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Is this a Constitution? Remarks on a Contested Concept

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I. The Rhetoric of the European Council

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

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1 Presidency Conclusions, 21/22 June 2007, 11177/07, Annex I, 15.

At the time of writing, the text of the Draft Lisbon Treaty which is the outcome of this mandate can be found in OJ No 2007/C 306/1; a

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

The purpose of the 'repealing-phrase' in the Presidency Conclusions clearly is, as has already been pointed out,[2] non-analytical. Instead, it serves the political effort to find a convincing reason for avoiding dangerous referenda on the new Treaty. The argument runs as follows: these referenda were needed because of the 'constitutional concept' of the Draft Treaty establishing a Constitution for Europe. Avoiding this concept makes future referenda unnecessary.

However, this is not convincing. It is certainly not correct to reduce the constitutional concept – and thereby implicitly also the reasons for the national referenda – of the Draft Treaty on the Constitution for Europe to the creation of a single text called 'Constitution'. To a certain extent this flaw is acknowledged also by the European Council in the same document, a few lines later, when it is stressed that the Treaty on European Union (TEU-L) and the Treaty on the Functioning of the European Union (TFEU) "will not have a constitutional character". Here, it is not only confirmed that the term 'Constitution' should not be used. It is also announced that the 'Union Minister for Foreign Affairs' will be called 'High Representative of the Union for Foreign Affairs and Security Policy'; that the denominations 'law' and 'framework law' will be abandoned, the existing denominations 'regulations', 'directives'

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consolidated version of the Treaty on European Union (TEU-L) as amended and the Treaty on the Functioning of the European Union (TFEU) was published by the Council only in April 2008, 6655/08, 15 April 2008. The Draft Treaty Establishing a Constitution for Europe, the constitutional concept of which should be "abandoned", is to be found in the OJ No 2004/C 310/1.

2 *Ziller* (2007), 115 *et seq*.

and 'decisions' being retained; that there will be no Article mentioning the symbols of the EU such as the flag, the anthem or the motto; and that the Article on the primacy of EU law should not be retained, and the IGC should instead adopt a Declaration recalling the existing case law of the EU Court of Justice. Even if, also in this passage, there is a certain thrust on terminology, it is clear that these are substantive issues, and it is equally clear that the effort is to avoid, as far as possible, the similarities to aspects of constitutionality we are very familiar with at the Member States' level. In other words: several parallels to the characteristics of a statal constitution should be avoided. The deletion of the symbols and the express spelling out of the primacy rule clearly go beyond terminological modifications.

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

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

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

The borderline between a treaty under international law and a Constitution would only be transgressed if future amendments would no longer be a prerogative of the Member States as the masters of the treaties, but a competence of the Union organs. Thus, the Treaty would only have 'established' a Constitution if future amendments could be enacted by the Union itself. However, this would not have been the case: also under the Constitutional Treaty, the ratification of proposed amendments by all Member States in accordance with their respective constitutional requirements would

have remained mandatory.[3] Also, and as a consequence, no *Kompetenz-Kompetenz* – the right of the Union to define its own competences – would have been included in this text.[4] The Union should not be transformed into a State.[5] Removing the name 'Constitution' from such a text consequently appears as a sort of rectification. Such rectification would probably not provide good reasons for avoiding referenda. But it would nevertheless clarify the limited constitutional impact both of the Constitutional Treaty and the Treaty of Lisbon. Both of them would be devoid of any constitutional character.

Some commentators obviously tend to look at the Draft Constitutional Treaty this way.[6] Arguably this is also the position taken by the French *Conseil Constitutionnel*[7] when it scrutinised the draft Treaty in 2004.

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

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

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3 Articles IV-443-445 Draft Constitutional Treaty.

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

5 All of these points are rightly stressed e.g. in *Piris* (2006), 131 and 186.

6 Compare e.g. *Triantafyllou* (2007), 242 *et seq*.

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

simplified revision procedure.[8] Furthermore, there is certainly also no transfer of *Kompetenz-Kompetenz*. Quite the contrary: What is now called the 'principle of conferral' is designed to ensure that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[9] Consequently the contention could be that due to those most relevant features both the Lisbon Treaty and the Draft Constitutional Treaty do not give rise to call them a 'Constitution'.

Nevertheless, and in order to make things short: both contentions are not convincing. Regarding terminology, it is well known that the term 'Constitution' in practice is not reserved for States.[10] On the contrary, it often captures the basic legal fundaments of an international organisation, even if it is beyond any doubt that this is a 'Treaty' under international law.[11] In general, what is covered by this notion is the founding treaty leading to the establishment of an organisation, including its legal personality, as well as amendment and termination procedures. Furthermore, legal theorists often refer to the 'constitutions' of confederations.[12] Moreover, several founding instruments of traditional international organisations are expressly titled as 'constitution'. This is so in the case of UNESCO,

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8 Article 48 TEU-L. The '*passerelle*' in Article 48(7) TEU-L might be seen differently, allowing for the introduction of qualified majority voting in the Council by unanimous decision of the European Council. However, this is a very limited power. Making use of it would more be a measure implementing that Article than amending the Treaty. Also, it is not really new: a similar '*passerelle*' already exists today in Article 42 of the pre-Lisbon TEU.

The Draft Constitutional Treaty contained the very same provisions in Articles IV-443-445.

The simplified amendment procedures in Article 48(6) and (7) TEU-L are not available for the TEAEC.

9 Article 5(2) TEU-L.

10 For a comprehensive discussion of the detachment of "Constitution" and "State": *Peters* (2001), 93 *et seq*.

11 See *Schermers / Blokker* (2003) § 1146.

12 Compare *Kelsen* (1949), 319: "[t]he constitution of the central community which is at the same time the constitution of the total community, the confederacy ....".

the WHO, the ILO and the FAO. However, it should be clear that this is only a matter of terminology, while the substantive issue of transforming an international community to a State is thereby not addressed.

One could feel tempted to stop here and put the issue aside by simply pointing to the fact that the ECJ addressed the TEC as the basic 'constitutional charter' of the Community.[13] However, obviously the ECJ referred to something more substantial than just the founding instrument as such. It emphasised that the EC "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[14] And it is not by chance that the Court stressed the common features of the Community and the Member States which begs the question to what extent the 'Constitution' of the EU resembles that of States and qualifies the Union itself as something similar to a State?

Connected and more complex is the issue of *Kompetenz-Kompetenz*.[15] It shall suffice to point out that the critical yardstick under international law for the delimitation of States is self determination, not centralisation. Thus transferring the right to amendments to common organs is certainly a very important feature. However, decentralised amendment procedures giving a decisive say to the members of the community (like in the EU) do not necessarily entail that the respective community is *not* a State. A number of federal States such as the US, but also Germany and Switzerland retain a decisive influence to their component States when it comes to amendments of the constitution. Conversely, rules allowing for the amendment of Treaties by a majority of ratifications of the Member States or even by a decision of an organ of the organisation are quite common and far from automatically transforming the organisation into a State.[16] Thus, not transferring the *Kompetenz-Kompetenz* to the 'central level' is no guarantee that the Union would not turn into a State.

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

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

15 See, most notably *Lerche* (1995).

16 *Schermers / Blokker* (2003) § 1173 *et seq*.

