The Indirect Effect of the Treaty on a Constitution for Europe

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Since Denmark joined the European Community in 1973 the European cooperation has constantly developed partly through new treaties and partly through case law from the European Court of Justice. The latest important development has been the Treaty on a Constitution for Europe. The treaty was rejected at referendums in France and the Netherlands in 2005 and thus the Member States decided to suspence the ratification of the treaty. At the moment Europe is in the middle of a reflection period. Even though the treaty has not entered into force it might nevertheless influence European law and thinking and the European cooperation might still develop into a closer cooperation. Also the Treaty might have some effects at the national level.

I shall focus on five examples on how the Treaty on a Constitution for Europe could possibly have an effect even though it has not entered into force (yet). Some examples will concern the European level and some the national level.

1 The Treaty as a Source of Interpretation

Even though the treaty has not entered into force the judges at the European Court of Justice and all the other political and legal actors are conscious of the treaty. The treaty is the result of a long process in the Convention. It has been the subject of thorow political and legal discussions. Add to this that the ratification of the treaty only has been suspended (not given up). Obviously the treaty has a place in the consciousness of not only the judges of the European Court of Justice but all the political and legal actors both at the European and the national level. Therefore the treaty might effect the judges – maybe even unconsciously – when interpreating the existing treaties and EU-legislation. Not only the judges but also political actors who interpret the existing treaties might be effected by the Treaty on a Constitution for Europe this way. Of course there are limits to how comprehensive the role of the Treaty on a Constitution for Europe can be when interpreting the existing treaties but when the treaties leave room for interpretation and in cases of doubt to interpretation the Treaty on a Constitution for Europe might play an informal role.

It is not easy to proove that the Treaty on a Constitution for Europe might (even unconsciously) effect the legal and political actors when interpreting the existing treaties. That involves some psychological factors. It is possible, however, to show that the existing treaties have in some cases recently been interpreted in the same direction as the Treaty of a Constitution for Europe. Whether this is a coinsidence or not is difficult to tell. I shall give two examples.

At the moment the European cooperation is divided into three pillars. Pillar one concerns the EC-cooperation. Pillar two concerns cooperation on Foreign and Security Policy. Pillar three concerns cooperation on Justice and Home Affairs. One of the aims of the Treaty on a Constitution for Europe is to eliminate the division of the European cooperation into three pillars. This means, among other things, that the general principles would apply to all

chapters of the Treaty on a Constitution for Europe, unless expressly excluded.[1] Today the EC's rules do not apply to pillar two or pillar three (or vice versa) unless specified.[2] In C-105/03 the European Court applied the priciple of loyalty to the pillar three cooperation[3] and the Court stated that framework decisions must be interpreted like directives. The Court stated:

> "42. It would be difficult for the Union to carry out its tasks effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union Law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in paragraph 26 of her Opinion.
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> 43. In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."

The judgement applies one of the general principles of the EC to pillar three and it contributes to blur the bordeline between pillar one and pillar three. This way the judgement by the European Court of Justice is consistent with one of the goals of the Treaty on a Constitution for Europe namely to eliminate the devision between the three pillars by among other things letting the general principles of the EC apply to all the pillars of the existing cooperation. The Principle of Loyalty is stated in Article I-5 (2) of the Treaty on a Constitution for Europe:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

1 *See* Piris, Jean-Claude, *The Constitution for Europe. A Legal Analysis*, Cambridge University Press, Cambridge, 2006, p. 66. It is important to note that even though the division of the pillars is removed in the Treaty on a Constitution for Europe there are still differences between the cooperation in different fields. Especially in the field of foreign affairs and security policy decissions will still require unanimity.

2 *See* Article 28 and 41 in the Treaty on a European Union. In these articles EC provisions which are applicable on pillar two and three are listed. *See* ibid, p. 66, n. 21.

3 It is quite interesting that Article 11 (2) in the EU Treaty concerning Foreign and Security Policy is almost identical to the principle of loyalty in Article 10 in the EC Treaty. A similar rule does not exist for Justice and Home Affairs in the EU Treaty, though. *See* Ramses A. Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective*, Kluwer Law International, Haugue, 1999, p. 104.

> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.
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> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

C-176/03 is an other example of the European Court of Justice reaching a judgement which is consistent with the Treaty on a Constitution of Europe – this time by interpreting the EC Treaty. The case concerned the relationship between pillar one and pillar three (like C-105/03). The question in the case was whether some rules concerning enviromental crime including the question of penalties had to be adopted as a directive under pillar one (by the Council and the European Parliament) or as a framework decision under pillar three (by the Council). The Court referred the power to require the Member States to impose criminal penalties in a number of enviromental offences to the Community (pillar one). Criminal Law is normally considered as part of pillar three on Justice and Home Affairs. The Court stated:

> "47. As to the content of the framework decision, Aticle 2 establishes a list of particularly enviromental offences, in respect of which the Member States must impose criminal penalties. Articles 2 to 7 of the decision do indeed entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 *Casati* (1981) ECR 2595, paragraph 27, and Case C-226/97 *Lemmens* (1998) ECR I-3711, paragraph 19).
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> 48. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious enviromental offences, from taking measures which relate to the criminal law of the Member States which it consideres necessary in order to ensure that the rules which it lays down on enviromental protection are fully effective."

If we then turn to the Treaty on a Constitution for Europe we find that Article III-271 is quite interesting in relation to the judgement:

> "Article III-271.
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> 1. European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the ares of particulaly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.
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> These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

> On the basis of developments in crime, the Council may adopt a European decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.
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> 2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such framework laws shall be adobted by the same procedure as was followed for the adoption of the harmonisation measures in question, without predudice to Article 111-264. …"

Especially Art. III-271 (2) is interestning as the argumentation is almost equal to paragraph 48 in the judgement. If the Treaty on a Constitution for Europe entered into force Article III-271 (2) would make it possible to adopt a European framework law[4] with a content similar to the content of the framework decision discussed in the judgement. This way the judgement interprets the EC Treaty in the direction of the Treaty on Constitution for Europe.

C-105/03 and C-176/03 are both examples of fairly recent judgements which are consistent with the Treaty on a Constitution for Europe. They are also both examples of judgements which contribute to blur the border between the pillars of the Greek temple structure of the European cooperation at least in the field of pillar one and pillar three.[5] It is also difficult to separate the pillar two cooperation clearly from the cooperation under the other pillars, though.[6] In fact the European policy under the three pillars is often very difficult to separate. For instance, political issues like trade, aid and human rights are often very closely connected to each other. This is reflected in the use of transversal instruments (multi-disciplinary policy). At the national level it is for instance reflected in the fact that it is not specified which pillar the subjects on the agenda for the meetings of the Danish European Affairs

4 European framework laws are adopted on the basis of proposals from the Commission jointly by the European Parliament and the Council under the ordinary legislative procedure in Art. III-396, cf. Art. I-34 (1) in the Treaty on a Constitution for Europe. European framework decissions have the same legal effect as an EC directive, *See* Piris, supra n. 1, p. 72.

5 *See* also Elholm, Thomas, *Pupino – Bambino!*, Advokaten, n. 9, 2005, p. 26-27, Elholm, Thomas, *Historisk EU-dom*, Advokaten, n. 11, 2005, p. 28-29, Pagh, Peter, *EF-dom ændrer indholdet i det danske forbehold for EU's retlige samarbejde – miljøstrafferet er en del af det overnationale samarbejde*, Ugeskrift for Retsvæsen 2005B.347 and Hansen, Jens Harkov, *Europaudvalgets forhandlingsmandater – politisk praksis eller retlig norm?*, Justitia, nr. 4, 2006, p. 3-48.

6 *See* Krunke, Helle, *Folketingets kontrol med den europæiske udenrigs- og sikkerheds-politik*, Ugeskrift for Retsvæsen 2001B.401, and Krunke, Helle, *Den Udenrigspolitiske Kompetence. Udenrigspolitik og magtfordeling ved overgangen til det 21. århundrede*, Jurist- og Økonomforbundets Forlag, Copenhagen, 2003, p. 193-198.

