Treaties and then failed to submit this amending treaty another referendum? Is it democratic if, even after the new negative referendum in Ireland, the process of ratification is continued with the express intention to show the Irish people how isolated they are in their negativity? Indeed, with the exception of the Czech Republic, the decision to ratify has meanwhile been taken in all other Member States—in

26 This is the conclusion with excellent arguments of Andrew Moravcsik, The European Constitutional Settlement, in: Kathleen McNamara and Sophie Meunier, eds. Making History: European Integration and Institutional Change (State of the European Union, Vol. 8, 2007), p. 23, at 47 et seq.


29 Critical Jürgen Habermas, Ein Lob den Iren, Süddeutsche Zeitung 17.6.2008, in the Internet available: http://www.sueddeutsche.de/ausland/artikel/310/180753/, who stated that after the failing of the European Constitution the Lisbon Treaty was intended as a bureaucratically agreed emergency solution, that should be pushed forward passing over the peoples’ opinions. By this last show of strength the governments demonstrated callously that they decide themselves on the destiny of Europe: „Nach dem Scheitern einer europäischen Verfassung stellte der bürokratisch verabredete Notlösung dar, die verhohlen an den Bevölkerungen vorbei durchgepuckt werden sollte. Mit diesem letzten Kraftakt haben die Regierungen kaltblütig vorgeführt, dass sie allein über das Schicksal Europas entscheiden.“

30 The procedure of ratification will now be started in the Czech Republic since the Czech Constitutional Court has decided the case brought against the ratification of the Treaty of Lisbon on Case P1 ÚS 19/08, Judgment of 26 November 2008, cf. (English summary) http://angl.concourt.cz/angl_verze/doc/pl-19-08.php; the parallel case at the German
most cases with an overwhelming majority in the national parliaments. The governments have clearly looked for a way to bring the Treaty of Lisbon into effect notwithstanding the Irish “no.” Meanwhile, a compromise was reached at the Brussels European Council of December 2008 satisfying, among other things, Irish concerns that every Member State should continue to have its Commissioner in Brussels. The compromise is based upon the express expectation that Ireland will hold another referendum by the end of the current Commission’s term. The referendum is necessary because Ireland is the only Member State where a referendum seems to be required under its Constitution. But can the people of Ireland believe that their vote is being taken seriously if a referendum on more or less the same question is just repeated? The Brussels compromise seems largely to have taken the reasons for the Irish rejection into...
account, but as much explanation as possible will have to be given to help the Irish people understand what the Treaty is about. On that basis they will be asked to vote again, but the question of whether or not it is democratic to repeat the referendum will remain.

a. Passing Over the Popular Vote in Ireland

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

First, political pressure exercised by other Member States or by the European institutions against the Irish people seems to be unacceptable and incompatible with traditional democratic principles. Although it is true that by signing an international treaty the governments have an obligation to take all appropriate steps to ensure ratification according to its constitutional requirements, where parliamentary or popular consent—as may be required—is refused, nothing more can be asked for. In particular, there is no obligation in the EU Treaty for any Member State to accept a reform treaty. Even if the EU and the EC Treaties underline the dynamics of the integration process by talking, in their preambles, of “an ever closer union among the peoples of Europe,” this does not imply a legal obligation to ratify amendments agreed on by the governments according to the procedure of Article 48 EU. This provision expressly states that “amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.”

The freedom to ratify or not to ratify amendments is an essential feature of the Union—as will be, after the entry into force of the Treaty of Lisbon, the right of

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36 See Min Shu, Referendums and the Political Constitutionalisation of the EU, 14 ELJ (2008) p. 423, at 437, pointing at the special opportunities for sectoral interest groups and ad hoc movements to influence the result. See also Leinen/Kreutz (note 33) p. 307 et seq., referring to the prohibition, according to the case-law of the Constitutional Court, for the government to campaign for the ratification of the Treaty. See also Brigid McLaffin, Ireland and the EU Post Lisbon, Notre Europe, Dec. 2008, http://www.notre-europe.eu/uploads/txt_publication/B_Laffan_ _Traite_Lisbonne.pdf, who mentions as reasons for voting no: “erosion of Irish neutrality, abortion and conscription to a European army. The loss of a Commissioner was also cited as a concern by no voters…”. Also the lack of understanding the Treaty and the lack of knowledge was cited by 65 / 45 % of the no-voters (ibid., p. 5 and 6. As to the Irish concerns see also Annex I of the Presidency Conclusions of the Brussels European Council of 11 and 12 December 2008, para. 1 - http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf.

37 Michael Dougan, The Treaties of Lisbon 2007: Winning Minds, not Hearts, 45 CMLRev. (2008), p. 617, at 700 et seq., sees a problem of legitimacy arising from a process, which has been „driving Europe even further away from even more of its citizens than ever before“.

38 See the critical remarks of Weiler (note 28), p. 653: stating that „the President of the French Republic, on assuming the Presidency of the Union, issues barely veiled threats to the Irish should they not tow the line“. It may be questioned, however, whether these principles are still valid in an interdependent world. Andrew Moravcsik rightly commented on this paragraph that such transnational pressure might be not only democratically permissible, but democratically required. Taking account of the horizontal dimension of multilevel constitutionalism in the EU people of other Member States have a legitimate interest for the policies of each Member State (see p. 35 below).

39 Article 48, EU Treaty.
each Member State to withdraw. Yet after signing an international treaty, every government has the responsibility under international law for taking all possible steps to ensure the entry into force of that treaty. This does include, before a referendum, a thorough explanation of what is at stake and of the consequences of a failure. The question is whether or not, after a failure, the government continues to be under the obligation to look for solutions permitting the entry into effect of the treaty. I argue that it is. In the absence of clear provisions of the national constitution to the opposite, nothing excludes, after a negative vote, careful consideration and negotiation with the other contracting parties of solutions and changes to the agreement that may allow another referendum to take place among a better-informed electorate. More generally, it does not seem to be a violation of democratic principles if an elected government asks people to reconsider the question of ratification when arguments can be put forward which allow the expectation that the public perception may have changed.

It follows that given the outcome of the discussions among the governments during the past months and the new conditions under which the Irish people will be asked to take a position, there is no objection in terms of democracy against a second referendum on the Treaty of Lisbon. The remaining democratic problem is how, after the compromise reached at the European Council in December 2008, to appropriately explain the Treaty of Lisbon as well as the terms under which the Irish concerns are agreed to be met, and to convince the Irish people of the need for, and the advantages of, the reform of the Treaties.

b. From Popular to Parliamentary Ratification

The other, more general, question is whether or not it was democratic, after the negative French and Dutch referenda, to reorganize the form and slightly amend the substance of the treaty—which was a Constitutional Treaty intended to replace the existing primary law of the European Union—into a “simple” treaty amending the EU and EC Treaties, with the clear intention of avoiding the submission of the new Treaty to another referendum in these countries. Is Lisbon, as Tom Eijsbouts puts it, “a Treaty spirited by fear from the Public”?

This question can be answered with a general consideration and some reflections regarding the specific countries in question.

The general criterion is whether or not a referendum is more democratic than a parliamentary decision? The reply in my view is no. Though it is argued that a

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40 See Article 50 EU-L.
referendum is closer to the citizen, democracy does not require, or even necessarily prefer, that decisions be made directly by the individuals concerned. Direct democracy is not the regular mode in most of the EU Member States, nor is it common, at least at the national level, in the American or any other constitutional system in the world—with the famous exception of Switzerland. Constitutions of the EU Member States regularly have chosen the model of a representative, parliamentary democracy, wherein the legislative power is given to democratically elected representatives of the people in the parliaments. Even constitutions are rarely adopted by a popular vote. Thus, the decision of whether or not a reform treaty shall be ratified must be subject to a referendum only where a national constitution expressly so requires. This seems to be the case in Ireland only.

For the particular case at issue, the French and Dutch constitutions do not require a referendum, neither for the ratification of international treaties generally, nor for the specific case of an EU “integration” treaty. In each case, it was a political decision to submit the ratification to a referendum. It is a political decision, too, for governments to choose the procedure of parliamentary ratification as far as their respective constitutions so allow. In representative democracies, parliaments are democratically elected bodies with the constitutional power to do exactly this. In Germany, the ability even to hold a (consultative) referendum would require a constitutional amendment.

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

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

Regarding the French and Dutch peoples, it cannot be considered anti-democratic that these countries chose the parliamentary method of authorisation

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42 In this sense: van den Bogaert (note 28) p. 7, at 18 et seq.
to ratify the Treaty of Lisbon—just as all the remaining Member States did. As Laurence Bourgorgue-Larsen rightly points out, there is no EU “confiscation démocratique,” because the Member States retain the power to choose between the parliamentary and the popular methods of ratification.\footnote{Bourgorgue-Larsen (note 2), p. 98 et seq.}

Not only has the language been changed from the Constitutional Treaty to the Treaty of Lisbon, but also the approach of the reform: instead of replacing the existing Treaties, it will amend them. Thus, as will be shown, the Treaty of Lisbon does not operate in a fundamentally different way than earlier treaties reforming the European Union. It should be asked, then, whether a referendum in one or another Member State is the appropriate means for gauging public support for, and the perceived legitimacy of, Treaty amendments at all.\footnote{This is the question of Ziller (note 1), p. 148.} Other procedures for bringing amendments to the constitutional foundations of the EU into effect could certainly be imagined. Tom Eijsbouts proposes—in order to better involve the public—delaying the ratification until parliamentary elections have taken place in each Member State.\footnote{Eijsbouts (note 41), p. 207-211.} For replacing the Treaties by a Constitution in a more formal sense, he argues, parliamentary ratifications in all Member States could be combined with a European-wide referendum.\footnote{For more arguments and the conditions see: Ingolf Pernice, Referendum sur la Constitution pour l’Europe: Conditions Risques Implications, in: Christine Kaddous/Andreas Auer (eds.), Les principes fondamentaux de la Constitution européenne. Brussels (Braylant) 2006, p. 301-315, also WHI-paper 7/2006: \url{http://www.whi-berlin.de/documents/whi-paper0706.pdf}. Ziller (note 1), p. 149, envisages this for the Treaty of Lisbon but sees no realistic way to have it in time.} What is essential for the ratification procedures and the legitimacy of the process, though, is that the citizens are aware of the developments and feel adequately represented by their respective parliaments; that is, represented as people(s) in the will of which the Union is rooted, feel taken seriously, included in the process, and empowered as the ultimate subjects and owners of this supranational joint venture. This regards not only the internal political process in each of the Member States, but also the ways of participation at the European level.

3. Constitutional Process in a Multilevel Polity

Difficulties in bringing into effect substantial reforms of the European Union and, particularly, in giving it a Constitution, have much to do with its specificities as compared to both states and international organizations. The term “constitution” for many does confer the message that it is about a state, since traditionally it is assumed that only states can have a constitution. On the other hand, the Statutes of some international organizations, such as the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the International Labour Organisation
are called “constitution,” though they are not states and, in particular, are not vested with executive and legislative powers to be exercised with direct effect against individuals. Before I explain the specific confusion created in the case of the Constitutional Treaty with regard to the term “constitution” and what it meant for the constitutional process of the EU, let me give a brief explanation of the terms used.

**a. Terminology**

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

**aa. A “Postnational” Concept of Constitution**

While there are many definitions of the term “constitution”—formal, material, functional, etc.—most are referring to a legal instrument with the specific authority to establish, organize, and define the government of a state on the basis of the rule of law. Generally, it is related to a state. My proposition is to look more generally at its functions as an instrument of societies organizing their political arrangements and to unbundle it from the state. According to what I call a “postnational” concept, this would include all instruments—national, sub-national, and supranational—for the establishment, organization, and limitation of public authority, including the legislative, executive, and judicial powers of institutions as defined by this instrument that was created by the people concerned and regarded by them as binding upon themselves. The distinctive feature of the constitution as compared to any other law, thus, is its fundamental character to establish the original and basic legal relationship between such institutions and the individuals who, in the case of a democratic constitution, are considered both the authors and the addressees of such authority.