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

Consequently, neither the qualification of the EU as based on an international Treaty both on the grounds of the Constitutional Treaty and the Lisbon Treaty, nor the ratification requirement for amendments provide a good reason for avoiding or discarding the term 'Constitution'.[17] Moreover, it is at that point not clear what it means to address the current and the future Treaties as 'Constitution' This invites for some basic reflections on constitutional concepts.

III. Thin and Thick Concepts of a Constitution

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

A legal norm may be defined as the meaning of an act of will posited from man and aiming at the behaviour of man. This is the starting point of a positivist concept. A legal order may thus be conceived as a system of norms which is effective and can, to that end, principally be enforced by coercion.[18]

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17 Similarly *Ziller* (2005), 35.

18 *Kelsen* (1967), 4 *et seq*. It shall be stressed that relying on this starting point does not necessarily include, and in fact does not include in the case of this author, accordance with other features of *Kelsen*ianism; especially not with the contention that a basic norm (*Grundnorm*) is an epistemological necessity in the *Kant*ian sense, and also not that only enforceable norms can be considered as norms (which creates difficulties for permissions and authorisations).

To determine whether any specific norm is part of a legal system – valid or binding law in a given situation – it is essential to identify what is commonly called a 'rule of recognition'. This is a rule authorising the enactment of the norm in question. The identification of such authorisation may lead to a chain of such rules of recognition. In principle such a chain might be infinite, in other words: it is not self explaining which ultimate rule of recognition should be accepted as binding. But the answer is essential in order to determine which norms govern which situations, or whether we are dealing with morals, wishful thinking, the command of gangsters, or an attempt of a revolution. Many answers are given. Some claim that justice is the ultimate yardstick and at the same time the decisive authorisation rule;[19] a variation of this might be the 'we the people rule'.[20] Others say that there it is an epistemic necessity to postulate a basic norm, even if this should be fictitious.[21] This is connected to the proposal to only assume such a basic norm with regard to effective legal systems while the content of those rules might be irrelevant. However, such a basic norm might be superfluous. It might be sufficient to qualify every effective system of norms as a legal order.[22]

On the grounds of such a definition of a legal order a second step might be to identify the *constitution* of that order. Not every norm within the system deserves to be qualified as constitutional. More than one concept is conceivable,[23] and in fact many different proposals are made, to a certain extent reflecting the differences in the underlying conceptions of law. While any positivist approach would avoid prescriptive elements aiming at specific contents, this is different especially with the concept of European Enlightenment and related conceptions. The latter would introduce rights based 'justice' as an essential feature of a constitution.

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19 E.g. *Alexy* (2002).

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

21 *Kelsen* (1967), 198 *et seq*.

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

23 Compare only *Craig* (2001), 126 *et seq*; *Gray* (1979), 191 *et seq*.

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

- The *minimalist concept* which one might also call *formal or positivist*:[24] 'Constitution' in a *material sense* is the positive norm or norms which regulate the creation of general legal norms (legislation). This might be a written or unwritten constitution brought about by custom. It necessarily includes the determination of the organs authorised to create general legal norms. A "constitution" in the *formal sense*, by contrast, is the set of norms in the legal system which is more stable in terms of alteration procedures than the (subordinate) rest of the legal order. The core purpose of these rules is to entrench the Constitution in the material sense. The formal constitution could also include other rules, e.g. fundamental rights limiting the powers of the legislator, the rule of law, democracy, separation of powers etc. However, none of these would be a constitutive element of a 'Constitution'. In principle, such a concept can be applied to State law and also to International law as a legal order.[25]
- The *concept of European Enlightenment*,[26] coined in Article 16 of the French declaration of the rights of men and of the citizen (1789): "Any society in which the guarantee of rights is not secured, and in which the separation of powers is not determined, has no constitution at all."[27] According to this approach, which

24 E.g. *Kelsen* (1967), 221 *et seq*; see also *Hart* (1994), 71 *et seq*.

25 Regarding the latter compare *Verdross* (1926). It might be seen as a variation to address the UN-Charter as the constitution of international community: *Fassbender* (1998).

26 E.g. *Ziller* (2005), 2 *et seq*.

Some reservation regarding the authorship as expressed in the term "European" is appropriate, though: *Lafayette* drew in his proposals mainly from the bills of rights of the individual North American States which themselves cannot simply be traced back to the well known English sources, the latter lacking higher rank and enforceable individual rights; compare *Jellinek* (1901), 13 *et seq*, 43 *et seq*.

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

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

There are many variations to this concept, some of them detailing the approach further.[28] Summing up in sober language one might coin the core subject of a Constitution – and omitting certain controversies – in defining and authorising certain organs to enact (and to enforce) law which is directly binding on the citizens, to define the law making procedures, and to establish limits to the powers of the authorised organs, especially limits flowing from rights of citizens and requirements of checks and balances.

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

Jellinek (1901), 40 *et seq* points to the Bills of Rights of New Hampshire and of Massachusetts as models for Article 16. The latter, however, is much shorter and clearer in language (as are many of the French stipulations).

28 Compare only *Craig* (2001), 126 *et seq*, and *Pernice* (2001), 158, *Streinz / Ohler / Herrmann* (2008), 8 *et seq*, with further references.

What is deliberately not included in the above concepts is the contention that a 'true' constitution must contribute to the shaping of collective identity. This may be desirable for a 'good' constitution. This author holds that such ambition should be kept apart from the conceptual debate. Even more problematic is the stance – emphatically voiced not the least in the German debate – that the 'relative homogeneity' of a polity (a people, a nation) might be an indispensable *prerequisite* for the existence and / or the establishment of a constitution. On the author's view on these issues compare *Griller* (2005), 237 *et seq*, 243 *et seq*.

- The *optimisation concept* or *international constitutionalism*:[29] more or less well defined notions of national constitutions such as the rule of law, checks and balances, human rights protection, and democracy, are being developed, detected, and/or advocated for mostly with regard to international law. Striving for the realisation of such concepts can be addressed as 'constitutionalism'.[30] In the context of the development of the international legal order such development is seen as a chance to compensate for the deficiencies resulting from 'globalisation' and/or the transfer of powers from national constitutional systems to international organisations and bodies. As a consequence it might be justifiable to talk about constitutional principles originally derived from national law which are equally to be found and optimised in (mainly) international law (EU law, WTO law, or the international legal order as such). Consequently it would be justified to isolate 'constitutional elements' in that development, and / or to develop a scale of more or less 'constitutional' systems or subsystems of law.

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

It is conceivable that constitutions as sketched out above do also exist within subsystems of legal orders. This may be so even on the grounds that such a subsystem may be seen as a delegated legal order, not as a legal order of its own. In this sense there can be constitutions of component states of federal states as well as constitutions of international organisations like those mentioned,[31] but also of organisations without an explicit self reference of that kind

29 Compare for the following *Peters* (2006). It is not that *Peters* would advocate the concept sketched out in the above text which is very much a simplification. But she excellently coins the most important "ingredients" as emerged during the last decades. Compare also *Schorkopf* (2007), 187 *et seq*., esp. 197 *et seq*.; *de Wet* (2006).

30 *Peters* (2006), 582 *et seq*., 599 *et seq*.; but compare also *Craig* (2001), 127 *et seq*.; *Weiler* (1999), 221 *et seq*.