Committee concern.[7] The provisions in the EU Treaty are common to all Union areas.[8] Also there is a convergence between the institutions and the actors of the cooperation under pillar 1 on the one hand and under pillar 2 and 3 on the other hand. Actually, already in 1999 it was stated in an academic legal study by Ramses A. Wessel that the pillar two cooperation on Foreign and Security Policy can not entirely be considered as intergovernmental. Wessel makes a very interesting link between the reasoning in the "Van Gend and Loos" decision and the pillar two cooperation:[9]

> "The image of CFSP as a purely "intergovernmental" form of international cooperation is not supported by the outcome of the present study. Despite the focus in many studies on the differences between the Community and the other areas of the European Union, the opinion of the European Court of Justice in the Van Gend and Loos case (red.: sag nr. 26/62) seems to be applicable to CFSP as well as it indeed "constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields". Nevertheless, it is clear that it is these "limited fields" in particular that define the scope of CFSP."

And further:[10]

> "While an analysis of the origins of the CFSP and the subsequent negotiations indeed reveal a certain preference for "intergovernmental" cooperation on the part of most memberstates, the conclusions of the present study do not seem to support the latter part of this assertion. A number of CFSP features indicate serious constraints on the member states in executing their foreign policy as well as on the EU-institutions involved."

According to Wessel there is a close relationship between the the CFSP legal order and the legal orders of the EU Member States and the EC legal order, and any interpretation of CFSP should take into account the competences of the EC (which through the preservation of the acquis communautaire may overrule CFSP procedures or decisions) and the prerogatives of the Member States.[11] It is very interesting that Wessel claims that even before the Treaty of a Constitution for Europe was written the pillar two cooperation was not an entirely intergovernmental cooperation.[12] This shows that the Treaty on a Constitution for Europe in some aspects reflect developments which have developed over a long time in the European cooperation. I shall get back to this in the concluding paragraph 6.

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7 *See* ibid, p. 201-03.

8 *See* Ramses, supra n. 4, p. 325.

9 *See* ibid, p. 319.

10 *See* ibid, p. 320-321.

11 *See* ibid, p. 322.

12 It should be emphasized that according to the Treaty on a Constitution for Europe decisions in the field of foreign affairs and security policy will still require unanimity.

2 Confirmation of Case Law from the European Court of Justice

Parts of the articles in the Treaty on a Constitution for Europe reflect practice established by the European Court of Justice. This means that those norms already originate from case law and that the Treaty merely confirms them. Thus the norms might be considered as part of European Law regardless of a ratification of the Treaty in the Member States. Of course the confirmation of the case law from the European Court of Justice in the Treaty on a Constitution for Europe strengthens the legal characther of the norms. Naturally this would be the case if the treaty entered into force but also without an entry into force the case law from the European Court of Justice is probably strengthened by the treaty. The treaty shows that the heads of state from the Member States support the case law from the European Court of Justice in these areas. The norms have legal and political support.

I shall give an example on how case law has found its way into the Treaty on a Constitution for Europe. A directly effective provision of Community law always prevails over a provision of national law. This basic rule of Community law has developed through case law from the European Court of Justice.[13] It has no legal basis in any of the existing treaties. The rule is however reflected in Article I-6 (on Union Law) of the Treaty on a Constitution for Europe:

> "Article I-6: Union Law
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> 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."

3 A New Constitution Draft /New Treaties

Obviously the Treaty on a Constitution for Europe would be the starting point if the heads of state should decide to design a new constitution draft. Even though the new draft would differ from the first Treaty on a Constitution for Europe in a number of ways there would almost centainly be many similarities between the two drafts. This way the first draft on a Constitution would to a certain extend be agenda setting for the proces of creating a new draft.