What distinguishes this postnational concept from the classical idea of a constitution is twofold. First, it is not exclusive; that is, it does not comprise the entirety of powers and public authority exercised within a determined territory or society. This allows conceptualizing federal systems as systems based upon some sort of power-sharing among interrelated levels of public authority, each being based upon its own constitution. Second, it is not based upon the pre-
existence of a state, the (pre-defined) people of which—as the constitution-making power—give the state its constitution. Instead, as Peter Häberle rightly puts it in his seminal “European Constitutional Theory”, in the present times of the “constitutional state” there is not more state than the constitution “constitutes”. And it may constitute political units of another kind or reach as well.

Thus, the term constitution reflects the formal consent of individuals desiring to organize themselves into a polity with determined institutions, powers, and procedures for determined action and with determined rights and duties, who so define themselves as the citizens of a polity which may be a state but may also be a supranational entity, or even one of global reach.

The essential characteristic of this notion is the status of the citizen as the author, and in some way also the owner, of the polity or organization so established by what we may call a—certainly fictive—social contract. The establishment of such a social contract may take different forms and procedures, but its function and stability as a constitution will always depend upon the continuing recognition of its legitimacy by the vast majority of the citizens. This recognition must be contractual, meaning that it is based on reciprocity between the citizens so engaged, and this is where its binding power and authority lies.

### bb. Elementary Characteristics of the State

The state has a monopoly on legitimate direct physical coercion. This is, according to Max Weber, its essential characteristic. Notwithstanding the other elements recognized by Georg Jellinek for defining a state, this power of direct physical coercion is something the Union definitely does not have. The EU is not a state, but an entity based upon states and their respective constitutions and powers. There is no European army or police. Membership in the Union is entirely voluntary and EU law has to be enforced against the citizens through national authorities. The European Court of Justice does not rule upon the validity of national law. But it has exclusive competence to rule upon the validity of European acts, and it may give preliminary rulings on the interpretation of European law when a national court requests one.
There is another important feature: States are considered to be competent to provide themselves with whatever competencies their people may wish ("competence-competence"). This is more difficult for the EU, the powers of which are limited to what the provisions of the Treaties expressly confer upon its institutions. Only by an agreement of all the Member States and their peoples can new powers be conferred to the EU. It is due to the multilevel structure of the EU and the powers conferred to it that, however, the idea of "competence-competence" no longer applies to the Member States of the EU either. This limitation is essential both for the EU and its Member States. According to the EC Treaty, in particular, European legislation as a principle is implemented by the Member States. In sum, according to the principle of subsidiarity the Union acts only insofar as Member States are deemed unable to act effectively in pursuance of the determined goals, or are unable to act at all.

cc. International Organizations

International organizations are a form of intergovernmental cooperation between states, based upon an international treaty for a determined purpose and equipped with institutions through which the contracting parties have agreed to cooperate and which are acting on their behalf. Acts of an international organization may be binding upon the states themselves, but in order to be applicable within a state, special authorisation by that state is needed.

In this light, the EU is not a classical international organization, but—if at all—a new and very special kind. The citizens of the Member States—as citizens of the Union—directly elect the European Parliament, which controls the European Commission and co-decides upon legislative acts. The citizens are granted the right of free movement throughout the Union and they participate in municipal and in European elections in whatever Member States they may have taken residence. Provisions for democratic legitimacy as well as the protection of fundamental rights are specific for constitutional public authority rather than for acts of an international organization and hence more state-like features.

57 See already ECJ Case 26/62 – Van Gend & Loos, 1963 ECR 1: „The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage”.


59 Articles 18 and 19 of the EU-Treaty.
**Conclusion: Voting on an Unknown Subject “Sui Generis”**

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

**b. Laeken and the “Constitutional Confusion”**

If there was little clarity on the terms, then the political handling of the reform in post-Nice process led to even more confusion on the issue of a Constitution for Europe. Instead of simply clarifying the constitutional character of the European Treaties, reforming them as necessary and reorganizing them within one simplified and systematic text, the Convention produced the Treaty Establishing a Constitution for Europe and claimed to have achieved a fundamental change. After this change was rejected, the Heads of State and Government decided to return to the more modest language of a simple reform of the Treaties and denied expressly the constitutional character of the future primary law of the European Union.

With all due respect, my view is that they got it all wrong at each of the three relevant stages. The initial hypothesis was wrong, since the existing primary law already has a constitutional character. It was wrong, therefore, to sell the Constitutional Treaty as a major act of constitution-making. To pretend, finally, that by omitting all constitution-language and symbolism the result would be that the future EU Treaty and Treaty on the Functioning of the EU

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60 This has been identified as a great mistake by the Luxemburg Prime Minister, Jean-Claude Juncker, in his Humboldt-Speech on Europe of November 21, 2005, on „Die Denkpause nutzen. Strategien zur Verfassung für Europa“, http://whi-berlin.de/hre, p. 2 et seq.


62 This does not mean that the EU has a Constitution in the traditional meaning, see Häberle (note Fehler! Textmarke nicht definiert.), p. 37, 273-599, 632 et seq.

63 See also Weiler (note 28), p. 650, pointing to the fact that the relationship between the EU, the Member States and the European citizens had already „followed for decades a constitutional rather than an international law sensibility and discipline...“. He also criticizes the pretention that „the legal mongrel produced by the Convention was a Constitution“.
would not have a constitutional character was wrong and misleading as well. Let me explain more in detail:

**aa. The Constitutional Character of European Primary Law**

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

> the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.

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

Thus, for the ECJ the European Treaties and the fundamental principles of European law have a constitutional character already. This is not the result of a “constitutionalization” of the Treaties by the Court’s jurisprudence, but rather due to the very specific sources and the nature of the new European legal system. The EC Treaty states in Article 249—the former Article 189 of the EEC Treaty—that like decisions as one of the forms legislative acts may take also the

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66 Decision of the Federal Constitutional Court BVerfGE 22, 293/296
69 Ibid., para. 285; see also ibid. para. 316: „... As noted above in paras. 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement“. For comments see Daniel Halberstam/Eric Stein, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order, in: 46 Common Market Law Review (2009), forthcoming, Chapter III.B.2 (near notes 134 et seq.).
70 This is the view of many authors interpreting the jurisprudence of the ECJ itself as having the effect of constitutionalizing what, at the beginning, was a simple international treaty, see: Stein, Lawyers, Judges and the Making of Transnational Constitution, 75 AJIL (1981) 1; Joseph H. H. Weiler, The Constitution of Europe, 1999, p. 224, who refers also to other actors as Commission and national Courts. If we talk about “constitutionalization” of the EU, in my view, this means talking about the citizens of the Union taking ownership of the Union in the sense of multilevel constitutionalism (see below, p. Fehler! Textmarke nicht definiert, et seq.).
regulations “shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”

The ECJ referred to this directly binding character as early as 1964 in order to establish the primacy of Community law in *Costa/ENEL*. It shows that the concept of the direct effect of Community law, as recognized more generally by the Court in *Van Gend & Loos*, was inherent already in the founding treaty of 1957. For the simple reason that under the EEC Treaty such direct legislative powers are vested with the EU institutions, the Member States had to use special provisions of their respective constitutions to ratify this particular treaty, provisions which expressly enable the state to confer sovereign powers or rights upon the institutions established by this treaty.

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

*bb. The Convention: Putting on Constitutional Clothes*

The Member States’ Heads of State and Government, however, did not use the term constitution, as I already mentioned, until the breakthrough of the Laeken Declaration of 2001. The constitutional debate was reopened when the German Minister of foreign affairs, Joschka Fischer, gave his famous Humboldt Speech of May 12, 2000 entitled *From Confederacy to Federation: Thoughts on the Finality of European Integration*. The idea was echoed in the Laeken Declaration and the Convention took it up in deciding to produce a historical milestone in giving the EU a Constitution in the form of an international treaty.

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72 ECJ Case 6/64 – Costa/ENEL (1964) ECR 1251, para. 8-13.
73 ECJ Case 26/62 – Van Gend& Loos (1963) ECR, 1, para. 10.
74 See Article 24, para. 1, of the German Basic Law; for other references see Grabenwarter (note 2), p. 95. See also Monica Claes, The National Courts’ Mandate in the European Constitution, 2006, and the Website of the European Constitutional Law Network (ECLN) which collects not only the national constitutions of the EU Member States but also important decisions of the Constitutional Courts and other highest national courts: http://www.ecln.net/index.php?option=com_content&task=view&id=29&Itemid=52.
75 Laeken Declaration, available under: european-convention.eu.int/pdf/LKNEN.pdf.
called the Treaty Establishing a Constitution for Europe. The draft of the Convention was slightly modified by the Intergovernmental Conference, adopted by the European Council and signed by all Member States in Rome on October 29, 2004.

This treaty was intended to be a substitute for the existing Treaties. While it took over most of their provisions, a number of important amendments in substance have nevertheless been added, they have been restructured and given new clothes. The Treaty of Rome II choose constitutional language for what so far was somewhat hidden behind technical administrative language. The primary law of the EU was named Constitution, the EU regulations and directives were named laws and framework laws, the “High Representative for the foreign and security policy” became the name Foreign Minister, the first Article of the Constitution stated that the Treaty is based upon the will both of the citizens and of the Member States of the Union, and the members of the European Parliament were identified as representing the citizens of the Union and not, as at present, as representatives of the peoples of their Member States. Thus, without really changing much in substance, the Constitutional Treaty allowed a little more understanding of what the EU really is and does. In the end, eighteen of the twenty-five Member States, including two popular votes (Spain and Luxembourg) and the two latest newcomers, Bulgaria and Romania, approved the Treaty establishing a Constitution for Europe. The peoples of two Member States, France and the Netherlands, voted against. Five governments did not proceed to take steps for ratification after the process was stopped by the two negative referenda.

cc. Dismantling the Constitution

All this new constitutional language was borrowed from state-related terminology. While it was argued that the EU is not and was not supposed to become a state, people and also politicians in a number of Member States felt that a treaty “establishing a Constitution for Europe” would indeed create a state, because the mere term “constitution” seemed to imply that the entity established by it is a state. In spite of important academic writings on the possibility of constitutionalism or a “constitution beyond the state,” no hope was left of bringing the Constitutional Treaty into effect.

In order to salvage the substance of the reform and to bring it into force without referenda, the only logical consequence apparently was to unclothe, or better, to dismantle the Constitutional Treaty by omitting the constitutional and state symbolism and turning back to the simple form of a treaty amending the existing EU and EC Treaties. The desired reform would still be achieved and in the end the Treaties would remain, ironically, what they were from the beginning: the constitutional charter of a Community of law. The history of the Treaty of Lisbon tells us, thus, a part of an ongoing process of European integration, the principle of which is, as explained by Jan-Werner Müller:

even what appears like constitutional failure—the popular rejection of a Treaty or an Accord—can be turned into part of a much more positive narrative: failure is a prelude to further inclusiveness, to hearing more voices, or hearing the same voices again with a different degree of attentiveness.

II. The Concept of Multilevel Constitutionalism

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

The concept of multilevel constitutionalism focuses on the correlation of national and European law from the perspective of both states and citizens. On the assumption that in modern democracies the citizens are the basis and origin of public authority and decision-making power, whether vested with national,
European, or possibly even global institutions, we reach an understanding that the two levels of government are complementary elements of one system serving the interest of their citizens, both national and European.