31 Compare in the above text after fn 12.

like the WTO.[32] This is important with regard to the EU insofar as it is consequently conceivable that the Union has a constitution not only on the grounds of the prevailing view developed by the ECJ that it constitutes an "independent source of law",[33] but also on the grounds of the earlier contention differing slightly but importantly in that "...the Community constitutes a new legal order *of international law*".[34]

IV. Interim Conclusions and Remarks

A. Yes, It's a Constitution

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

The Treaties as they currently stand define legislative organs – mainly the Council or the Council together with the European Parliament, and the Commission having the monopoly of initiative whenever the 'Community Method' applies. Sources of primary and secondary law are binding not only upon the Member States but also on citizens, as far as direct application is foreseen. Limits of legislation result, amongst others, from fundamental rights as guaranteed by the ECJ which is relying on the common constitutional traditions of the Member States and draws from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[35] Separation of powers is foreseen not only vertically – through the division of competences between the EU and the Member States – but also horizontally between the institutions and

32 For the respective dispute see only *Dunoff* (2006); *Simma / Pulkowski* (2006); *Trachtmann* (2006).

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

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

35 Article 6 TEU-L.

organs of the EU – mainly through what is called the 'institutional balance'.[36]

Consequently, and even against the background of substantially differing concepts of constitution and constitutionalism, it can safely be said, even claiming that this is the prevailing view today: "The 'constitutional law' of the European Communities consists of all the rules of Community law relating to the general objectives, the allocation of competences and the way in which the legislative, executive and judicial functions are performed within the Community... the constitutional law of the *European Union* extends the analysis to cover the areas in which the Union does not act as the Community".[37]

The Union and the European Community will be merged by the Treaty of Lisbon. This makes things clearer but does not change the substance of the 'constitutional issue'. Furthermore, in all of the above mentioned fields the Lisbon Treaty, once ratified, entails minor or major changes if compared to the status quo.[38] They relate mainly to the protection of individual rights (through making the Charter of Fundamental Rights binding law), democratic aspects of law making both regarding the procedures and the organs involved, and the separation of powers (both vertically and horizontally). This means that the Constitution of the EU will be changed considerably by the Lisbon Treaty. But it does not mean that there is no Constitution.

B. Disclaimers

It might be worth reflecting that, as a matter of principle, specifying the contents of a definition as an element of scientific ambition is a matter of utility rather than truth. If we find it fruitful to conceptualise the term 'Constitution' as proposed, there is no strong argument against addressing both the Constitutional Treaty and the Lisbon Treaty as constitutions, to be more precise: as a draft for the replacement of and a draft for an amendment to the actual constitution respectively. We could also discuss whether the explicit self

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36 Compare only *Lenaerts / Verhoeven* (2002)*; Jacqué* (2004).

37 *Lenaerts / van Nuffel* (2005) para. 1-020, with further references. Compare also not only the title of the book but also the arguments in *Weiler* (1999), esp. 3-101, and 221-237.

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

reference or 'explicit' avoidance meets the usual delimitations of scientific language. Even if this would not be the case, the title 'Constitution' would not simply be wrong, but would probably change the use of the term in what we might call a legal '*Sprachspiel*', a language-game in the sense of *Wittgenstein*. Also avoiding such denomination is a meaningful 'move' within that game involving academics, politicians and citizens, not the least also organs of Member States and of the EU. As already mentioned, an important component of that 'move' in the Lisbon Treaty is to avoid similarities to constitutions of nation states.

However, several things should be kept apart from such analysis: first there is the issue of the eventual transformation of the Union into a state. By accepting that the Treaties do fulfil the mentioned functions of all of the presented constitutional concepts we acknowledge the state-like appearance of the Union. This neither implies that the Union actually is a State nor that it should become one. Admittedly, there is a point in assuming that it was the suspicion or fear that using the term 'Constitution' would entail or at least promote the future creation of a European State which triggered the opposition against such terminology. And it is to be conceded, even, that using the same term as for the legal fundaments of states for an entity which comes near a State in terms of its legal functions might indeed induce such development. On these grounds there might even be a point in assuming that concerns of this type influenced the negative outcome of the referenda in the Netherlands and in France on the Constitutional Treaty. In turn it might be 'rational' to avoid the term in the Lisbon Treaty. However, avoiding the term does neither mean that, legally speaking, the Treaty should not be qualified as a 'Constitution' nor that this would eliminate the substantive reasons for the negative referenda outcomes.

Second, regarding the debate on constitutionalism in general, calling the existing and the future amended Treaties a Constitution does not include a specific evaluation of its contents, neither a negative nor a positive one. It goes without saying that everywhere in the world we can observe deficient constitutions, or at least constitutions with a potential to be improved. By calling the Treaties a Constitution and the Lisbon Treaty an important constitutional amendment we do not necessarily imply that they establish sufficient limits to power, an optimal expression of the European polity, or that the guarantees for a system of deliberation (democracy) at

European level would be satisfactory.[39] We are simply saying that this is the fundament of the normative order of the EU which regulates law making and also addresses these issues.

V. A Step toward European Statehood?

A. Introductory Remarks

We have already seen that avoiding any 'constitutional language' in the Lisbon Treaty serves the purpose of avoiding similarities to constitutions of nation states. What should be discouraged is any suggestion that concluding this new 'Treaty' could be the next or even the decisive step to European statehood. This begs the question why this should be of importance at all and to what extent this move can be successful, in other words: what are the remaining differences between the EU and a state, and would the Lisbon Treaty change this significantly, or would the Constitutional Treaty have changed it?

In contemporary academic contributions such debate is widely avoided;[40] rather the concentration is on elaborating on the specific, '*sui-generis*' features[41] of the Union and the European Communities respectively in a 'post-national' or 'post-Westphalian' world. Debates on statehood appear to be outdated or beside the point with regard to a development which arguably from the beginning aimed at overcoming the traps of nationalism, historically being a close ally of statehood.

The Lisbon Treaty and the preceding controversies on the Draft Constitutional Treaty however make apparent that the issue has not simply "gone away" by avoiding it. This is less surprising if the broader picture of international law is taken into account.

At stake is the consequence of an entity being qualified as a 'sovereign' state under international law (even with restricted competences), or as something different, be it a 'state' within a federa-

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39 To mention some of the most popular elements of constitutionalism: compare *Poiares Maduro* (2005), 333.

40 But compare e.g. *von Bogdandy* (1999), *Dashwood* (1998), *Mancini* (1998) and *Weiler* (1998).

41 Such as 'Multilevel Constitutionalism' (*Pernice* (1999)), 'Supranational Federalism' (*von Bogdandy* (1999)), or 'European Commonwealth' (*MacCormick* (1999)), to name but a few of the many well argued proposals.

tion, or be it a component of an international organisation depriving it of its legal capacity under international law.[42] If we agree that one of the most salient features for a 'sovereign' state is the existence or the non-existence of legal personality *under international law* with all its repercussions – e.g. the ability to enter into international agreements, including membership rights in international organisations, liability under international law for wrong doing, exclusive jurisdiction, the protection flowing from the prohibition of the use of force and the right of non-intervention –, it becomes abundantly clear that the point is of vital importance for the Member States of the Union, and still remains to be even against the background of the obligations resulting from EU membership.[43] Retaining the status of 'sovereign' States makes sure that the bundle of legal rights and obligations under international law are still available, in contrast to entities not being sovereign in this sense. Legal certainty not only for EU Member States but also for all other States in the world is thus preserved. This is the more the case as long as the Union itself is not in the legal condition taking over as a *fully fledged*, 'sovereign' member of the international community.[44] And this arguably is not the case until the Union itself will either become a State or alternatively an international organisation acquiring, under the acceptance of the international community and the Member States, the whole 'bundle' of sovereign rights from its members. For, international law does not offer a third alternative to confederations – international organisations being captured by that notion – and (federal) states.[45] Summing up, the difference between

42 Compare for the following e.g. and especially *Oeter* (2002), 275 *et seq*, and 283 *et seq*, with further references; *Brownlie* (2003), 287. But compare already also *Kelsen / Tucker* (1966), 259.