The problem for the heads of state is that they do not have the support of (enough) of the European citizens. Therefore the national governments need to figure out why some European citizens do not support the Treaty on a Constitution for Europe. The problem is that it might not be the same reasons that are significant in the different Member States, it might not even be the same reasons that are significant among the citizens of the same Member

13 *See* Van Gend en Loos, C-26/62, Costa/ENEL, C-6/64, Internationale Handelsgesellschaft, C-11/70, Simmenthal, C- 106/77, and Factorame, C-213/89.

State and the problem might not even have anything to do with the specific content of the treaty.

In a way the situation is similar to the Danish referendum on the Maastricht Treaty in 1992. 50.7 % rejected the treaty while 49.3 % voted in favour of it. The Danish Government and all of the political parties except one agreed on a socalled "national compromise" listing some exceptions from the Maastricht Treaty. The Danish government negotiated the exceptions at a meeting in the European Council on 11 and 12 December 1992. The result of these negotiations was the Edinburgh Agreement which listed four exceptions from the Maastricht Treaty. In a second referendum in 1993 the Danish politicans managed to convince the voters to vote in favour of the Maastricht Treaty and the Edinburgh Agreement. This time 56.7 voted in favour of the treaty and the exceptions while 43.3 rejected it. The Danish politicans succeeded in pointing out and removing a few issues from the Maasticht Treaty which could unite enough of the voters for the treaty to be accepted.[14]

The question is whether the same would be possible with the Treaty on a Constitution for Europe. Would it be possible to change a few significant Articles in the Treaty on a Constitution for Europe and then get the approval from enough of the European citizens for all the Member States to ratify the treaty? One can also wonder whether it would be possible to have a treaty almost identical to the Treaty on a Constitution for Europe ratified in all the Member States if the new treaty was not named "constitution". As I have pointed out in an article in European Constitutional Law Review several conditions made the approval of the Maastricht Treaty at the second referendum in Denmark possible.[15] It would be too comprehensive to go any deeper into that in this article. It is obvius though, that it will be much more difficult to unite (enough of) the no-voters in Europe than (enough of) the no-voters in a single country like it was the case in Denmark in 1992/93. Sometimes, the reluctance in the Member States againtst a new EU treaty can even be due to national/local circumstances. Therefore, a succesful process will involve the EU-level as well as the national level. Communication also plays a quite important role. The Danish Parliament spent almost 25 million Danish kroner (equivalent to approximately 3-3,5 million Euro) on distributing information to the voters before the second Maastricht referendum.[16]

Anyway, it is not likely that the EU will let the comprehensive work done by the convention go to waste. The content of the Treaty on a Constitution for Europe (or part of it) will probably find its way to a new Constitution draft or (little by little) into new treaties without the word "Constitution" in their titles.

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14 *See* Krunke, Helle, *From Maastricht to Edinburgh: The Danish Solution*, European Constitutional Law Review, Volume I, Issue 3, 2005, p. 339-56.

15 *See* ibid, p. 355-56.

16 *See* Siune, Karen and Svensson, Palle and Tonsgaard, Ole, *Fra et nej til et ja*, Forlaget Politica, Aarhus, 1994, p. 27.

4 The Protocol on the Application of the Principles of Subsisidiarity and Proportionality

The second protocol of the Treaty on a Constitution for Europe is named "Protocol on the application of the principles of subsidiarity and proportionality". The protocol introduces the "early warning system". Draft European legislative acts must be forwarded to the national Parliaments. If a national Parliament (or a chamber) find that the draft does not comply with the principle of subsidiarity it may within six weeks express it in a reasoned opinion to the Commision, the Council and the European Parliament (Article 6 of the Protocol). The Commission, the Council and the European Parliament must take the reasoned opinions into account (Article 7). Each national Parliament has two votes (in bicameral Parliamentary systems each of the chambers have one vote). If one third of the votes or more express that the draft does not comply with the principle of subsidiarity the draft must be reviewed. EU-legislator may maintain, amend or withdraw the draft. Reasons must be given for this decission, though (Article 7).