1. National Constitutions and European Law

The failures and intensive debates surrounding the Union and its constitutional future are phenomena inherent to constitutionalism as a process, particularly in a multilevel system of governance, such as the EU. I have proposed to use the term “multilevel constitutionalism” to describe this specific kind of constitutionalism, primarily with a view to developing a comprehensive perspective for the analysis of a process affecting national and European law simultaneously. Whenever the Treaties on the European Union are changed, national constitutions undergo significant changes as well. Both constitutional levels are in permanent interdependency. Nearly all parts of the national legal orders—from constitutional law to private and criminal law—are affected by the Treaties and EU secondary law and are thereby Europeanized. The European level, in turn, is influenced by national law, in particular through the general principles of law—including human rights as referred to in Article 6(2) of the EU Treaty and developed by the ECJ case law from national constitutional traditions.

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

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83 Pernice, Multilevel Constitutionalism (note 2) p. 703 et seq.
84 Established case-law of the ECJ beginning with Case 29/69 – Stauder, ECR 1969, 419, most recently confirmed in Case C-402/05 – Kadi, para. 283: “In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (see, inter alia, Case C:305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I:5305, paragraph 29 and case-law cited”); see also Christian Walter, History and Development of European Fundamental Rights and Fundamental Freedoms, in: Dirk Ehlers (ed.), European Fundamental Rights and Freedoms, 2007, p. 1.
85 See Article 249 of the EC-Treaty, which provides for directives adopted by the Council and the European Parliament according to the procedure of Article 251 of the EC-Treaty that they are binding for the Member States as to the objective but leave the choice of the form and means of the transposition to the national authorities. As far as legislative acts are necessary, at the national level, to bring national law in conformity with the objectives of the directive, the task of the national parliaments, thus, is to execute faithfully the provisions of the European directive.
State and Government in the European Council – and in this role they are actors of the EU and bear important European responsibilities.

The above observations concerning the institutions at both levels can also be seen in the relationship between national and European law. According to the principles of the primacy and direct effect of European law, in cases of conflict between national and European law, national administrations and courts must give precedence to the European provision and set aside the act of their own national parliament. With a few exceptions—such as competition policy, state aid, and the management of structural funds—implementing European legislation is their responsibility and their duty under EC Treaty Article 10, 86 and in doing so national authorities act as European agencies.

The Member States of the European Union, consequently, have changed their character. Though their sovereign equality within the meaning of Article 2(1) of the UN Charter remains untouched, the “constitutional culture” of EU membership means that the process of European integration is “a ‘silent cosmopolitan revolution’ that has transformed nation states themselves, as opposed to superseding them with a ‘supra-nation state’ that simply replicates the logic of the nation state on a larger scale.” 87

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

86 This is the established case-law of the ECJ, see Case 205-215/82 – Milchkontor (1983) ECR 2633, para. 17.
87 Müller (note 81) at p. 552, referring to Jean-Marc Ferry for the “constitutional culture” as being “about taming raw sovereignty, and establishing a politics of compromise, civilized confrontation and mutual learning”.
89 See above, p. 22.
influential parts of one unit, the concept of multilevel constitutionalism facilitates understanding the peculiarities of the European Union.

2. European Citizens and New Sovereignty

Creating a functioning internal market and, in close relation to this, conferring exclusive competencies to the Union for commercial and monetary policy, as well as creating shared legislative powers for environmental and consumer protection, transport and other policies, has impacted not only the Member States’s constitutions and the powers and functions of their national institutions, as described above. But the provisions of the Treaties and of European legislation and decision-making also directly affect the daily lives of European citizens.

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

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

102. The character of integration, in this regard also in the case of the European Union, can ultimately lead to protection and strengthening of the sovereignty of member states vis-à-vis external, especially geopolitical and economic factors; for example, also vis-

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90 This is what is laid down in Article 5 (2) of the EC-Treaty and in the new provisions on subsidiarity in Article 5 (3) of the new EU-Treaty as amended by the Treaty of Lisbon (hereafter called TEU-L).
91 With the concept of „cooperative sovereignty” see also Besson, Sovereignty (note 129) p. 18.
92 For this concept see Anne Marie Slaughter, The New World Order, 2004, p. 34, and 266 et seq.: „Disaggregated sovereignty“. 
à-vis newly emerging world superpowers, where it is difficult to guess the future priority of values to which they will be willing to subordinate the building of a new order in the globalized world...

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

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

This new understanding of sovereignty is reflected in new provisions included in the EC-Treaty as amended by the Treaty of Lisbon and renamed Treaty on the Functioning of the EU (TFEU), e.g. the new provisions on European solidarity in the event of severe difficulties “in the supply of certain products, notably in the area of energy,” or in the framework of environmental policies for “combating climate change”. In the face of certain threats from Russia in the case of Ukraine, another example is the conferral of new EU competency for a “Union policy on energy,” introduced under Article 194 TFEU with the objectives to “(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.” It was felt that these objectives would be more effectively served by common action than by each Member State alone, and the EC-Treaty was amended accordingly.

This is the rationale behind the European Union, which is about citizens and their concerns rather than about abstract sovereign states. This is why I believe that the more that institutions representing their citizens at the national level come to view their European function as an opportunity to pursue certain policies by common action, and the more their citizens become aware of this new function and responsibility, the more likely it is for the Union to function effectively and to get the public support needed for effective reform.

Multilevel constitutionalism, thus, encourages conceptualizing the European Union from the perspective of its citizens. On this view, instead of being a threat on national sovereignty and statehood of the Member States, as again the applicants to the German Federal Constitutional Court have put forward recently

94 Article 122 TFEU
95 Article 191 para. 1 TFEU
in their case against the ratification of the Treaty of Lisbon, the EU is an instrument of the states and their peoples for meeting new challenges and for achieving certain common political goals at the European level through European institutions, which are formally autonomous, but are in reality interacting and interwoven with national institutions, largely depending on them for their proper functioning.

Moreover, with the establishment of the European Union, the citizens of the Member States have created for themselves a new political status: They are citizens of the Union, with the rights and duties this status implies: freedom to move, free trade and open capital markets, equality, electoral rights at the European and municipal level, eligibility for important positions in the European civil service or political institutions, and even diplomatic protection by fellow Member States in third countries. Any modification of the Treaties, and also each particular measure taken by European institutions, therefore, is directly relevant for the individual citizen and his or her legal and political status.

Consequently, like in any federal system the powers conferred upon the European Union—just like the powers exercised by the national authorities—have their democratic roots in the will of the people(s). For national policies—including their stake in the European institutions such as the Council—the power comes from the will of the citizens of the respective Member State. For policies implemented through European institutions, the power comes from the will of the same citizens, but in their common identity as citizens of the Union. The principle of conferral works at the two levels, as James Madison stated very clearly, when explaining the federal division of powers, that “[t]he federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”

I borrow from this great insight to demonstrate that the concept is also applicable to the European Union, notwithstanding all the differences. As representatives of the citizens of their respective countries, the governments of the original six Member States established the European Communities and negotiated with the candidates for enlargement and with the new Member States about the successive reform treaties for the European Union. Representing the people of their country, the respective national parliaments brought all these treaties into effect, except for where this was done by direct referendum. The specific powers

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96 German Federal Constitutional Court (BVerfG), Cases 2 BvE 2/08 and 2 BvR 1010/08 – Gauweiler, pending. For the application see: [http://www.peter-gauweiler.de/pdf/Klage-Lissabon-Vertrag.pdf](http://www.peter-gauweiler.de/pdf/Klage-Lissabon-Vertrag.pdf). See also the comments of Der Spiegel of February 10, 11 and 16, 2009, to be found under: [http://www.spiegel.de/international/europe/0,1518,k-6717,00.html](http://www.spiegel.de/international/europe/0,1518,k-6717,00.html).

97 See the provisions on non-discrimination (Article 12), on the market freedoms (Articles 28 et seq., 39 et seq., 43 et seq., 49 et seq., 56 et seq.) and on the citizenship of the Union in Articles 17 to 20 of the EC-Treaty. There is no special provision, however, on the eligibility for the European civil service or political institutions. Articles 27 and 28 lit. (a) of the Staff Regulation (No 31 (EEC), however, point out that “an official of the EU may be appointed only on the condition that: (a) he is a national of one of the Member States of the Communities, unless an exception is authorized… and enjoys his full rights as a citizen” - [ec.europa.eu/dgs/personnel_administration/status/tenure100.pdf](http://ec.europa.eu/dgs/personnel_administration/status/tenure100.pdf).

and procedures for such accessions and amendments are provided for in the national constitutions. Thus, when we talk of Member States pooling their sovereignty in establishing a supranational authority or, as Article 88-1 of the French Constitution says, about “States which have freely chosen to exercise some of their powers in common...”, should we not admit that the sovereignty in question is that of the people? In other words, how can we deny that the citizens of the Member States have established—according to their respective constitutional procedures and on their behalf—the European Union? The concept of Union citizenship, consequently, helps the citizens of the Member States to identify their common political and legal status as a common European status.

As the citizens become more and more aware of the importance of European policies in their daily lives, they may also see amendments of the European Treaties more critically. The times when such treaties were taken as international treaties, dealing with foreign policies only, are over. The EU is progressively understood to be implementing policies, which, so far, are regarded as internal policies of the Member States. If the referenda on the Treaties of Maastricht and Nice, and the work of the Convention on the Treaty establishing a Constitution for Europe and the subsequent debates have had any positive effect, it is the rising awareness of the citizens that this European joint venture really matters for each of them.

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

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99 For the text see: http://www.assemblee-nationale.fr/english/8ah.asp.
100 Müller (note 81), at p. 551, who sees the “EU as a polity not based on pre-existing or ‘pre-political’ solidarities, but on mutually agreed projects and enterprises; and it is certainly prima facie true that a European constitutional culture fits the notion of an ongoing project”.
and the Union is still missing a reform that would allow it to serve its important tasks effectively.

Some of these European policies are certainly less salient for citizens and may not provide as much of a basis for sustained political learning, allegiance, cleavages, organization, and voting behaviour as is common in the national democratic process, so that European citizens do not exploit the opportunities of participation they have.\footnote{Ibid., p. 605, 615 et sequ.; see also Moravcsik, Settlement (note 26), p. 40 et seq.} What is needed, however, is a broader awareness that the Union is an efficient level of action for policies of common concern where state action would remain ineffective, and that it necessitates stronger involvement of citizens in the decision-making processes, whenever salient political questions arise.\footnote{As the Treaty of Lisbon offers better opportunities for than the existing law, see Articles 10 and 11 TEU-L and in particular the citizens’ initiative under Article 11 (4) TEU-L. Also the inclusion of the national parliaments as listed in Article 12 TEU-L and the publicity of the Council when it meets as a legislative body offer more opportunities for the citizen to take part in the political life of the EU (Articles 16 (8) TEU-L and 15 TFEU on transparency and public access to files).}

3. Dimensions of Multilevel Constitutionalism

As noted above, the national constitutions and the European constitutional level are closely interwoven and interconnected in both their institutions and their substantive law. In addition to this vertical bond between the EU and its Member States, horizontal bonds are developing between Member States under the roof of, and stimulated by, the EU framework. Although this is happening at all levels of administration, in the judiciary, and even in democratic representation, this horizontal dimension has not been described and analyzed sufficiently yet.\footnote{As a form of horizontal networks see: Slaughter (note 92), particularly on p. 19, for the parliaments ibid., p. 122 et seq. With the example of the EU arrest warrant and other horizontal arrangements: Ingolf Pernice, Die horizontale Dimension des Europäischen Verfassungsverbundes. Europäische Justizpolitik im Licht von Pupino und Darkanzali, in: Hans Jörg Derra (ed.), Freiheit, Sicherheit und Recht, Festschrift für Jürgen Meyer, 2006, p. 359-393 (also published as WHI-paper 3/05, see: \url{http://www.whi-berlin.de//documents/whi-paper0305.pdf}, p. 11 et seq.).} Its development seems to be, nevertheless, what really makes the EU “an ever closer Union” of the peoples, and citizens, of Europe. Multilevel constitutionalism focuses on both the vertical as well as the horizontal dimensions of the EU-constitutional network and so allows for a comprehensive understanding of this complex system.