It shall be stressed that this is by no means denying the merits of the contemporary debate as well as the important changes sovereignty has undergone in recent decades: compare e.g. *Walker* (2003).

43 Very clearly addressed e.g. in the speech by *Jacques Chirac* to the German *Bundestag*, 27 June 2000 (LE MONDE, 28 June 2000, 16) stressing that neither the French nor the Germans envisage the creation of a European Super State "qui se substituerait à nos Etats-nation et marquerait la fin de leur existence comme *acteurs de la vie internationale*".

44 *Giegerich* (2003), 730 *et seq.*

45 In the same vein *Leben* (2000), esp. 110 *et seq*.

being a state *directly* subordinate to international law and a component of a larger community replacing it in general involves the issue of 'international presence', international responsibility, and protection by international law. Coined in an abbreviation, sovereignty continues to be the decisive aspect of an entity forming a full member of the international community or not.[46]

This remains so irrespective of the multitude of obligations which arguably transformed EU Member States to sovereign States with restricted competences. The *internal structure* of the EU with its undeniable specificities should not be confounded with the relevance of statehood *vis-à-vis* the rest of the world. Arguably this is an important aspect of the background to the changes from the Draft Constitutional Treaty to the Lisbon Treaty.

B. Elements of Statehood

According to the 'Three-Elements-Doctrine' the essential elements of a State are State territory, State people, and State power.[47] With regard to the EU[48] it is claimed that it lacks all elements but especially the third one, since the power to use force is still monopolised by the Member States. It is argued in particular that military and police affairs, as well as the enforcement of European law in general, remain within the national sphere, and that the Union lacks also *Kompetenz-Kompetenz*.[49]

These observations are all true. However, they are not really convincing when it comes to the delimitation of confederations or Unions of States under international law and States.[50]

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46 To the same end *Oeter* (2002), 285.

47 Pathbreaking *Jellinek* (1914), 394 *et seq*. This is still relevant today under international law: compare *Brownlie* (2003), 70 *et seq*; *Cassese* (2003), 71 *et seq*.

48 The discussion in the text is dependent neither on the legal personality of the EU nor on a specific characterisation of the relationship between the EU and the Communities. Thus it of relevance both for the status quo ante before and after the Lisbon Treaty.

49 Compare e.g. *Everling* (1993), 941 *et seq*; *Oppermann* (1994), 91; *Piris* (2006), 192 *et seq*.

50 The argument shall only be sketched out briefly here. For a full debate compare *Griller et al.* (2000), 65 *et seq*; *Griller* (2005), 220 *et seq*.

As for the territorial scope of Union law, it has to be said that international law requires a definition of state territory for the sake of delimiting governmental powers.[51] There is no reason why such delimitation cannot be accomplished by referring to the territories of the Member States. As for the definition of a ‘state people’, it is, under international law, somewhat synonymous with that of population. In other words, the people of a state need not form a nation (or a ‘homogeneous people’) and it may occur that several nations are gathered in one state or that one nation can be spread over or divided into several states[52] – to mention only the well known examples of Switzerland, Belgium, Canada, South Africa or India.[53]

The most salient issue certainly is that of State power. Suffice it to say that already today the regulatory powers of the Union and the Communities do not lag far behind those of central authorities in a loosely integrated federal state. Despite acknowledged limits in several fields including foreign affairs, the EU clearly has a ‘state-like’ appearance in terms of powers. As a general impression, this view is acknowledged even by writers fiercely opposed to the concept of European statehood *per se*.[54]

It is relatively undisputed that Community competences nowadays impinge on nearly every field of national law-making. It is only of secondary concern that the exact degree of this intrusion into the core of national sovereignty (in the sense of political independence) is difficult to estimate. Moreover, this calculation varies from state to state, depending on the division of powers between legislative and executive institutions at the national level.[55]

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51 E.g. *Brownlie* (2003), 71.

52 See *Doehring* (1987), 425: “For the definition of State population, homogeneity regarding ethnic, cultural, religious, racial or other criteria is not decisive. A multinational State can be a State under international law, and the criteria mentioned above are only relevant when defining the nation as a bearer of the right of self-determination.” Compare also *Cassese* (2003), 73.

53 For a discussion of these examples, see *Mancini* (1998).

54 E.g. *Isensee* (1995), 572 *et seq*.

55 The legislative organs, *i.e.* parliaments, in Member States like Great Britain and France with a traditionally strong executive may be less affected than those in states like Germany or Austria, where thorough determination of each act of the executive by the legislature is mandatory under constitutional provisions.

In essence, the powers of the Union and the Communities encompass what is necessary for a federal state; in terms of competences maybe still a rather weak federal state, yes, but nevertheless a federal state in the sense that both central and component entities enact laws directly binding for the citizens within defined fields of activity, that there is participation of the component entities in the law making of the central entity, and that there is a mechanism of judicial settlement of disputes in cases of conflicts between them.[56]

The most forceful objection against the view that foreign affairs, military matters, other specified fields, or law enforcement in general have to be centralised in order to transform a community of states into a federal state is that the essential element of the notion of state power, at least in international law, is *not* to secure a certain element of centralisation *within* a polity but to secure – in addition to validity and efficacy – independence from outside powers. State power under international law is a decisive criterion when ascertaining self-governance,[57] but not when ascertaining the specific degree of centralisation within a state.[58] It has already been contended that the same is true for the well known debate on *Kompetenz-Kompetenz*.[59]

This is not to say that the issue of centralisation is completely irrelevant. But it is submitted that there are no good reasons to define, in terms of specific fields of activity, sort of *à priori* competences the centralisation of which would be indispensable. As far as the necessary degree of centralisation, in general terms of 'regulatory output', is concerned, neither international law nor theory provide for a precise dividing line. Instead, "there is a smooth transition from loose cooperation between states to structured cooperation within an international organization, just as there is a smooth

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56 See e.g. *Lenaerts* (1990); *Weiler* (2000), 239.

57 Meaning the ability to form a will of its own, not the absence of obligations. Compare *Doehring* (1987), 426.

58 Compare the thorough study by *Kunz* (1929), 660, who stresses that the division of competences in the field of foreign affairs is a mere question of positive law for the federal state and that under international law, the centralisation of competences does not constitute a decisive difference between a confederation and a federal state.

59 Compare in the above text near fn 15.

transition between some international organizations and sovereign states".[60]

Therefore, the conclusion is that the existing relationship between the Union (and the Communities) and its Member States does not decide the statehood of the Union conclusively.

C. The Lack of Will to Found a European State

Why, then, is the Union not perceived as a state, if the existing powers might actually be sufficiently comprehensive, if a European territory and a European population can be identified, that is to say, if the structural state of affairs is sufficient?

The contention is that the reason is simply the absence of will, on the part of the Member States and the institutions of the Union, to found a European State,[61] and the absence of corresponding acts recognising the Union's statehood on the part of the international community. This lack of will is reinforced by the Lisbon Treaty given the very absence of provisions aiming at an alteration of the current situation. However, this would have been only marginally different if the Draft Constitutional Treaty would have entered into force, as shall be shown.