Thus, the protocol provides the national Parliaments with a direct (though limited) opportunity to influence the European legislation draft. Establishing a direct opportunity for the national Parliaments to influence the European legislation is in many aspects innovative. Joseph Weiler mentions three approaches when decribing/analysing European governance: International, supranational and infranational.[17] In the International approach the states are the key players and the governments the principal actors.[18] In the supranational approach the privileged players are the state governments and the Community institutions.[19] The infranational approach focuses both at Union and Member State levels on the administrations, departments, private and public associations, and certain, mainly corporate, interest groups.[20] A direct opportunity for the national Parliaments to influence the European legislation traverses the international and supranational approach in Weiler's theory. The same can be said about article I-47, part 4, of the Treaty establishing a Constitution for Europe. According to this article one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. Even though neither the national Parliaments nor the European citizens would gain a legally binding influence on the European legislation (only an opportunity to influence those who have the legal competence and

17 Weiler, Joseph H.H. with Haltern, Ulrich & Mayer, Franz, *European Democracy and its Critique. Five Uneasy Pieces*, EUI Working Paper RSC No. 95/11, European University Institute, Florenze, 1995, p. 25.

18 *See* ibid, p. 26.

19 *See* ibid, p. 26-27

20 *See* ibid, p. 27.

the competence to put forward legislation drafts) the involvement of new national institutions/groups in the legislation process is really quite unique.

However, the early warning system has weaknesses. First, as already mentioned the national Parliaments do not gain a legally binding competence on the European legislation, just a better opportunity to scrutinize the legislative drafts and an opportunity to try to influence the Commission and the EU-legislator. The Commission can decide to maintain the draft if it wishes so – reasons for the decision must be given though (art. 7, part 4, of the Protocol). Secondly, the early warning system is limited to the national Parliaments concidering whether the draft in question complies with the *principle of subsidiarity*. This means that formally the national Parliaments are not given an opportunity to try to influence EU-legislator and the Commission on the *content* of the draft. Of course, in practice there is a rather close connection between the question of subsidiarity and the content of the draft.[21] Thirdly, the principle of subsidiarity is often perceived as a political principle with little legal/normative effect. There seems to exist a considerable mismatch between the weight given to the principle of subsidiarity by the national politicians in the Member States before referenda on treaties relating to EC/EU and the effect that the principle actually has in the EU-system. The principle of subsidiarity has not been invoked very often before the European Court of Justice and the Court has never annulled acts on the basis of a violation of the principle of subsidiarity.[22] A quick search in the judgements from the European Court of Justice shows a list of 70 judgements that mentions the principle of subsidiarity. Of course the effect of the principle can not only be measured by its impact at the European Court of Justice. The effect on the Commission, the Council and the European Parliament is also important. Apparently, the Commission now has more focus on the principle of subsidiarity than it was the case earlier and apparently, it is mostly older legislation that gives rise to critisism on violation of the principle.[23] It has been estimated that the Commission trespassed the principle of subsidiarity in 3.33 % of cases of legislation in 1999 and in 5.95 % of cases of legislation in 2000.[24] Contrary to the

21 *See* also Bausili, Anna Vergés, *Rethinking the methods of dividing and exercising powers in the EU. Reforming subsidiarity, national parliaments and legitimacy*, in Shaw, Jo, and Magnette, Paul, and Hoffmann, Lars and Bausili, Anna Vergés, *The Convention on the future of Europe. Working towards an EU Constitution*, The Federal Trust for Education and Research, 2003, p. 113. *See* also evidence given by Legal Adviser and Director-General of the Council Legal Service Jean–Claude Piris to Working Group 1 on the Principle of Subsidiarity, Summary of the meeting of 25 June 2002, Brussels, 28 June 2002, CONV 156/02 WGI5.

22 *See* evidence given by Advocate-Genral Jacobs to Working Group 1 on the Principle of Subsidiarity, Summary of the meeting of 25 June 2002, Brussels, 28 June 2002, CONV 156/02 WGI5.