a. The Vertical Dimension

In the vertical relationship between the EU and its Member States, the citizens are the source of democratic legitimacy for both levels of government, as well as the focal point for all levels of policy considerations. Guided by the principle of subsidiarity, responsibilities are assigned to the regional, national, and European levels of government with the goal of ensuring that each task is implemented most effectively in the interest of the citizens concerned. There is a
strong preference for taking action at the lowest possible level in order to safeguard the highest degree of self-determination of the citizens and the most direct democratic control possible for each policy. It is in the interest not only of the functioning of the system, but also of the citizens, to ensure that national and European action are not overlapping and competitive, but rather complementary and reciprocally supportive. Thus, in terms of the vertical balance of powers, the principle of subsidiarity is closely linked to the democratic principle in that it ensures efficiency and is the basis for the justification and legitimacy of all action at the European level. As a key element of the composed constitutional system of the EU, it governs the relationship between the two levels of public authority and is as essential for its unity and functioning as the principle of the primacy of EU Law.\textsuperscript{105}

Multilevel constitutionalism thus helps explain that the different levels of government are formally autonomous components of what is, in substance, one constitutional unit. It consists of the Member States and the European Union servicing—each at their respective level—the interests of the same citizens. Because they are each serving the same people, these components are closely interdependent and interwoven. For example, where the EU has exclusive competencies, Member States depend on effective institutions and procedures at the European level to achieve their goals.\textsuperscript{106} On the other hand, the policies of European institutions generally become effective within the Member States only through their implementation by national parliaments, administrations, and judges.

\textit{b. The Horizontal Dimension}

The other dimension of the European multilevel system of governance is the horizontal cooperation and mutual recognition between the Member States.\textsuperscript{107} Effective and coherent implementation of European policies and equal treatment of all Union citizens throughout the Member States requires cooperation and networking at all levels of national administrations,\textsuperscript{108} such as for the implementation of environmental legislation,\textsuperscript{109} the proper conduct of the competition policies,\textsuperscript{110} or for exercising regulatory functions in the

\textsuperscript{105} ECJ Case 6/64 – Costa/ENEL (1964) ECR 1251, para. 8-13. \textit{See also} Part III.6.c. infra.

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

\textsuperscript{107} For the concept see Pernice, Horizontale Dimension (note 104), p. 372 et seq.

\textsuperscript{108} See insofar the study of Anne-Marie Slaughter (note 92) p. 19 et seq, 135 et seq.


telecommunications or energy markets. In addition, it also requires cooperation among the courts and judges in all Member States.

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

These kind of “mutual evaluation mechanisms,” which are inspired “by the examples of mutual evaluation already conducted within the Council,” have the triple advantage of better ensuring implementation, institutionalizing horizontal cooperation, and learning from each other on best practices. “Cooperation on internal security” will further be promoted and strengthened within the Union by a “standing committee” to be set up within the Council under the new Article 71 TFEU. More generally, Article 74 TFEU will empower the Council to adopt “measures to ensure administrative cooperation between the relevant departments of the Member States,” and with the Commission in the areas covered by the Title on the Area of Freedom Security and Justice.

Even where the new Treaty expressly excludes any European action—for example, concerning the “maintenance of law and order and the safeguarding of internal security” —Article 73 TEFU nevertheless invites them to cooperate, by making clear that “it shall be open to Member States to organize between themselves and under their responsibility such forms of cooperation and

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112 See in particular Article 197 para. 2 EU-L: „The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States“.


114 Articles 77-81 on border controls, asylum and immigration, Articles 82-86 on judicial cooperation in criminal matters, and Articles 87-87-89 TFEU on police cooperation.

115 Article 72 TFEU.
coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.”

Furthermore, the new provisions introduced by the Treaty of Lisbon regarding the more active role of the national parliaments, namely on the “early warning system,” will lead to an extension of networks between national parliaments as well as between the national parliamentarians and the members of the European Parliament, in addition to the important work of COSAC. For example, Title II of Protocol No. 1 on the Role of National Parliaments in the European Union expressly addresses “Interparliamentary Cooperation.” Such networks are tying the diverse institutions of the Member States together to develop an ever more coherent system of interchange and cooperation.

Common values such as those laid down in Article 6 (1) of the EU Treaty still in force and in more detail in Article 2 of the EU-Treaty as amended by the Treaty of Lisbon, are contributing to this process. This also can be seen in the procedure for sanctioning Member States violating these common values, such as that set up by Article 7 of the EU Treaty and the European Charter of Fundamental Rights. These common values and, in particular, respecting the rule of law and the principle of democracy at the national level, are not only important for the functioning of the Union as such. They also play a fundamental role as a precondition for the increasing use of the principle of mutual recognition as it has been developed for the completion of the internal market—and formally acknowledged for the area of freedom, security, and

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116 Ladenburger (note 113), p. 36, interprets this „carve out“ as applying „merely to member state intelligence services, provided that they do not carry out any law enforcement measures“.
117 Article 5 (3)(2) EU-L and the new Protocol on Subsidiarity. For details see below III.3.a.
118 COSAC is the Conference of the Community and European Affairs Committees. In preparing the entry into force of the Treaty of Lisbon national parliaments have revised their legislation regarding the control of European activities of the governments and the procedures allowing coordinated action within the framework of the „early warning system“, see for Germany: Draft of a „Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union“ (BT Drs. 16/8489). In particular, the COSAC (see Article 10 of Protocol No. 1 on the Role of National Parliaments in the European Union) will be the forum in which such cooperation develops; see insofar the result of an enquiry around national parliaments on their new role and cooperation: „Cooperation among national parliaments is essential to ensure the effective exercise of parliamentary competences in the monitoring of the principle of subsidiarity and to promote the exchange of information and best practice according to the opinion of the overwhelming majority of parliaments that replied to the questionnaire. As far as the mechanisms deemed needed to improve this cooperation further, three main suggestions were made: the focus that COSAC should put on this, the more intensive use of IPEX and the strengthening of the informal network of national parliament representatives in Brussels“ (COSAC, 9th bi-annual report, May 2008, p. 26 - http://www.cosac.eu/en/documents/biannual. IPEX is the new Interparliamentary EU Information Exchange System, see: http://www.europarl.europa.eu/webgpp/webda/site/myjahiasite/users/jribot/public/IPEX_leaflet_EN.pdf.
119 Article 9 of the Protocol reads: “The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union”.
120 The provision reads: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” This provision was carried over from Article I-2 of the Constitutional Treaty.
121 Art. 7 TEU has been taken over without major amendment by Article 7 TEU-L.
122 It is the basis of the famous “Cassis-de-Dijon” jurisprudence of the ECJ, Case 120/78, Rewe, 1979 ECR 649. Also the EC program on the completion of the Internal Market as set out in the Commission’s White Paper, 12 EC Bulletin (1982), para. 1.2.3. is based upon the principle of mutual recognition. For a thorough study see: Kalypso Nicolaodis,
justice.\textsuperscript{123} Without the mutual trust based upon the recognition of these common values in all Member States, new instruments for combatting cross-border crime and terrorism like the European arrest warrant\textsuperscript{124} could not properly function.\textsuperscript{125} The implications of this horizontal effect, furthermore, trigger new kinds of interest by the people in one country for policies of the others. For example, whenever the legislation or decisions of one Member State become legally relevant in other Member States, the citizens of each Member State begin to have an interest in the politics and legal culture of the others. To this end, academic networks are established and strive for horizontal exchange of knowledge and understanding of the law, which is common to the citizens of the Union.\textsuperscript{126}

4. Multilevel Structure without Hierarchies
Talking about a multilevel structure, and the vertical and horizontal dimensions of multilevel constitutionalism, seems to imply the subordination of the “lower” level of constitutional law to the “higher” levels and, consequently, a hierarchy between European and national law. Such a hierarchy would certainly comply with a monistic normative model such as described in the legal theory of Hans Kelsen.\textsuperscript{127} Yet, insofar as European and national law are understood as formally autonomous systems, each of which is based originally on the will of the people or citizens united under their constitution respectively, such a hierarchy does not follow as a theoretical necessity.

Rather, the relationship between the two levels of law is functional and flows from both the objectives of the entire system and the principles of law. As it is an inherent quality of law that each rule applies equally to all people meeting its defined conditions, European legislation, in order to be law, must apply equally in all Member States and prevail in the case of a conflict with national law. This is a condition of the unity and functioning of the European legal system. On the other hand, supranational law is limited to certain purposes and policies, and

\textsuperscript{123} See Articles 67 (3) and 82 (1) TFEU on the mutual recognition of judgements and judicial decisions in the area of criminal justice. Powers for harmonization of laws are provided in Article 82 (1) and (2) in order to “facilitate” mutual recognition.


\textsuperscript{125} See Pernice, horizontale Dimension (note 104) p. 12 et seq.


\textsuperscript{127} Hans Kelsen, General Theory of Law and State, 1945 (translated by Anders Wedberg, 1999), p. 123 et seq. explaining the “hierarchy of norms” derived from a (hypothetical) “basic norm” which gives validity to all norms on all levels. For a critique of multilevel constitutionalism based on the theoretical terms of Kelsen see namely Jestaedt, Der Europäische Verfassungsverbund, in: Callies (note 2), p. 100 et seq., 120-124, and my reply ibid., p. 78-84.
should be complementary to national law; it is not meant to jeopardize the validity of national law or, in particular, the fundamental principles of the diverse national constitutions. Mutual consideration and regard for the functioning of the European system, as well as for the basics of national constitutional law, is therefore required—as is cooperation between the relevant actors at both levels.

Accordingly, Member States and their constitutional courts have acknowledged the primacy of European law even over their national constitutions, but this is not an unconditional primacy.\textsuperscript{128} In the view of multilevel constitutionalism, this is to be expected because there is no hierarchy between the two components of the European legal system.\textsuperscript{129} Rather, the relationship is pluralistic and cooperative,\textsuperscript{130} as it is based upon the general recognition that European law is given precedence above national law—including constitutional provisions. On this view, courts at the national and the European level share a responsibility to ensure the proper functioning of the Union, equal and effective application of the law throughout the Union, and the full respect of the basic principles common to the Union and its Member States—including the fundamental rights and liberties of the individual.\textsuperscript{131} This distinguishes the European model of multilevel constitutionalism from most federal states, where federal law trumps state law in the event of a conflict.\textsuperscript{132} This is not what Carl Schmitt and those who apply his theory of a federation to supra- or international contexts understand when talking about a federation.\textsuperscript{133} Instead of monism as for Kelsen und Schmidt there is constitutional pluralism,\textsuperscript{134} instead of hierarchy and supremacy of federal law, there is functional primacy,\textsuperscript{135} based upon mutual consideration, recognition, and


\textsuperscript{129} See also, on basis of legal pluralism: Samantha Besson, Sovereignty in Conflict, 8 European Integration Online Papers (2004), no. 15, http://eiop.or.at/eiop/texte/2004-015.html#4.4, p. 13, 22.


\textsuperscript{131} EU Treaty Article 6(1) TEU. See with references to the case law of several national supreme and constitutional courts: Ingolf Pernice, Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund (2007), WHI-paper 05/07, p. 43 et seq., 53 et seq. (http://www.who-berlin.de/documents/whi-paper0507.pdf).