The Member States of the Union are not yet prepared to change the legal quality of their relations to state law, which would be the primary implication of the foundation of a European state.[62] If the above quoted contention of the "smooth transition between some international organisations and sovereign states" is true this implies that the triad of state power, state people and state territory under international law allows for some discretion. In general, decisions on classification for entities within the zone of uncertainty

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60 *Schermers / Blokker* (2003), § 31.

61 This is rightly stressed, as a sort of bottom line, e.g. in *Piris* (2006), 194: "In the end, the strongest argument of all against the idea of the EU being a State or becoming a State, is that the Member States simply do not want that".

62 It should at the same time be noted that this would *not* imply the loss of the capacity of the Member States to act in the international sphere, especially the right to conclude treaties. Compare in this respect – the disputed issue being whether, in a case where members of a federation are empowered to conclude treaties with third parties, these members are to be classified as partial subjects of international law or only as components of a decentralised state – *Kunz* (1929), 130, 660 *et seq.*, 678 *et seq.*; *Verdross* (1926), 125 (but see also 123).

rest with the international community. The Union, having transcended the traditional limits of confederations (including international organisations), but still not equipped with the full range of the *usual* and *traditional* insignia of a state, seems to have a choice. To date, it has avoided choosing statehood, with the international community accepting this *status quo*.

In fact, according to the prevailing view, international law itself provides the basis for such a situation.[63] While the general principle is that a polity clearly fulfilling all three criteria of statehood should be classified as a state, even if it would deny being one,[64] there are specificities to be observed for non-typical 'borderline cases'. Uncertainties in the application of the traditional 'three elements' theory are inevitable and well known in practice.[65] It is possible that an entity can be recognised as a new state without or before fulfilling all of the criteria. And it is equally possible that a polity that *does* fulfil all of the criteria might not be recognised in international terms. This is relevant also for the EU which might be a specific 'borderline case' with ever more competences being transferred from the Member States. Where a clear cut decision is not possible, it seems only natural that the international community would respect the will of the entity in question.[66] As long as there is no expression of will to form a new state, there is no reason to treat this special community as if it had reached such a decision. The situation would be more difficult if there was international pressure on the entity to act as a state in the international sphere.[67] But as

63 For closer analysis compare *Brownlie* (2003), 86 *et seq*, *Cassese* (2003), 74; *Crawford* (2006), 17 *et seq* (on the EU 495 *et seq.*).

64 Compare *Doehring* (1987), 423.

65 Recent examples are offered by the recognition of Croatia, Slovenia, Bosnia-Herzegovina, and Kosovo by (parts of) the international community.

66 Some scholars argue that a state population under international law only exists if the overwhelming part of the population is willing to form a particular state. *Doehring* (1987), 424 writes: "[a] population whose majority refuses to be assembled as a State population does not correspond to the requirements for identifying a State in international law".

67 Such a pressure might at least partly develop in the framework of the participatory rights of the EU and the Member States respectively, in international organisations such as the WTO, the IMF, etc. It might

long as this is not the case, ultimately, even a highly integrated international organisation such as the European Union together with its members has the final say.

Needless to say, the fact that the Union and its Member States have so far chosen to refrain from the expression of such will or intention is not merely casual. In truth, most of the EU Member States simply prefer to uphold the idea that the Union is a community based on international law,[68] leaving untouched their own legal quality as states under international law. Furthermore, most of the Member States would be prevented by their national constitutional systems from assenting to such a step. Constitutional amendments, in some cases including a referendum, would be the constitutional prerequisite to the foundation of a European state.[69] Nothing indicates that this is about to change in the near or even in the far future.

D. Changes Made by the Lisbon Treaty – Compared to the Draft Constitutional Treaty

1. Traces of Statehood

If one scrutinises both the Draft Treaty establishing a Constitution for Europe and the Lisbon Treaty for reinforcing or developing further the already existing 'traces of statehood' in terms of centralisation and structural insignia of statehood, ambivalent strands may be detected.[70]

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be looked at as an advantage for the EU to dispose of the voting rights of all of its members, given that federally structured states are quite naturally treated as one state.

68 In 'academic language' this can be expressed like in *de Witte* (1999), 210: "The principles of direct effect and supremacy, as presently formulated and accepted, continue to confirm the nature of EC law as that of a branch of international law, albeit a branch with some unusual, quasi-federal, blossoms."

69 Compare e.g. the contributions in *Kellermann / de Zwaan / Czuczai* (2001). In some Member States, especially in Germany, it is even (but not yet convincingly) argued that the constitution would completely impede such an amendment – see e.g. *Isensee* (1995), 575 *et seq*.

70 It was already mentioned above that similarities to national constitutions should be avoided: the 'Union Minister for Foreign Affairs' was renamed the 'High Representative of the Union for Foreign Af-

What is continued – respectively would have been continued under the Constitutional Treaty – is the transfer of powers to the European Union. Specifically remarkable in this respect are the new provisions regarding the area of freedom, security and justice including not only the current powers from today's first and third pillar but including new ones.[71] Respective primary and secondary legislation consequently comes under the supranational features of direct effect and primacy. Another example which can hardly be overestimated is the reform of the Common Commercial Policy. The Constitution expands its scope to the conclusion of agreements relating to services, the commercial aspects of intellectual property and foreign direct investment.[72] Contrasting to the present situation under the Nice Treaty, this is an *exclusive* competence in its entirety. Among others, nearly the whole range of WTO-subjects would come under the new *exclusive* competence.[73] As a consequence, the Member States lose their right to conclude international agreements in these fields. Their ability to act in international fora is thereby considerably diminished.

The far reaching general clauses granting political discretion in expanding the scope of Union law by secondary legislation did not disappear, but were only marginally adjusted. In order *to achieve the establishment and functioning of the internal market*, the EU may still "adopt the measures for the approximation" of Member

fairs and Security Policy'; 'law' and 'framework law' does not appear in the text, the existing denominations 'regulations', 'directives' and 'decisions' being retained; and the symbols of the EU such as the flag, the anthem or the motto were deleted from the text. These changes will not be addressed in more detail as is contended that they have no bearing on the issue in their own right. This could be different in the context of more powerful arguments. However, such arguments seem to be missing as will be shown.

71 Title V TFEU; Part III, Title III, Chapter IV of the Constitutional Treaty.

72 Article 207 TFEU; Article III-315 of the Constitutional Treaty.

73 This might be different only regarding international agreements in the field of transport. Arguably, Article 207(5) TFEU [Article III-315(5) of the Constitutional Treaty] would create a shared competence in this field. Thus, there would still be the option to conclude (WTO-) agreements in this field as mixed agreements.

States' legislation.[74] It remains also possible to decide on the *'necessary' action* in cases where the Constitution has not provided the "necessary powers"[75] – under the new but insignificant condition that the action has to be "within the framework of the policies defined in the Treaties".

The clearer categorisation of the competencies[76] in exclusive, shared, and supporting, co-ordinating and supplementing competencies – while leaving the category open especially with regard to common foreign and security policy – does not reduce the far reaching scope of powers as transferred by the Lisbon Treaty.

Taken altogether, deliberate conferral by the Member States is being continued and deepened. A major and ever growing part of the applicable law in the Member States would be Union law or national law determined by Union law.