23 *See* evidence given by General Manager of the Legal Service of the Commission Michel Petite to Working Group 3 on the Principle of Subsidiarity, Summary of the meeting of 17 June 2002, Brussels, 20 June 2002, CONV 106/02 WGI3.

24 *See* Groupe de travail I ”Subsidarité”, Objet: Intervention de M. Michel Petite, Directeur Général du Service juridique de la Commission, á la réunion du groupe, le 17 juin 2002,

principle's effect at the European Court of Justice it is quite difficult to measure the precise effect of the principle at the Commission, the Council and the European Parliament. Forth, the national Parliaments are not awarded locus standi on their own before the European Court of Justice to enforce the subsidiarity principle, see Article 8 in the Protocol. Thus, under the Constitutional Treaty a national Parliament would have to ask its government to bring an action on its behalf.[25] Anyway, the early warning system's effect on the balance of powers between the national Parliaments and Governments is of course limited by the weaknesses of the early warning system.

The Danish European Affairs Committee decided to adjust its procedures to the Protocol on the application of the principles of subsidiarity and proportionality as early as December 2004.[26] The purpose was to be ready to build on the new opportunities given to the national Parliaments by the Protocol.[27] Thus the Committee decided on some new scrutiny procedures concerning the principle of subsidiarity in the European Affairs Committee as well as in the ordinary select committees. Also procedures on co-operation with COSAC on the principle of subsidiarity were adopted. The new procedures also included a procedure involving the Danish governement. The government should according to this procedure provide the European Affairs Committee (and the relevant select committees) with a memorandum on important new draft legislative acts from the Commission within two weeks from the draft had been sent to the Council. The memorandum should state the purpose of the draft legislative acts, the Commission's opinion on why the draft legislative acts comply with the principle of subsidiarity and the Danish governement's opinion on whether the draft legislative acts comply with the Principle of Subsidiarity.[28] This way the Danish European Affairs Committee strengthened its scrutiny of European Business concerning the principle of subsidiarity even before the Treaty should have been ratified. This way the Treaty on a Constitution for Europe had an effect even before it was supposed to be ratified.

The Member States decided to suspence the ratification of the Treaty on a Constitution for Europe in the summer of 2005 and thus one might ask how this has effected the procedures concerning the principle of subsidiarity decided by the European Affairs Committee in December 2004. Well, to a certain extent the procedures are actually still carried out. For instance the Danish government still provides the European Affairs Committe (and the relevant select committees) with the subsidiarity memorandum just described. The time limits described in the report from 2004 (which were quite tide

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Bruxelles, 27 juin 2002, WGI WD3, p. 6, which referes to a study by the German Federal Finance Ministery. *See* also Bausili, supra n. 21, p. 108.

25 *See* Kilver, Philipp, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building*, Kluwer Law International, 2006, p. 164-167.

26 *See* Report on a reform of Parliament's reading of EU-business, 10. december 2004, sub-section 8.

27 *See* ibid, sub-section 8.

28 *See* ibid, sub-section 8.

because the whole procedure according to the Protocol had to be carried out within 6 weekes) are not maintained though. In COSAC the national European Affairs Committes sometimes cooperate on important draft legislative acts with focus on whether the drafts comply with the principle of subsidiarity. Thus, the conclusion must be that the European Affairs Committee has managed to strengthen its scrutiny of European legislation on the basis of the second protocol to the Treaty on a Constitution for Europe even though the treaty has not been ratified (yet).

5 The European Union Agency for Fundamental Rights

If the Treaty on a Constitution for Europe entered into force the Charter of Fundamental Rights of the EU would become part of the treaties of the European cooperation (treaty-level law). The Charter was adopted in Nice in December 2000 as a political declaration. The Charter including its Preamble is incorporated in Part II of the Treaty on a Constitution for Europe.

According to Aticle II-111[29] of the treaty it would not increase the competences of the EU if the treaty entered into force.[30] Jean-Claude Piris states:[31]

> "This will not increase the competences of the EU, but it will underline the importance for the EU itself and its institutions of respecting fundamental rights and of being a "Union based on the rule of law" or, in French "Union de droit" as the Court has called the Community in its case-law."