\textsuperscript{132} E.g. Article 31 of the German Federal Constitution: „Bundesrecht bricht Landesrecht“ (federal law trumps Land law). See also the Supremacy Clause of Article VI (2) of the US Constitution, which says: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

\textsuperscript{133} Carl Schmitt, Verfassungsllehre (1928), p. 363 et seq. 381 (eng. translation, note 50, p. 381, at 397 et seq.), where he maintains that from the public law character of every federation follows that federation law has “always . . . precedence over Land law”. For the application of the concept of federation to International Law see: Jean L. Cohen, A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach, in: Constellations Vol. 15, No 4 (2008), p. 470 et seq.

\textsuperscript{134} For „constitutional pluralism“ see Walker (note 130), p. 336 et seq.; see also: Miguel Poiareas Maduro, Europe and the constitution: what if this is as good as it gets?, in: Joseph H.H. Weiler//Marlene Wind, European Constitutionalism Beyond the State, 2003, p. 75, at. 95 et seq., proposing to talk about “contrapuntal law” (ibid., p. 98-100); commenting the „Kadi“-jurisprudence of the ECJ in the light of constitutional pluralism: Halberstam/Stein (note 70), III.C.2.

\textsuperscript{135} See the distinction between supramacía and primacía made by the Spanish Constitutional Court with regard to the relation between the national constitution and European law in Tribunal Constitucional, Declaración DTC 1/2004 of 13 December 2004, http://www.ecln.net/index.php?option=com_content&task=view&id=61, p. 11.
cooperation between the courts.\textsuperscript{136} There is no \textit{ius belli} of the federation,\textsuperscript{137} and no “right of supervision” over the member states or right to intervene.\textsuperscript{138} Thus, national courts generally respect the primacy of European law, except—so far theoretically—for particular situations where basic values, rights, or structures of the national constitutions are in question.\textsuperscript{139}

III. Multilevel Constitutionalism in Action

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

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

\textsuperscript{136} See also the Czech Constitutional Court (note 93), para. 197: “In any case, we can also agree with the government’s opinion that, even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of member states will not be placed in a hierarchy in any way; it should continue to be a dialog of equal partners, who will respect and supplement each other’s activities, not compete with each other.”

\textsuperscript{137} As argued to be a typical feature of the federation by Schmidt (note 133), p. 396.

\textsuperscript{138} These two elements are characterizing the federation in the theory of Carl Schmitt (note 133), p. 360 et seq. (engl., p. 386 et seq.).

\textsuperscript{139} For more details see: Perrince, Verhältnis (note 131), p. 49. For the materialisation of these terms by new provisions of the Treaty of Lisbon see below, p. 57. Cohen (note 133), p. 477, proposes in view of the rights of the individuals to challenge acts at the European and on the national level that this element of „constitutional pluralism“ should be „reproduced on the international level“, though it should be added that for acts of the EU the recourse to national (constitutional) courts is \textit{ultima ratio} available in extreme situations only.

\textsuperscript{140} For summaries and comments see e.g.: Dougan, Treaty of Lisbon (note 37); Stefan van den Bogaert, Annette Schrauwen, Andrea Ott and others, in: Maastricht Journal 15, 2008 Issue 1; Ekaterina Sabatakakis, Cécile Rapoport Muriel Le Barbier-LeBris and others, in: Series in Revue du Marché commun et de l’Union européenne (2008) Nr. 518 et seq.; Rudolf Streinz/Christoph Ohler/Christoph Herrmann, Der Vertrag von Lissabon zur Reform der EU, 2nd ed. 2008; Terhechte (note 24).
1. The Citizens of the Union

If, in a democratic, multilevel constitutional system, it is ultimately the citizen to whom any political actor must be accountable and on whom legitimacy must be based, the Treaty of Lisbon can be seen as a major step forward to actually giving this concept a positive expression in the European Union. More than ever before since the introduction of European citizenship in the primary law of the EU, the amendments envisaged by the Treaty of Lisbon refer to the position and rights of the individual and, in particular, develop the political status of Member State citizens in their additional identity as citizens of the Union.

As the Lisbon Treaty scrubbed much of the “constitutional” language of the Constitutional Treaty, also the latter’s references to the “will of the citizens and States” reflected in “this Constitution“ have not been taken over. Nevertheless, the status and rights of the citizens as the source of legitimacy for European policies is referred to in a number of new provisions. They give a more precise meaning to the general clause already contained in the existing Article 1(2) of the EU Treaty, according to which “[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”

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

Along the same line, the new reference to the Charter of Fundamental Rights in Article 6 (1) EU-L as a legally binding instrument “which shall have the same legal value as the Treaties” underlines that these values are not only political

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142 See the last paragraph of the Preamble and Article I-1 (1) of the Treaty establishing a Constitution for Europe.
143 See also the observations of Müller-Graff (note 24), at p. 126. See also Part I.3.a aa supra.
144 See, e.g., Article 3 (3) (3) TUEU-L; Articles 122 (1), 194 (1), 222 TFEU.
promises, but have turned into concrete, binding law to be respected by European institutions as well as the Member States when they are implementing European law. This also applies to the provision for the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, the Lisbon Treaty carries over Article 6 (2) of the existing EU Treaty, saying that “the Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” The protection of the individual fundamental rights of the citizens, thus, is becoming a prominent feature of the new constitutional framework of the European Union.

Furthermore, the central political status of the citizen is explained in a particularly clear manner in the new “provisions on democratic principles.” All citizens are equal under European law, the citizens—no longer referred to as the peoples of the Member States—are directly represented at Union level in the European Parliament, while the national governments representing the Member States at the Union level are “democratically accountable either to their national Parliaments, or to their citizens.”

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

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146 Article 6 (2) TEU-L.
147 Article 6 (3) TEU-L.
149 Articles 9–12 TEU-L.
150 Article 9 TEU-L.
151 Article 10 (2) EU Treaty, Article 14 (2) TEU-L.
152 Article 10 TEU-L.
153 Article 10 (2) TEU-L.
154 Article 6 (1); EU Treaty, Article 2 TEU-L.
The Treaty of Maastricht fashioned one mode of expressing the newly created European citizenship by granting electoral rights for the European Parliament and local elections within the Member States. The Treaty of Lisbon grants another expression of this political status with the introduction of a citizens’ initiative.\textsuperscript{156} Under this new provision, if one million citizens from a significant number of Member States sign an initiative, they can “invite” the Commission to submit a proposal for a legal act. European citizens, thus, get the same rights as the existing law already confers to the European Parliament and the Council, though they may not only invite, but even “request” the Commission to submit an appropriate proposal on a specific issue.\textsuperscript{157}

\section*{2. Transparency of the Union and Democratic Legitimacy}

The new Treaty provisions not only strengthen the political status of European citizens, its mechanisms also allow more efficient political control. Although it is arguable whether a democratic deficit in the Union can truly be detected,\textsuperscript{158} the Treaty of Lisbon nevertheless amends and reorganizes the existing EU and EC Treaties in order to increase transparency and enhance democratic legitimacy by several measures.

\textit{a. Reorganization of the Treaties}

Though the Treaty of Lisbon does not abolish the separation between the EU and EC Treaties, it changes the nature of the distinction. The EU Treaty will no longer be a basis for the three pillar structure of the Union—which is abolished\textsuperscript{159}—but rather will contain a “constitutional umbrella” for the primary law of the EU. The new EU Treaty will be the repository of the common values, general objectives, and principles of the Union as a unified political unit; it will contain general provisions on fundamental rights, the institutional framework, and enhanced cooperation, as well as the final provisions on membership, amendments, and the Treaty’s entry into force. Except for the Common Foreign and Security Policy,\textsuperscript{160} the more detailed provisions on specific rights in the

\begin{footnotesize}
\begin{itemize}
\item Article 11 (4) TEU-L.
\item Articles 192 (2), 208 EC Treaty; Articles 225, 241 TFEU
\item See however the critical remarks of Andrea Ott, „Depillarisation’: The Entrance of Intergovernmentalism through the Backdoor?, 15 MJ (2008) 35 et seq., talking about a diffusion of pillars and an illusion of unity; intergovernmental elements spread over the entire Treaties.
\item The provisions which actually form pillar II of the EU (Articles 11-28 TEU) have not been moved to the Treaty on the Functioning of the EU. With the amendments provided for in the Constitutional Treaty they are remain in the EU-Treaty
\end{itemize}
\end{footnotesize}
Union, European competencies and policies, institutions, and financial matters will be included in the amended EC Treaty, the name of which will be “Treaty on the Functioning of the European Union” (TFEU).\footnote{161}

This new arrangement largely follows the approach of the Constitutional Treaty in that most of the substance of Parts One and Four of the Constitutional Treaty will be integrated in the EU Treaty so amended,\footnote{162} while the technical provisions of Part Three of the Constitutional Treaty will be integrated into the TFEU,\footnote{163} which can now be understood as the more technical part of the primary law. Though the systematic distinction between the more general clauses and the technical details will facilitate understanding the structure of the Union, there is no hierarchy between the two future treaties, as the first provisions of both Treaties make quite clear.\footnote{164}

Some hierarchization may be deduced, however, from the final provisions of Article 48 (6) and (7) of the new EU Treaty.\footnote{165} These provide simplified procedures for amending Part III of the TFEU on European policies except where the competences conferred to the Union by the Treaties would be increased. In addition, the European Council may unanimously adopt authorizing the Council to act by a qualified majority where, under the TFEU, unanimity is still required, and to apply the regular legislative procedure where, so far, the TFEU requires the application of a special legislative procedure. Interestingly, the simplified switch to majority voting in the Council will also apply to Title V of the EU Treaty outlining the Common Foreign and Security Policy, except for decisions with military implications and those in the area of defence.\footnote{166}

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

\footnote{161}{On the lack of coherence in the repartition in TEU and TFEU, e.g. because the CFSP is still in the TEU: Cécile Rapoport, Interrogations sur la Réorganisation du Droit Primaire de l’Union Européenne, Revue du Marché commun et de l’Union européenne, No. 518 (2008), p. 292, at 293.}

\footnote{162}{Titles I-IV and Title VI TEU-L, while the definition of the categories of competences are now included in Part One, Title I (Articles 2-6) TFEU.}

\footnote{163}{Part One, Title II, and Part Two to Seven TFEU.}

\footnote{164}{See, e.g., Article 1 (1) TEU-L: “The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as “the Treaties”). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community”.}

\footnote{165}{Cécile Rapoport, Interrogations sur la Réorganisation du Droit Primaire de l’Union Européenne, supra (talking about “hierarchisation politique”).}

\footnote{166}{Article 48 (7) (1) TFEU-L.}

\footnote{167}{See also Sieberson (note 158), p. 448 et seq.; Dougan, Treaty of Lisbon (note 37), p. 690.}
b. Public Sessions of the Legislative Council

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

c. The European Parliament’s New Powers

More transparency in the Union’s legislative activities and, consequently, more democratic legitimacy, also follows from the various provisions enhancing the powers of the European Parliament. Article 14(1) EU-L highlights that the legislative and budgetary functions in the Union shall be exercised “jointly” by the Parliament with the Council. This is the rule for the “ordinary legislative procedure” as defined in Articles 289(1) and 294 TFEU, which will apply to an increased number of policies in future—for example the agricultural policy, common commercial policy, and in many parts of the Area of Freedom, Security and Justice. Eventually this procedure will apply in most of the areas where the EU is given legislative powers.