As a kind of counterpoise to that, the Lisbon Treaty stresses the persistent importance of the Member States and their competencies. The respect of the Union not only for the equality of the Member States but also for their national identities is expressly stipulated.[77] The Treaties protect their "fundamental structures, political and constitutional, inclusive of regional and local self-government", and call upon the Union to respect "their essential State functions, including ensuring the territorial integrity of the State …". Also, revamping the competencies certainly not only aims at clarification but includes markedly conservatory elements designed to preserve the statal character of the Member States.[78] This happens by upholding the so-called principles of conferral, subsidiarity and proportionality. Furthermore, the backside of the coin is expressly spelt out as well: "Competences not conferred upon the Union in the Treaties remain with the Member States."[79] It is

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74 Article 114 TFEU; with slightly different wording Article III-172 of the Constitutional Treaty.

75 Article 352 TFEU; with slightly different wording Article I-18 of the Constitutional Treaty.

76 Article 2 TFEU; Article I-12 of the Constitutional Treaty.

77 Article 4 TEU-L; Article I-5 of the Constitutional Treaty.

78 In parts, this is a continuation of similar efforts starting with the Maastricht Treaty at the latest; compare *Dashwood* (1998), 201 *et seq*.

79 Article 5(2) TEU-L; Article I-11 of the Constitutional Treaty (with slightly different wording).

thereby reinforced that the conferral of competencies by the Member States is a condition for a corresponding power of the Union meaning that it is not in the Union's discretion to determine its own competencies (*Kompetenz-Kompetenz*).

Another important feature, as already mentioned previously, is the provisions relating to the legal foundation of the Union including amendment procedures. First, we are dealing with a *Treaty* concluded by the Member States and open to all "European States".[80] As far as the conclusion and the possible termination of the Treaties are concerned, the citizens are represented by their States.[81]

Second, the TEU-L differentiates between ordinary and simplified revision procedures. Ordinary revisions[82] can be initiated by any Member State, the European Parliament or the Commission. The European Council consequently convenes a Convention similar to the one which drafted the Constitutional Treaty, composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The Convention can adopt by consensus a recommendation for amendments to an intergovernmental conference. Only minor changes can be submitted – by skipping the Convention procedure – directly to such a conference by the European Council and with the consent of the European Parliament. Changes accorded by the intergovernmental conference enter into force only after being ratified by all Member States in accordance with their respective constitutional requirements. Simplified revisions are twofold. The first alternative[83] concerns the so-called *Passerelle*: it authorises the Council to introduce qualified majority voting or the ordinary legislative procedure in those cases where the TFEU or

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80 Article 49 TEU-L; Article I-1 of the Constitutional Treaty.

81 In its language – however not regarding the substance of enactment and amendments – the Constitutional Treaty went a step further. It stated that the establishment of the Union would not only reflect the will of the States of Europe but also the will of the citizens of Europe: Article I-1 of the Constitutional Treaty; compare also the preamble (last recital) saying that the members of the European Convention prepared the draft of the Constitution "on behalf of the citizens and the States of Europe" which was equally discarded from the Lisbon version.

82 Article 48 TEU-L; Article IV-443 of the Constitutional Treaty.

83 Article 48(7) TEU-L; Article IV-444 of the Constitutional Treaty.

Title V of the TEU-L stipulates unanimity or a special legislative procedure. The second alternative[84] concerns internal Union policies and action. It allows for revising all or part of the provisions on internal policies and action by unanimous European decision to be taken by the European Council. However, such a decision needs the approval by the Member States in accordance with their respective constitutional requirements, and it must not increase the competencies of the Union. Thus, also the simplified procedure foresees the co-operation of institutions of the Union and of the Member States as a prerequisite of alterations.

Of central importance with regard to the subject of statehood is the new clause providing for voluntary withdrawal from the Union, basically simply by notification and the subsequent lapse of a two years period.[85] Certainly it would be unusual (but not inconceivable) to include such a clause in the constitution of a federal State. And it had been disputed whether unilateral withdrawal from the EU would be legal.

Taken altogether these alterations would not produce a qualitative leap compared to the situation as it stands today. It goes without saying that there would still be no clear cut limitation for the competencies of the EU, and no corresponding guarantee of national 'sovereignty' for the Member States. There would be a continuation with the development of the last decades, namely the transfer of competencies to the European level resulting in a substantial restriction of the Member States' ability to take policy decisions on their own; this capacity would be continued to be shifted gradually to the EU. In a counterbalancing effort, however, the new Treaty is eager to avoid the impression that the Member States' status is substantially diminished, by stressing the respect for their identities including the essential State functions. The fragile balance between preserving the statal quality of the Member States and strengthening the capacity of the EU would continue to exist. Consequently, the unified EU would still remain in the undecided state of suspense, in a material sense, between a confederation and a federation. The formal status of State sovereignty would not be wiped out on the side of the Member States, and it would not be transferred to the EU.

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84 Article 48(6) TEU-L; Article IV-445 of the Constitutional Treaty.

85 Article 50 TEU-L; Article I-60 of the Constitutional Treaty.

2. Primacy

There is a difference between the Draft Constitutional Treaty and the Lisbon Treaty regarding the so called "primacy clause". The Constitution for the first time would have included an explicit primacy clause for the law adopted by the institutions of the union, thereby coining the respective jurisprudence of the ECJ: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States."[86]

The Lisbon Treaty, by contrast and as already mentioned, suppresses this clause. What is included instead is a declaration (No 17) to the Treaties "concerning primacy". It 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." The Intergovernmental Conference also decided to attach as an Annex to the Final Act an Opinion of the Council Legal Service. In its core part, this opinion reads as follows: "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".

Is this difference between the Constitutional Treaty and the Lisbon Treaty significant?

First, the primacy clause would have made the previous jurisprudence explicit without significantly changing it.[87] Thus, conflict-

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86 Article I-6 of the Constitutional Treaty. See also Declaration no. 1 to the Constitutional Treaty: "The conference notes that Article I-6 reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance".

87 *Piris* (2006), 82 *et seq*. Compare also *de Witte* (2007), §§ 12 *et seq*; *Eriksen / Fossum / Kumm / Menéndez* (2005), 20 *et seq*.; *Streinz / Ohler / Herrmann* (2008), 88.

This view was also taken by the French Conseil Constitutionnel in its Decision n. 2004-505, 19 novembre 2004, §§ 9 ff. It stressed, among others, that the reach of the primacy principle would not have been extended, and that Article I-5 of the Constitution included the guarantee for "national identities" including the "fundamental structures, political and constitutional". Similarly is the Decision of the Spanish Constitutional Court, DTC 1/2004, de 13 de diciembre de 2004.

ing Member States' law would have been superseded by directly applicable Union law. In substance, this would have been a continuation with the current situation. This would not have entirely excluded the reservation of certain Member States' constitutional Courts on their own prerogative for the protection of core features of their national constitutions such as fundamental rights protection or retained national competencies. It could have been argued that primacy was only granted if the Union was exercising conferred competences which could still have been scrutinised by national courts.

Second, it has to be noted that under the Constitutional Treaty it might have been possible to advocate primacy not only with regard to former "third pillar" law but also regarding European decisions in the framework of the CFSP including International Agreements in the field of CFSP.[88] This seems to be difficult under the Lisbon Treaty which stresses strongly that CFSP "is subject to specific rules and procedures",[89] thereby arguably preserving the current intergovernmental character of this policy more than the Constitutional Treaty would have done.