The Preamble of part II of the treaty states:

> "…Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law…"

At the moment the plan is to establish a European Union Agency for Fundamental Rights. The proposal for a council regulation on establishing a

29 Article 111: (1) The provisions of this Charter are adressed to the institutions, bodies, officies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution. (2) This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the orher parts.

30 *See* also Report on certain constitutional questions in relation to Denmark's ratification of the Treaty on a Constitution for Europe, Ministery of Justice, 22 November 2004, p. 87-88.

31 *See* Piris, supra n. 1, p.134.

European Union Agency for Fundamental Rights[32] has not yet been adopted. The Council was supposed to adopt it at a Council meeting on 12-13 June 2006 but the Council could not agree on adopting the proposal. The proposal now lies with COREPER. COREPER is supossed to mend the proposal in order to find a compromise which the Council can agree on.[33]

According to the proposal the objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertice relating to fundamental rights in order to support them when they take measures or formulate cources of action within their respective spheres of competence to fully respect fundamental rights.[34]

The Explanatory Memorandum following the proposal explains the objective of the proposal the following way:[35]

> "to extend the mandate of the EUMC[36] and to establish a European Agency for Fundamental Rights. It will establish a centre of expertise on fundamental rights issues at the European level. Establishing an Agency will make the Charter more tangible, and the close relation to the Charter is reflected in the Agency's name."

The Explanatory Memorandum states that securing fundamental rights depends on appropriate governance mechanisms to ensure that fundamental rights are taken fully into account in policy setting and decision-making in the Union.[37]

The proposal emphasizes that:[38]

> "The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common values to the Member States."

This is quite similar to the Preamble of Part II of the Treaty.

Article II-111 (1) in the Treaty on a Constitution for Europe is among other adressed to the agencies of the Union. Thus, there would be a direct relationship between the incorporation of the Charter into the Treaty on a Constitution for Europe and the Agency of Fundamental Rights if the Treaty entered into force and if the Agency was established. If the Treaty does not step into force one might ask whether an establishment of the Agency

32 COM (2005) 280. The proposal is based on Article 308 of the EC Treaty.

33 *See* Memorandum to the members of the Danish European Affairs Committee, 15 June, 2006.

34 *See* Article 2 of the proposal.

35 *See* COM (2005) 280, Explanatory Memorandum, par. 1.

36 EUMC stands for European Monitoring Centre on Racism and Xenophobia.

37 *See* ibid, par. 1.

38 *See* COM (2005) 280, Proposal for a Council Regulation on establishing a European Union Agency for Fundamental Rights, Preamble, (1).

together with the Nice declarartion could have some of the same effect as if the Treaty on a Constitution for Europe had entered into force.[39] After all, both initiatives concern the observance of the Charter.

Both incorporating the Charter into the Treaty on a Constitution for Europe and the establishment of the Agency would be a way of underlining and thereby probably strengthening the position of fundamental rights and not least the Charter itself in the European Union. Though, as mentioned before the Treaty would not give the European Union more competence than it has now and of course neither would the establishment of the Agency.

There is a quite important difference between the effect of incorporating the Charter into the Treaty on a Constitution for Europe and the effects of establishing an Angency on Fundamental Rigts. If the Treaty on a Constitution for Europe entered into force, the Member States would according to Article 111 (1) be obliged to respect the Charter in Part II of the Treaty when implementing Union law. Questions concerning this could be trialled at the European Court of Justice.[40] As long as the Charter is only a politically binding document there is no formal jurisdiction for the European Court of Justice to trial whether the Charter has been respected when implementing Union law in the Member States. Establishing the Agency does not change that. The tasks and competences of the Agency are stated in Article 4 of the proposal. The most far-reaching task seems to be the following:

> "(d) formulate conclusions and opinions on general subjects, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission."