The European Parliament will also be given the right to “elect” as President of the Commission the candidate proposed by the European Council. In choosing the candidate, the Council has to take into account the European Parliamentary elections and to hold “the appropriate consultations.” The more that political

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168 Article 16 (8) TEU-L.
169 See para. 35 of the Presidency Conclusions of the European Council of 15/16 June 2006: „Providing citizens with firsthand insight into EU activities is a pre-requisite for increasing their trust and confidence in the European Union. The European Council therefore agrees to further open up the work of the Council and adopts an overall policy on transparency (Annex I). In particular, all Council deliberations under the co-decision procedure shall now be public. It requests the Council to take the measures necessary to ensure implementation of the new policy and to review their implementation in six months with a view to assessing their impact on the effectiveness of the Council's work”.
170 Sieberson (note 158), p. 445, rightly criticizes, however, that non-legislative acts are not covered by this mechanism (ibid., p. 458) and that the accountability of the Commission and the Council to the European Parliament should be improved by mechanisms of institutional control (ibid. p. 452 et seq).
171 Problems remain in areas where the Treaty provisions refer to the non-legislative acts in which the EP must be consulted but has no vote, see Sieberson (note 158), p. 456.
172 Article .17 (7) TEU-L.
parties can come to an agreement at the European level on their political agendas and their respective top-candidate for the European elections, the more the citizens’ wills—as expressed by their electoral vote—will impact the policies proposed by the Commission. This may increase the political influence of the European Parliament as well as the interest of the citizens in European politics, while at the same time supporting the political function of the European Commission.  

**d. New Responsibilities for the National Parliaments**

The European Parliament, however, is not the only institution providing democratic legitimacy and control. As already mentioned, the active role of the national parliaments in the EU’s institutional setting is now explicitly recognized in the text of the Treaties. This is contrary to the traditional approach of the “unitary state,” under which the Community communicated with the Member States only through their permanent representatives in Brussels. The express inclusion of national institutions and their horizontal cooperation in the governance-structure of the EU is an example of what Anne Marie Slaughter describes as the “disaggregated state”. It is a new form states are taking in a world where governmental, judicial and even parliamentary networks are playing an increasingly important role, an innovation by which the EU also deviates from the classical model of international organizations and underlines its peculiar multilevel constitutional structure.

Article 12 EU-L summarizes the various forms in which “national Parliaments contribute actively to the good functioning of the Union.” One of the most striking of these is the “early warning system” instituted for the protection of subsidiarity. In terms of multilevel constitutionalism it seems to be particularly remarkable that this Article includes the participation of national Parliaments in the procedures for amending the Treaty and for the accession of new Member States:

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty”.

Even if this model of cooperation and participation is more about information than intervention, and the benefits of this procedure are questioned by

173 Dougan, Treaty of Lisbon (note 37), p. 636, who sees the risk, however, for a loss of „the relative independence from the rough-and-tumble of the ordinary left-right politics that still dominate public life within the Member States“ (ibid., p. 694).

174 See above III.1.

175 Slaughter (note 92) p. 31-33, 131 et seq.

practitioners, the formal constitutional status of national parliaments in the European decision-making processes is an important innovation. The terms of the provisions to which Article 12 refers are without parallel in international law insofar as they involve the institutions of the EU in the process for amending the Treaty and enlarging the Union. Moreover, the inclusion of representatives of both the European Parliament and the national parliaments, in addition to those of the national governments and the European Commission, and the early information of the national parliaments on any application for accession to the Union, clearly demonstrate that the national parliaments are becoming a constituent part of the multilevel European institutional system. In addition, these innovations should work to enhance the general legitimacy of the Union itself.

3. Conferral, Clarification and Subsidiarity of EU Powers

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

a. Making the Principles of Conferral and of Subsidiarity Effective

Articles 4(1) and 5(2) EU-L establish the principle of conferral. These provisions reiterate that “competences not conferred upon the Union in the Treaties remain with the Member States.” An increasing number of negative delimitations in the Lisbon Treaty work to clarify the division and balance of

179 EU-L art. 48(3) provides for representatives of national governments and the European Commission to be members of the European Convention to be established for preparing the amendments of Treaties to be adopted by the Intergovernmental Conference and ratified by the Member States.
180 EU-L art. 49.
181 Ibid., p. 498, referring to J. Maja, La contrainte européenne sur la loi", in: “La Loi”, Pouvoirs, n° 114, 2005, p. 53, at 68, stating that the Lisbon Treaty confers them a “forme nouvelle de diplomatie parlementaire distincte des relations internationales du pouvoir executive”; see also the reference to E. de Poncins, Le traité de Lisbonne en 27 clés, éd. Lignes de repères, Paris 2008, p. 216, who regards this as a change from a purely international logic, in which the executive retains the monopoly of the representation of the state, to a true logic of integration in which every national power intervenes on the European level.
182 See also Sabatakakis (note 155) p. 432, at 438.
powers between the Union and the Member States. Examples of such negative delimitations are the provision for the “sole responsibility of each Member State” over “national security,” and the general exclusion of any “harmonization of Member States’ laws or legislations” in the areas where the Union only has “competence to carry out actions to support, coordinate or supplement the actions of the Member States.” This can also be seen in specific provisions such as the competency of the Member States over the geographical demarcation of their borders, the Union’s the respect for national competency over employment policies or the guaranty that the provisions adopted in the area of social policy “shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof”.

On the other hand, for the Union’s exclusive competencies—which are now defined and listed in Articles 2(1) and 3 TFEU—the principle of conferral is reversed, meaning that Member States have no power to legislate except where expressly so empowered. Despite the new clarity in some areas, however, in areas of shared competencies the limits for European action still need to be clarified. This is where Article 5 TEU-L, with the principles of subsidiarity and proportionality, plays a decisive role. The definition of subsidiarity is maintained from the existing EC Treaty, but an important procedural device has been added with the “early warning system”.

Bringing this system into effect, Article 5(3) EU-L will contain a new paragraph reading as follows:

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

Protocol Number 2 sets up a procedure according to which the national parliaments may submit to the Presidents of the Council, the European Parliament, and the Commission a reasoned opinion on any draft legislative act, stating why they believe that the draft does not comply with the principle of subsidiarity. Express provision is made for them to consult their “regional parliaments with legislative powers.” The reasoned opinion must be taken into account by the institutions and, depending on the number of national parliaments...

[183 Article 4 (2) EU-L]
[184 Article 2 (5) TFEU]
[185 Article 77 (4) TFEU]
[186 Article 147 (1) TFEU]
[187 Article 153 (4) TFEU]
[189 Article 6 (1) of Protocol no. 2 to the Treaty of Lisbon.]
raising questions, the proposal must be formally reviewed. Should the Commission nevertheless decide to maintain the draft act, it must give a reasoned opinion for why it considers that its proposal does, in fact, conform with subsidiarity. The European Parliament and the Council have to consider all these opinions, knowing that each national parliament—or even a chamber thereof—has the right in the end to bring the case to the Court of Justice if a legal act is still considered to be incompatible with the principle of subsidiarity.

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

While it is true that under the European system it is the responsibility of the national governments sitting in the Council to make sure that national sovereignty and discretion are not exceedingly restricted by European measures, they may nevertheless tend to (ab-)use the “European path” for pushing through legislation that is unpopular at home and so agree on measures in violation of the principle of subsidiarity. Where the national parliaments—and even more importantly the political minority in the national parliaments—have the right to intervene in cases of doubt, it will be more probable that the principle of subsidiarity is taken seriously.

What is more important in the present context, however, is that the use of these new national powers will trigger a political debate about legislative activities at the European level. It may also get the parliamentarians as well as the public in the Member States more actively involved in European politics and rise awareness of the opportunities the EU offers for using its institutions for proactive politics outside the normal reach of national legislation.

190 See Dougan, Treaty of Lisbon (note 37), p. 658 et seq. For further comments and discussion see: Gavin Barrett (ed.), A New Improved Formula? The Treaty of Lisbon and National Parliaments, in: National Parliaments and the European Union: The Constitutional Challenge for the Oireachtas and Other Member State Legislatures. Clarus Press: Dublin, 2008. See also Bermann (note 188), p. 160, noting, however, that the earlier discussions on green papers, white papers and other policy documents of the Commission during the “pre-legislative” period may be the solution.

191 Such strategies are criticized by Herzsig/Gerken (note 158) p. 209, at 211, as „Spiel über die Bande“. This is the case in Germany, at least, for the right to bring the case to the ECJ (future Art. 23 para. 1a German Grundgesetz, cf. Gesetz zur Änderung des Grundgesetzdes BT-Drs. 16/8488 v. 11.3.2008, approved on 24.4.2008)

b. Protection of National Identity

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

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

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

c. Distribution and Delimitation of Competencies

It has never really been clear who in the EU is responsible for what. The new systematic definition of the categories of EU competencies introduced by the Treaty of Lisbon—exclusive, shared, coordination, and support—and an exhaustive listing of the areas of action in each category can therefore be regarded as a major step towards transparency and legal certainty. Article 2(6) TFEU points out that the precise scope of, and arrangements for, exercising the

194 Article 4(2) TEU-L.
196 Article 4(2) TEU-L.
197 Article 6 (1) Subsidiarity Protocol.
198 Articles 305–07 TFEU.
199 Article 8 (2) Subsidiarity Protocol.
200 Article 305 TEU-L (as carried over from Article 263 EU Treaty).
201 Article 2–6 TFEU.
Union’s competencies are determined by the provisions of the Treaties relating to each area. Accordingly, for “communitarizing” the Area of Freedom, Security and Justice, the Treaty of Lisbon defines the powers involved not only exhaustively but also much more precisely and restrictively.²⁰² Compared to Articles 73 and 74 of the German Grundgesetz where exclusive and concurrent legislative competencies of the federal legislator in Germany are defined in a relatively general way, the attributions of powers to the Union are much more detailed, concrete, and limited.

There is a strong debate, however, about whether or not the unchanged Article 95 of the EC Treaty—regarding harmonization of Member State legislation—and, in particular, the amended terms of the “flexibility” clause in Article 352 TFEU put into question the entire system of conferred powers because of the vagueness of their terms. While paragraphs 2 to 4 of the new Article 352 TFEU provide for strict subsidiarity control and excludes acting on this basis in the area of common foreign and security policies, Article 352 (1) TFEU conferring the competency to the Union reads:

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

Some assume that this clause gives an unlimited “competence-competence” to the Union,²⁰⁴ while others see no widening of the powers in this provision compared to the terms of the existing Article 308 EC, which are interpreted quite restrictively by the EJC.²⁰⁵ My contention is that Article 352 TFEU’s limitation to the “framework of the policies defined in the Treaties” is more restrictive than the reference to just the “framework of the Common Market” that the existing Article 308 of the EC Treaty refers to. More important are the new procedural safeguards requiring the consent of the European Parliament and the alert of the national Parliaments,²⁰⁶ as well as the exclusion of harmonization in the policy fields where specific provisions of the Treaty do not allow harmonization, and

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²⁰² For details see Ladenburger (note 113), p. 34 et seq. explaining that this was „probably the most important precondition“ for an agreement at the Convention to „communitarize the Third Pillar“.
²⁰³ This will be Article 114 TFEU.
²⁰⁴ This alleged power to define and extend its own competence is one of the major issues in the case against the Treaty of Lisbon pending before the German Federal Constitutional Court. (see above, note 96), with regard to the “flexibility-clause” in Article 352 TFEU see also the judgment of the Czech Constitutional Court (note 93), paras. 145 et seq., 149: “The ability to adopt such measures is limited to the objectives defined in Article 3 of the Treaty on EU (previously Art. 2), which thus also provides a sufficient guide for determining the limits of conferred competences that Union bodies may not exceed. The third and fourth paragraphs of Article 352 expressly narrow the field in which it can be applied. In addition, as the government of the Czech Republic correctly states in its brief, Declarations no. 41 and 42 on this article (attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon) further narrow the possibility for using Article 352 of the Treaty on the Functioning of the EU as a means for covert expansion of the competences of Union bodies.”
²⁰⁵ Last: Case 402/05 – Kadi, para. 203, not yet reported, see also Opinion 1/94 – WTO (1994) ECR 5267, para. 60.
²⁰⁶ Article 352 (1), (2) TFEU
the inapplicability of the flexibility clause to objectives pertaining to the foreign and security policies.\textsuperscript{207}

On that basis, the new flexibility clause also enhances legal certainty in the divided power system of the EU. The question is a central issue in the constitutional proceedings against the Treaty of Lisbon before the Federal Constitutional Court of Germany.\textsuperscript{208} No doubt, a restrictive interpretation will have to be given with regard to the principle of conferral which otherwise would be meaningless.