All this indicates that the Constitutional Treaty would not have changed the substance of the primacy rule. Yet it was put forward that the new primacy rule would change the legal quality of the relation between the Union and the Member States. Codifying the principle of supremacy in the Constitution would, as was contended, go far beyond the case law of the ECJ and thus produce a qualitative change.[90] By accepting the Constitutional Treaty, the Member States would accept primacy of EU law over the *entire* corpus of national law. Reservations with respect to the core of national constitutional law, like in the Maastricht-judgement of the German Constitutional Court, would no longer be possible. Such national reservations could no longer be upheld on the grounds of the new Treaty. The guarantee for the national identity of the Member States[91] would only exist at EU level. Its observation would be exclusively a question of Union law making the ECJ the last arbiter in the matter.

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88 *De Witte* (2007), § 10 *et seq*.

89 Article 24(1) TEU-L.

90 *Öhlinger* (2005), 691 *et seq; Öhlinger* (2007), 350 *et seq*.

91 Article I-5(1) of the Constitutional Treaty.

However, it is not easy to infer such far-reaching consequences from the codification of the supremacy principle given the limitations resulting both from the clause "in exercising competences conferred on it" and the guarantees for the national identity. These clauses could have been the anchor for the Member States' courts to limit any encroachments on national 'sovereignty'. Regarding fundamental rights protection, it has furthermore to be borne in mind that the Draft Constitution did not only expressly secure the level of protection as recognised by Union law, international law and international agreements but also "by the Member States' constitutions".[92] This could even encourage Member States' reservations against the notion of unconditional supremacy of community law over national law, and is certainly not strengthening the ECJ's jurisprudence in this respect.[93]

Moreover, future amendments to the Constitution would have been subject to national ratification and judicial control regarding their constitutionality. Of course, the threat of an open conflict between the ECJ and national courts insisting on their power to preserve national sovereignty would not have been eliminated. Rather the 'co-operation' between the ECJ and national courts in the enforcement of the respective constitutions would have continued.

If it is agreed that the Constitutional Treaty would not have changed much in this respect it is difficult to argue that the Lisbon Treaty will, given its comparative silence on the issue.[94] There is neither a good reason to hold that primacy should be discarded nor that it should be extended compared to the Status Quo or the Constitutional Treaty. The latter stance could be considered given that Declaration No 17 is unconditional and does not mention the competences of the Union. However, the limits of the Union's powers to conferred competences cannot really be challenged.[95] It is not difficult for a Member State court to invoke this restriction quite similarly as it has happened in the past.

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92 Article II-113 of the Constitutional Treaty. This is now included in Article 53 of the Charter of Fundamental Rights.

93 For a discussion of this controversial provision see *Griller* (2002); for a different view compare e.g. *Rengeling / Szczekalla* (2004), esp. para. 495.

94 In the same vein *Ziller* (2007), 139 *et seq*.

95 Article 4(1)(2) and Article 5(1)(2) TEU-L.

Taken altogether there seems to be little textual or contextual support for the contention that the Primacy Clause in the Constitutional Treaty would have brought a decisive step into the direction of Statehood of the European Union. The lack of such a clause in the revised Treaties does not create a big difference either.

VI. Conclusions

The alleged abandonment of the 'constitutional concept' in the Lisbon Treaty as compared to the Draft Constitutional Treaty reanimates the dispute on whether the Union does already have a constitution, or should have one in the future. The answer offered here is that, yes, the Union has a constitution, and in a double sense: First in the sense that every international organisation has a constitution. Second and more important in the sense that the current Treaties already fulfil the functions traditionally ascribed to constitutions *of states* both in a 'thin' positivist understanding but also in a 'thick' understanding reflecting the achievements of European Enlightenment.

The Lisbon Treaty to a certain extent reinforces this development by bringing additional competences under what used to be called the 'Community method' of supranational law making, most notably in the 'Area of Freedom, Security and Justice', and in the Common Commercial Policy. In addition, the Treaty fosters and develops further essential constitutional elements such as democratic law making (majority decisions in the Council with the European Parliament acting as a true co-legislator) and limits to the legislator as included in Fundamental Rights of the citizens. It also enhances legal consistence by merging the European Union and the European Community into one single legal personality. Taken altogether, the Lisbon Treaty is yet another important stage in the constitutional development of the European Union.

That the Union still is no state and assumedly will not turn into a state in the years to come is not, as is sometimes argued, due to a lack of power, state people, or territory. By contrast, already today in terms of powers the Union has reached a degree of centralisation which would be sufficient. The reason is simply the lack of a founding will on the side of the Member States. The Constitutional Treaty would not have changed that. The Lisbon Treaty will not either.

References

Robert Alexy (2002), The Argument from Injustice, Oxford (Clarendon Press) 2002.

Armin von Bogdandy (1999), Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform, Baden-Baden (Nomos) 1999.

Ian Brownlie (2003), Principles of Public International Law, Oxford (Oxford University Press) [6]2003.

Antonio Cassese (2003), International Law, Oxford [2]2003.

Paul Craig (2001), Constitutions, Constitutionalism, and the European Union, in: European Law Journal 7 (2001), 125-150.

James Crawford (2006), The Creation of States in International Law, Oxford (Clarendon Press) [2]2006.

Alan Dashwood (1998), States in the European Union, in: European Law Review 23 (1998), 201-216.

Karl Doehring (1987), State, in: *Rudolf Bernhardt* (ed.), Encyclopedia of Public International Law, instalment 10, Amsterdam (North Holland) 1987, 423-428.

Jeffrey L. Dunoff (2006), Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law, in: European Journal of International Law 17 (2006), 647-675.

Erik O. Eriksen / John E. Fossum / Matthias Kumm / Agustin J. Menéndez (2005), The European Constitution: the Rubicon crossed?, ARENA, Oslo 2005.

Ulrich Everling (1993), Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes, in: Deutsches Verwaltungsblatt 108 (1993), 936-947.

Bardo Fassbender (1998), The United Nations Charter as Constitution of the International Community, Columbia Journal of Transnational Law 36 (1998), 529-619.

Thomas Giegerich (2003), Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung (= Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 157), Berlin (Springer) 2003.

Thomas C. Grey (1979), Constitutionalism: An Analytic Framework, in: *J. Ronald Pennock / John William Chapman* (eds.), Constitutionalism, New York (New York University Press) 1979, 189-209.

Stefan Griller (2002), Primacy of Community Law: a Hidden Agenda of the Charter of Fundamental Rights, in *Dimitri Melissas / Ingolf Pernice* (eds.), Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004, Baden-Baden (Nomos) (2002), 47-61.

Stefan Griller (2005), Die Europäische Union. Ein staatsrechtliches Monstrum?, in: *Gunnar Folke Schuppert / Ingolf Pernice / Ulrich Haltern* (eds.), Europawissenschaft, Baden-Baden (Nomos) 2005, 201-272.

Stefan Griller / Dimitris Droutsas / Gerda Falkner / Katrin Forgó / Michael Nentwich (2000), The Treaty of Amsterdam. Facts, Analysis, Prospects, Vienna (Springer) 2000.

H. L. A. Hart (1994), The Concept of Law, Oxford (Oxford University Press) ^{2}1994.

Josef Isensee (1995), Integrationsziel Europastaat?, in *Olle Due / Marcus. Lutter / Jürgen Schwarze* (eds.), Festschrift für Ulrich Everling, Vol. 1, Baden-Baden (Nomos) 1995, 567-592.