Even though the Charter of Fundamental Rights of the EU from 2000 is not a legally binding document one could have expected the European Court of Justice to give legal authority to the Charter by incorporating it into the legal order by judicial activity. However the European Court of Justice has chosen to take very little notice of the Charter.[41] There could be different reasons for this. It might be because the Charter is not clear enough.[42] I could also be because the Court by using the Charter instead of its usual sources could come under preassure to reject any progressive interpretations.[43] Finally, the

39 In Report on the reflection period and the future of the EU, Danish European Affairs Committee, 9 June, 2006, a minority of the Committee voices that by establishing a European Union Agency for Fundamental Rights Europe will be going far in the direction of implementing Part II of the Treaty on a Constitution for Europe. *See* the Report, p. 6.

40 *See* Report on certain constitutional questions in relation to Denmark's ratification of the Treaty on a Constitution for Europe, Ministery of Justice, 22 November 2004, p. 88.

41 *See* Claes, Monica, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford, 2006, p. 687.

42 *See* ibid, p. 687.

43 *See* ibid, p. 687-88.

Court may be reluctant because the Court does not want to go against the clear will of the Member States who chose not to make it a binding instrument.[44] The reluctant posistion of the Court means it would have a clear effect if the Treaty on a Constitution for Europe entered into force. The Court would suddenly have to take notice of the Charter and the Charter would be a legal source in the judgements. Establishing an Agency for Fundamental Rights cannot match up to this effect even though it would underline and probably streghten the position of the Charter as would the Treaty on a Constitution for Europe.

It should be noted that The European court of Justice has no jurisdiction in the field of pillar three cooperation. In this area fundamental rights protection does not lie before the European Court of Justice.[45] If the Treaty on a Constitution for Europe entered into force this would change.[46] The proposal on establishing a European Agency for Fundamental Rights is accompanied by a Council decission empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union. This means that the proposal on establishing the Agency and the Council decission might have a special effect in the field of pillar three if the Treaty on a Constitution for Europe does not step into force. Apparently, one of the subjects of controversy at the Council meeting on the 12-13 June 2006 was actually the competence of the Agency in the field of pillar three.[47] Therefore, at this point it is hard to tell what the proposal for a Council decission on empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union will look like when it returns from COREPER to the Council.

6 Conclusion

In this article I have discussed ways for the Treaty on a Constitution for Europe to influence European law and way of thinking even though it has not entered into force (yet). Apparently, the Treaty will have an affct even if it does not step into force. The referendums in France and the Netherlands and the following suspension of the ratification of the Treaty was naturally a political defeat for the European Union. Not least when it comes to foreign policy - it weakend the image of Europe as a strong unity in the eyes of the rest of the world. However, the suspension of the Treaty on a Constitution for Europe does not hinder the European cooperation in developing into a closer cooperation. As I have shown in this article the Treaty might still have an effect on the European integration even though it has not entered into force.

44 *See* ibid, p. 688.

45 *See* ibid, p. 685.

46 *See* also Piris, supra n. 1, p. 67.

47 *See* Memorandum to the members of the Danish European Affairs Committee, 15 June, 2006.

However, this is not the only way for the European cooperation to develop, more common examples like for instance the European Court of Justice's use of the teleological method of interpretation and Article 308 in the EC-Treaty could be mentioned. Also, new treaties (without the word "constitution" in the title) will probably develop the European cooperation in the future.

In some aspects the Treaty on a Constitution for Europe reflects developments which have developed over a long period of time in the European cooperation. Thus, these developments are not new and the suspension of the Treaty does not suspend the developments taking place for instance in case law from the European Court of Justice. One could argue that the case law on supremacy of European legislation[48] is much more crucial/vital than the innovations in the Treaty on a Constiution for Europe. The Treaty on a Constitution for Europe originates from and reflects a political/legal enviroment/culture which is still there also after a suspension or even a definite rejection of the Treaty on a Constitution for Europe - even though it must of course be noted that there are different opinions on which way the European cooperation should develop build into this enviroment/culture. Also the new Member States can play a role in the latter but many of them have actually already ratified the Treaty on a Constitution for Europe.

48 *See* paragraph 2 on confirmation of case law from the European Court of Justice.