4. Efficiency of Decision-Making Procedures

The design of the decision-making procedures—in particular, the balance of states’ and citizens’ representation—and the question of when the Council decides by qualified majority or takes unanimous decisions, is also of great relevance for the constitutional balance of powers between the EU and its Member States. One of the most difficult chapters in the Treaty of Lisbon therefore was the decision-making procedure in the Council. While everybody agreed on the need for the most general application of the ordinary legislative procedure, with the Council deciding by qualified majority, Member States had quite divergent ideas about where unanimity needed to be maintained and where decisions by qualified majority were possible. A great number of areas were eventually transferred from unanimity to qualified majority, but with the “alarm bell system” and important opt-outs for the UK in the areas of criminal justice and police cooperation.\textsuperscript{209} This alone is an important advancement in efficiency for a Union of 27 Member States.

Another issue presented even more problems: what are the criteria for a qualified majority? The Nice system was thought to be impracticable and also unfair by most of the Member States, while the German proposal for a double majority—under which a qualified majority is reached if at least 15 members of the Council having 55\% of the votes and representing at least 65\% of the population of the Union agree\textsuperscript{210}—was strongly opposed by Poland and Spain, the countries who had the greatest advantage under the Nice system. Finally, an agreement was reached under which the double majority system will be introduced, but not before November 1, 2014.\textsuperscript{211} A protocol regarding these provisions states that until May 31, 2017 any Member State can ask that the old method be applied in

\textsuperscript{207} Article 352 (3), (4) TFEU

\textsuperscript{208} German Federal Constitutional Court (BVerfG), Cases 2 BvE 2/08 and 2 BvR 1010/08 – Gauweiler, pending. For the application see: http://www.peter-gauweiler.de/pdf/Klage-Lissabon-Vertrag.pdf.

\textsuperscript{209} Ladenburg (note 113), p. 32 et seq. calls it the „emergency brake“, considering it nevertheless „also as an accelerator“, since it allows an „ad hoc opt-out“ of Member States experiencing persistent problems with an initiative.

\textsuperscript{210} Article 16 (4) TEU-L.

\textsuperscript{211} For details see e.g. Stefan van den Bogaert, Qualified Majority Voting in the Council: First Reflections on the New Rules, 15 MJ (2008), p. 97.
a particular case. Such constitutional dynamics are familiar in the EU system, as shown by the original provisions on the time frame for the abolition of customs among the Member States and the “passarelle” clauses like Article 42 of the existing EU Treaty or the future Article 48(7) EU-L. Though the transition period is extremely long for the double majority system to come into effect, this system is more democratic and, above all, simpler and more transparent than the present voting system at the Council.

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

5. Legal Capacity and Foreign Representation of the Union

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

a. The EU’s Legal Capacity and Unity

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

212 Article 3(2) of the Protocol No 36 on Transitional Provisions. Find a detailed description of the QMV in Dougan, Treaty of Lisbon (note 37), p. 630 et seq.; Terhechte (note 24) at p. 166 et seq.
213 These provisions contained transitional periods for the step by step completion of the internal market or allow to step forward with integration according to special conditions laid down in the respective provisions.
214 Müller-Graff (note 24) at p. 131, criticizes nevertheless that this is not sufficient.
216 See the table showing an average of 83.17% of legislation adopted by consensus during the period from 1994 to 2005, ibid., p. 82.
217 Article 281 EC Treaty.
b. Uniting Shared Competencies: The High Representative for CFSP

The recognition of its legal personality also underscores the character of the Union as a multilevel actor with competencies shared among itself and its Member States. Without regard to the question of whether a specific action is a matter of European or national competency, or both, for matters of common interest it will, after Lisbon, always be the Union who is acting.\(^{219}\) The question of competency will only be relevant for the choice of the internal procedures and of the person representing the Union; within the areas of Community competency, this is always the European Commission, while negotiations and representation for the other areas will be undertaken by the presidency of the Council.\(^{220}\)

The new position of “High Representative of the Union for Foreign Affairs and Security Policy” will, in some respects, represent the unity of the two domains. This person will additionally play the double role of being the Vice-President of the Commission responsible for foreign affairs.\(^{221}\) In the function of what the Constitutional Treaty called the EU “foreign minister,” he or she will also chair the Foreign Affairs Council,\(^{222}\) make proposals for the shaping of the foreign and security policy,\(^{223}\) and be responsible—together with the Member States—for putting these policies into effect.\(^{224}\) This “double hat” and “double role” in some way mirrors the unity of the supranational (Commission) and intergovernmental (Council) logic of the Union; it combines in one person the European and the Member States’ lines of interest. The responsibility of ensuring the “consistency of the Union’s external action”\(^ {225}\) precisely describes what the Treaty of Lisbon is aiming at: the Union shall be perceived as one unit, speak with one mouth, and implement consistent policies in external matters.

These provisions, however, do not imply that the competence for external and security policies will be passed in their entirety from the Member States to the Union. As can be seen from Article 34 EU-L, the Member States will continue to act in international organizations and conferences, though they are meant to coordinate their actions, in order to defend the common positions of the EU and to inform each other of their actions. Article 24(1) EU-L expressly states that “the adoption of legislative acts shall be excluded.” Although particular tensions may exist with the national security and defense policies, there is provision for

\(^{219}\) See Articles 24, 26, 28, 31 TEU-L.
\(^{220}\) See in particular Article 18 para. 4 TEU-L: “The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.”
\(^{221}\) Article 18(2) TEU-L.
\(^{222}\) Article 18(4) TEU-L.
\(^{223}\) Article 26(3) TEU-L.
\(^{224}\) Article 27(1) TEU-L.
\(^{225}\) Article 15 (5), 17 (1), 22 (2), Article 218 (3) TFEU.
ensuring consistency, and the amended EU Treaty provides that “the Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.”

This seems to be contrary to Article 4(2) EU-L, under which “national security” is said to remain “the sole responsibility of each Member State.” As this provision does not seem to be limited to internal matters of police and home affairs, the contradiction can only be reconciled if national security is distinguished from the security of the Union—defined in Article 21(2) EU-L as one of the objectives of the Common Foreign and Security Policy of the EU. Yet, the distinction looks rather artificial. For example, Article 42(2) EU-L envisages the possibility of a future inclusion of defense policies in the framework of coordinated or even common action, saying:

The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

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

c. The President of the European Council
With a view to ensuring better and more continuous representation towards third states, as well as towards the citizens of the Union, the new position of

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226 Article 24(1) TEU-L.
227 The provision reads: “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity…”
229 Cf. Sieberson (note 158), p. 454, emphasizes the significance of the European Council president and the High Representative as “recognisable public figures who might offer EU citizens a greater sense of shared identity”. See also Ingolf Pernice, Democratic Leadership in Europe: The European Council and the President of the Union, in: José María Beneyto Peréz (ed.), El Gobierno de Europa. Diseño institucional de la Unión Europea. The Government of Europe,
President of the European Council is a significant advance. The President will be elected by a qualified majority of the European Council for a period of 2 ½ years, renewable once. In this capacity, he or she will ensure the external representation of the Union on issues concerning its common foreign and security policy, and so provide for the necessary continuity. Yet, for foreign issues under Union competence, as opposed to shared competence, the representation at this highest level remains the responsibility of the President of the Commission. The unity achieved at the ministerial level, thus, is not realized at the level of Heads of State and Government.

The Treaty of Lisbon, however, does not exclude merging the functions of the President of the European Council and the President of the Commission. Article 15 EU-L only states that the “President of the European Council shall not hold a national office.” Though it is not what most of the Member States had in mind, a double-hatted President would have many advantages. It would indeed better represent the unity of the Union to its citizens and third countries. It would also allow for more direct democratic control of that person by the European Parliament. Giving the highest representative of the Union a personal face and political responsibility—as would be the case for a double-hatted President of the European Council and the Commission—thus would be another step towards a more effective, coherent, and democratic system of multilevel governance.

6. Rule of Law and Voluntary Membership

Last but not least, is the respect for rule the law, which the Treaty of Lisbon not only mentions, but also enhances in various aspects. It is, as the ECJ has again confirmed recently, a fundamental constitutional principle—all the more since the Union was created by law, acts only through law, is bound to the law, and relies upon the voluntary respect of the law by all Member States. This rule is as essential for the Union and its functioning as it is for Member States and for its citizens, who entrust powers to the European institutions and mutually rely on the respect of the common rules of law.
In this Union, based upon the rule of law instead of the rule of man, and on conviction instead of physical coercion through central authorities, four constitutional changes envisaged by the Treaty of Lisbon are of particular importance regarding multilevel constitutionalism. These are the provisions on the protection of fundamental rights, the extension of the judicial protection of the individual against regulatory acts, a clarification of the principle of primacy of European law, and the right of Member States to withdraw from the Union.

a. New Provisions for the Protection of Fundamental Rights

The established jurisprudence of the ECJ since 1969 clearly confirms that the fundamental rights of the individual are protected as part of the general principles of law to be respected by all the institutions. In order to strengthen this guaranty and to make it part of the positive law, the Heads of State and Government solemnly proclaimed the Charter of Fundamental Rights at the summit of Nice in December 2000. The Charter was drafted by the first Constitutional Convention of the EU—which was established by the European Council of Cologne in June 1999—and chaired by the former President of Germany, Roman Herzog. Its objectives are, as the Preamble of the Charter states, “to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.”

Article 6(1) EU-L now refers to this Charter as a legally binding instrument which will have the same legal status as the Treaty itself. The new EU Treaty also contains a reference to the European Convention of Human Rights to which the Union shall accede, and maintains the reference of Article 6(2) of the EU Treaty to “fundamental rights . . . as they result from the constitutional traditions common to the Member States.” It specifies that they “shall constitute general principles of the Union’s law.” With these new “three pillars”—the Charter, 

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236 Presidency Conclusions of the European Council of 6 and 7th June 1999, points 44 and 45: „The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident. 45. To this end it has adopted the Decision appended as Annex IV. The incoming Presidency is asked to establish the conditions for the implementation of this Decision by the time of the extraordinary meeting of the European Council in Tampere on 15 and 16 October 1999.” See also ibid. Annex IV. The term „body“ is used here for what in fact developed to be the first Constitutional Convention.


238 Article 6 (3) TEU-L.
European Convention, and Member State constitutions—acting as the basis for the protection of fundamental rights in the Union, the Treaty of Lisbon makes it entirely clear that the powers of the Union, be they exercised by the European institutions or implemented by the Member States’ authorities, are limited to what is compatible with the fundamental rights of the individual. It confirms and strengthens, as stated above, the basic role of the individual and, in particular, the status of the citizens of the Union as the genuine subjects of the European multilevel constitutional setting. With its reference to national constitutional traditions as a basis for European fundamental rights, the treaty maintains not only the necessary dynamics of rights protection, but also the necessary openness at the Union level for the continuous borrowing and trade-offs between national and the European standards of rights through the judicial dialogue between the two constitutional levels.

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

b. Judicial Review of Regulatory Acts

The EC Treaty establishes a system of effective judicial review of all legal acts of the Community, though access to justice for individuals is limited to actions against a decision “addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.” Under the so-called “Plaumann jurisprudence” of the ECJ this means that for European acts of

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240 See above III.1.
242 Article 267 TFEU (as carried over from Article 234 EC Treaty).
243 Articles 220–45 EC Treaty.
244 Article 230(4) EC Treaty.
general application, individuals can obtain judicial protection only against “measures of direct and individual concern to them.”