Jean-Paul Jacqué (2004), The Principle of Institutional Balance, in: Common Market Law Review 41 (2004), 383-391.

Georg Jellinek (1901), The Declaration Of The Rights Of Man And Of Citizens: A Contribution To Modern Constitutional History, New York (Henry Holt and Company) 1901.

Georg Jellinek (1914), Allgemeine Staatslehre, Berlin (Häring) ^{3}1914.

Alfred E. Kellermann / Jaap W. Zwaan / Jenö Czuczai (eds.) (2001), EU Enlargement – The Constitutional Impact at EU and National Level, The Hague (T. M. C. Asser Press) 2001.

Hans Kelsen (1949), General Theory of Law and State, Cambridge/MA (Harvard University Press) 1949.

Hans Kelsen (1967), Reine Rechtslehre, Vienna (Deuticke) ^{2}1960 [English version cited: Pure Theory of Law, translated by *Max Knight*, Berkeley/Los Angeles (University of California Press) 1967].

Hans Kelsen / Robert W. Tucker, Principles of International Law, New York (Holt, Rinehart and Winston) 1966.

Josef L. Kunz (1929), Die Staatenverbindungen, Stuttgart (W. Kohlhammer) 1929.

Charles Leben (2000), A Federation of Nation States or a Federal State?, in: *Christian Joerges / Yves Mény / Joseph H. Weiler* (eds.), What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer, San Domenico (Robert Schuman Centre) 2000, 99-111.

Koen Lenaerts (1990), Constitutionalism and the Many Faces of Federalism, in: The American Journal of Comparative Law 38 (1990), 205-263.

Koen Lenaerts / Piet van Nuffel (2005), Constitutional Law of the European Union, London (Sweet&Maxwell) ^{2}2005.

Koen Lenaerts / Amaryllis Verhoeven (2002), Institutional Balance as a Guarantee for Democracy in EU Governance, in *Christian Joerges / Renaud Dehousse* (eds.), Good Governance in Europe's Integrated Market, Oxford (Oxford University Press) 2002), 35-88.

Peter Lerche (1995), "Kompetenz-Kompetenz" und das Maastricht-Urteil des Bundesverfassungsgerichts, in: *Jörn Ipsen et al.* (Hrsg.), Verfassungsrecht im Wandel, Festschrift zum 180jährigen Bestehen des Heymanns Verlags, Cologne (Heymann). 1995, 409.

Neil MacCormick (1999), Questioning Sovereignty. Law, State and Nation in the European Commonwealth, Oxford (Oxford University Press) 1999.

Miguel Poiares Maduro (2005), The importance of being called a constitution: constitutional authority and the authority of constitutionalism, in: International Journal of constitutional law 3 (2005), 332-356.

G. Federico Mancini (1998), Europe: The Case for Statehood, in: European Law Journal 4 (1998), No. 1, 29-42.

Theo Öhlinger (2005), Der Vorrang des Unionsrechts im Lichte des Verfassungsvertrags, in: *Jürgen Bröhmer / Roland Bieber / Christian Calliess / Christine Langenfeld / Stefan Weber / Joachim Wolf* (eds.), Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress zum 70. Geburtstag, Cologne (Heymanns) (2005), 685-698.

Theo Öhlinger (2007), Die Ratifikation des Verfassungsvertrages in Österreich – Anmerkungen zum konstitutionellen Gehalt des Verfassungsvertrages, in: *Waldemar Hummer / Walter Obwexer* (eds.), Der Vertrag über eine Verfassung für Europa, Baden-Baden (Nomos) 2007, 343-358.

Stefan Oeter (2002), Souveränität – ein überholtes Konzept?, in: *Hans-Joachim Cremer / Thomas Giegerich / Dagmar Richter / Andreas Zimmermann* (eds.), Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger, Berlin (Springer) (2002), 259-290.

Thomas Oppermann (1994), Zur Eigenart der Europäischen Union, in: *Peter Hommelhoff / Paul Kirchhof* (eds.), Der Staatenverbund der Europäischen Union, Heidelberg (Müller) 1994, 87-98.

Ingolf Pernice (1999), Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, in: Common Market Law Review 36 (1999), 703-750.

Ingolf Pernice (2001), Europäisches und nationales Verfassungsrecht, Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 60 (2001), 148-193.

Anne Peters (2001), Elemente einer Theorie der Verfassung Europas, Berlin (Duncker & Humblot) 2001.

Anne Peters (2006), Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, in: Leiden Journal of International Law, 19 (2006), 579-610.

Jean-Claude Piris (1999), Does the European Union have a Constitution? Does it need one?, in: European Law Review 24 1999, 557-585.

Jean-Claude Piris (2006), The Constitution for Europe: A Legal Analysis, Cambridge (Cambridge University Press) 2006.

Hans-Werner Rengeling / Peter Szczekalla, Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze, Cologne (Heymann) 2004.

Henry G. Schermers / Niels M. Blokker, International Institutional Law, Boston / Leiden (Martinus Nijhoff Publishers) ^{4}2003.

Frank Schorkopf (2007), Grundgesetz und Überstaatlichkeit, Tübingen (Mohr Siebeck) 2007.

Bruno Simma / Dirk Pulkowski (2006), Of Planets and the Universe: Self-contained Regimes in International Law, in: European Journal of International Law 17 (2006), 483-529.

Rudolf Streinz / Christoph Ohler / Christoph Herrmann (2008), Der Vertrag von Lissabon zur Reform der EU, München (C.H. Beck) [2]2008.

Joel P. Trachtman (2006), The Constitutions of the WTO, in: European Journal of International Law 17 (2006), 623-646.

Dimitris Triantafyllou, Les procedures d'adoption et de revision du traité constitutionnel, in: *Giulio Amato / Hervé Bribosia / Bruno de Witte* (eds.), Genesis and Destiny of the European Constitution, Brussels (Bruylant) 2007, 223-245.

Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft, Wien / Berlin (Verlag von Julius Springer) 1926.

Neil Walker (ed.) (2003), Sovereignty in Transition, Oxford / Portland/OR (Hart Publishing) 2003.

Joseph H. H. Weiler (1998), Europe: The Case Against the Case for Statehood, in: European Law Journal 4 (1998), 43-62.

Joseph H. H. Weiler (1999), The Constitution of Europe, Cambridge (Cambridge University Press) 1999.

Joseph H. H. Weiler (2000), Epilogue. Fischer: The Dark Side, in: *Christian Joerges / Yves Mény / Joseph H. Weiler* (eds.), What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer, San Domenico (Robert Schuman Centre) 2000, 235-247.

Erika de Wet (2006), The International Constitutional Order, in: International & Comparative Law Quarterly 55 (2006), 51-75.

Bruno de Witte (1999), Direct Effect, Supremacy and the Nature of the Legal Order, in: *Paul Craig / Gráinne de Búrca* (eds.), The Evolution of EU Law, Oxford (Oxford University Press) 1999, 177-213.

Bruno de Witte (2007), Article I-6, in: *Laurence Burgorgue-Larsen / Anne Levade / Fabrice Picod* (eds.), Traité établissant une Constitution pour l'Europe – Commentaire article par article, Vol. 1, Brussels (Bruylant) 2007, 106-116.

Jacques Ziller (2005), The European Constitution, The Hague (Kluwer) 2005.

Jacques Ziller (2007), Il nuovo Trattato europeo, Bologna (Il Mulino) 2007.