This was contested by the Court of First Instance in the Jégo Quéré case of 2002 regarding Regulation 1162/2001 establishing measures for the recovery of the stock of hake. On the application of a fishing company which was not allowed under this regulation to continue its activity, the Court of First Instance detected a lacuna in the system of legal protection and found that access to justice under Article 230(4) of the EC Treaty should be extended to cases where individual rights are directly affected by a regulation even though the applicant was not individualized in the regulation as required by the established ECJ case law. In line with the convincing arguments developed by Advocate General Francis Jacobs in another case, the Court of First Instance—by giving the criterion of individual concern a larger meaning—held the application admissible. However, this judgment was annulled by the ECJ, which held that this extensive interpretation was contra legem.

In the parallel Unión de Pequeños Agricultores, the Court had already explained that if there is a lacuna it was for the Member States to fill within the framework of the ongoing reform of the Treaties.

This reform is included in the Treaty of Lisbon, under which Article 230(4)—which will become Article 263(4) TFEU—will be completed by a phrase giving the Court jurisdiction for applications of individuals “against a regulatory act which is of direct concern to them and does not entail implementing measures.”

Moreover, as advised by the Court in Unión de Pequeños Agricultores, Article 19(1)(2) of the new EU Treaty will underscore the fact that the Member States “shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

Hence, the Treaty of Lisbon not only strengthens the protection of individual rights in the EU, but also underlines the co-responsibility of the Member States.

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249 ECJ Case C-263/02 P – Jégo Quéré, para. 29-39.
250 Case C-50/00 P – Unión de Pequeños Agricultores v Council (2002) ECR I-6677, para. 45: „While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force“. 251 Concerning the problems in interpreting this provision see Dougan, Treaty of Lisbon (note 37), p. 677 et seq.; Usher, Direct and individual concern: An effective remedy or conventional solution?, 28 ELRev. (2003), 575, at 599; Schwarze, The legal protection of the individual against regulations in European Union law, 10 EPL (2004), 285; Koch, Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy, 30 ELRev. (2005), 511.
252 ECJ Case C-50/00 P – Unión de Pequeños Agricultores v Council (2002) ECR I-6677, paras. 40 and 41, concluding: „Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.“
and their courts as part of the multilevel judicial system of the Union. It confirms what the German Federal Constitutional Court had already underlined in its famous Solange II judgement: that because of the specific character of the EC’s judicial system, consisting of the national courts and the ECJ as integral parts, the latter is to be regarded as gesetzlicher Richter (the competent judge determined by law) within the meaning of Article 101(1) of the German Constitution. Where a national court, contrary to its obligation under Article 234 EC, arbitrarily refuses to refer a case to the ECJ for a violation of a fundamental right, the applicant is entitled to bring this case to the Constitutional Court for violation of this constitutional guarantee of “access to the right judge.”

253 BVerfGE 73, 339 (368), in German: http://www.servat.unibe.ch/law/dfr/bv073339.html, for an English translation see: 3 CMLR 225, noted by Frowein (1988) 25 CMLRev 201 et seq.

254 The German Federal Constitutional Court has reiterated this guarantee namely for alleged violations of fundamental rights by an EU regulation in the Order of 9 January 2001, case 1 BvR 1036/99 http://www.bverfg.de/entscheidungen/rk20010109_1bvr103699.html, paras. 17 and 18.

255 Declaration No. 17 concerning primacy, it continues with a reference to the Opinion of the Council’s Legal Service—which even includes a reference to an Opinion of the Council’s Legal Service—makes entirely clear that the established case law of the ECJ will also apply in future:

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law . . . .

256 BVerfGE 73, 339 (368), in German: http://www.servat.unibe.ch/law/dfr/bv073339.html, for an English translation see: 3 CMLR 225, noted by Frowein (1988) 25 CMLRev 201 et seq.

254 The German Federal Constitutional Court has reiterated this guarantee namely for alleged violations of fundamental rights by an EU regulation in the Order of 9 January 2001, case 1 BvR 1036/99 http://www.bverfg.de/entscheidungen/rk20010109_1bvr103699.html, paras. 17 and 18.

255 Declaration No. 17 concerning primacy, it continues with a reference to the Opinion of the Council’s Legal Service of 22 June 2007 which reads as follows: „It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. 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." This Opinion also contains a footnote quoting Case 6/64: „"It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."
As the respect of this principle by all the Member States and national authorities is a condition for the functioning of the European Union, no exception is admissible. Even with regard to national constitutions that are regarded as the supreme law of the land, the national Constitutional Courts in countries such as Spain and in Germany accept that the principle of primacy is part of European law.\textsuperscript{256} Dialogue and close cooperation between the Constitutional Courts and the ECJ, guided by the principles of mutual respect and the guaranty of national identity, will bring about an adequate solution where essential rules of national law seem to be in question. Where a true conflict remains, the Union may need to digest the occasional disregard or the Member State concerned may consider its withdrawal from the Union.

d. The Right of Withdrawal

The case of a real conflict between the supreme courts at the two levels seems to be mostly academic, but the mere fact that it may occur, coupled with the fact that there is no clear legal hierarchy, demonstrates that Union membership and respect for the rule of law are voluntary, not imposed. There is no preceptor, no domination of one legal order or court on another, and no coercion. Though the concept seems outdated under the present conditions of globalization,\textsuperscript{257} Member States may continue to consider themselves sovereign.

In addition to the flexibility provided by new opt-outs and improved provisions for enhanced cooperation, it is in order to underline this voluntary character that the Treaty of Lisbon now introduces the possibility of withdrawal in Article 50 EU-L. It is made clear, thus, that for all the states, continued EU membership remains an option but is not a duty. This adds to the legitimacy of the Union, as no Member State is forced to participate.\textsuperscript{258} Clearly the option of withdrawal is more hypothetical than a real political option for some Member States like Germany. But it is also unrealistic in terms of law, because the European Union is more than a form of cooperation among states. The more the Union can be considered as based upon the constitutional rights and freedoms of individuals, the more the option of withdrawal becomes unacceptable for both a Member State’s own citizens as well as for the citizens of the other Member States, who increasingly see themselves as holding a stake in that one Member State. This, indeed, is a reason to rethink the concept of sovereignty again.

\textsuperscript{256} The claim of Frédérique Michéa, La primauté du droit de l’Union à la lumière du Traité de Lisbonne, Revue du Marché commun et de l’Union européenne, n. 520 (July 2008), p. 446, at 447, to mention the jurisprudence of the national Constitutional Courts, is therefore not comprehensible.

\textsuperscript{257} See above, II.2.

\textsuperscript{258} For this idea see Terhechte (note 24) at p. 153.
Conclusion

The Treaty of Lisbon is neither a failure nor an overruling of democratic decisions of the people of some Member States. Before too quickly questioning the legitimacy of the process, the political background of the referenda in France, the Netherlands, and Ireland and the negative outcome need to be carefully examined, as well as the conditions under which new attempts with a second referendum or a switch to another mode of ratification may be made. Even if the Treaty of Lisbon were not to be brought into force, it contains a number of insights and clarifications which are important for the future understanding and operation of the European Union. In confirming common European values, making explicit Europe’s fundamental rights, and enhancing European constitutional principles such as democracy, the rule of law, subsidiarity, and proportionality, the Treaty reflects the “state of the art” of constitution-making for a system of multilevel governance—with a constitutional framework that is complementary to the national constitutions of its Member States. If there has been no “constitutional moment” in the making of Europe, then the conclusion and earlier revisions of the founding Treaties, the attempt to substitute them with the Treaty establishing a Constitution for Europe, and finally the submission of the Treaty of Lisbon to ratification and, under some new conditions, to a second Irish referendum, are certainly steps of a “constitutional process.” This is a process by which the European people, having learned from the horrible experiences of the past centuries—the Second World War in particular—are trying to find a legal framework for better organizing their common future.

This process has resulted in developing the citizenship of the Union, providing the people in the Member States with a more effective, transparent, and democratic political device for efficiently articulating and implementing policies that are in their common interest but which individual Member States are not able to meet effectively. Thus, the Treaty of Lisbon would not challenge sovereignty but rather strengthen it under a new, multilevel form. In this way, restructuring the Constitutional Treaty and bringing it in the traditional form of a

259 Dougan, Treaty of Lisbon (note 37), p. 700 et seq.
treaty amending the European Treaties via parliamentary ratification—and even trying for a second referendum in Ireland—does not demonstrate a disregard for democratic decisions. Rather, it shows the legitimate determination of democratically elected governments, eventually including that of Ireland, to make the advantages and the necessity of this Treaty sufficiently understood by their citizens, and under the conditions that have been agreed at by the European Council of December 2008, to give them the opportunity to reconsider their position.

Analyzing the terms of the Treaty of Lisbon in the light of multilevel constitutionalism shows that this treaty represents an important step forward. It promotes the development of the Union as a composed system of multilevel governance, in which the Member States and their constitutions are the basis upon which the supranational institutions are built, allowing them to do in common what would be impossible or ineffective if done individually. Instead of creating or developing the EU into a European super state which would replace the Member States,\textsuperscript{262} the Treaty of Lisbon balances the supranational and intergovernmental elements of the Union\textsuperscript{263} and underscores its subsidiary character as a complementary instrument of the citizens for pursuing certain common objectives.

To this end, the Treaty of Lisbon furthers the system of effective protection of fundamental rights of the individual in establishing a substantial dialogue and coherence between the two constitutional levels. It confirms and enhances the additional political status of the citizens of the Member States as citizens of the Union. It provides for the more efficient action of the institutions when exercising their respective competences, which will be more systematically and clearly defined and delimited. It clarifies the principles of subsidiarity and proportionality and establishes procedural means to better ensure their respect. By creating the position of President of the European Council, it gives the Union a personal face and voice; this de facto foreign minister (who cannot be called so) is given the power to ensure coherent foreign policies and more effective external representation of the Union.

The Treaty of Lisbon gives the national parliaments a clear European role and responsibilities for the control of the legislative activities of the Council. It revalues the European Parliament on equal terms with the Council as one of the legislative and budgetary authorities of the Union, it defines a limited set of forms in which the Union may take action, and it develops in many other ways the features of the Union as a multilevel system of governance.

\textsuperscript{262} For more arguments against the thesis of a super-state see: Moravcsik (note 101) at p. 606 et seq.: „Yet the threat of a European superstate is a myth.”

\textsuperscript{263} Dougan (note 140), p. 692, states that there is a trend of balancing supranationalism with intergovernmentalism, i.e. that greater supranational governance is counter-weighted by more effective checks and balances to protect Member States prerogatives.
Multilevel Constitutionalism regards not only supranational constitutional processes such as European integration, but also understands such processes as part of, and in close relation to, constitutional development at the national level. National constitutions change with the progress of supranational constitutional arrangements, as much as the states themselves change their face, political structure, and nature as a result of their integration in supranational organizations. Even the individual citizen as the political owner of its national policy changes identity and status, in that citizenship of the Union is regarded as “additional” to national citizenship and expresses ownership of the European Union as well.

In closing, to establish such a supranational union, to develop its democratic structures and procedures, and to organize its powers and their limits with regard to the rights of the Member States and their citizens through discussing, negotiating, evaluating, and finally ratifying the Treaty of Lisbon, is as much a constitutional exercise as organizing the statutes of a state. It is much more complex, however, and more challenging, as a social and cultural process because it is a new and innovative venture for all concerned.\textsuperscript{264} The Treaty of Lisbon, hence, is multilevel constitutionalism in action.