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## EUROPEAN CONSTITUTIONALISM V. REFORMED CONSTITUTION FOR EUROPE

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**Abstract.** *The very idea of the draft European Union (EU) Constitutional Treaty was reexamined after the failed French and Dutch referendums and the Treaty of Lisbon (also known as the Reform Treaty) was drafted and entered into force on 1 December 2009 after its ratification by all 27 member states. The traditional notion of a Constitution as a national legal document establishing the social contract and a moral minimum for a particular socially unified group still prevails in legal and political thinking. Indeed, the European Union has some constitutional elements, but absence of the so called ‘European demos’ prevents us from recognizing the founding treaties as a real ‘European constitution’ in the proper sense of the word. The author agrees with the decision to exclude the term ‘Constitution’ from the title and contents of the new Reform Treaty. The author also suggests that softer terms, like ‘European constitutional order’ and ‘European Constitutionalism’ might better reflect the scope of contemporary European integration than the term of ‘a Constitution for Europe’. A rethinking of the ‘constitutional core’ of the Lisbon Treaty was inspired following the so-called Lisbon judgments of Czech, Latvian and German constitutional courts.*

**Keywords:** *European constitutionalism, EU Constitutional Treaty, Treaty of Lisbon, Member States, national constitutional courts, harmonization.*

## Introduction and Constitutional Terminology

In 2004, the Lithuanian Parliament was the first among the European Union member states to ratify the Treaty establishing a Constitution for Europe ('Constitutional Treaty') without any substantial discussion with the citizens of the country. When the *échec* of public referendums in France and the Netherlands resulted in the rejection of the Treaty, the time came for reflection and reexamination of this 'great venture' of a project as it was called in the preamble of the document. As a consequence of this, the *Treaty of Lisbon*<sup>1</sup>—a document with a more modest title—was drafted in 2007 and entered into force on 1 December, 2009. The original plan was to have it ratified by the end of 2008, but this was postponed as a result of its rejection by the first Irish referendum. Nevertheless, it was approved by the second Irish referendum<sup>2</sup> and entered into force in 1 December 2009 after its approval by the Czech President, Václav Klaus. Although the Treaty of Lisbon represents something of a political compromise reached after the rejection of the Constitutional Treaty, it actually includes major components (about 90%) of the earlier document, namely, more qualified majority voting in the Council of Ministers and increased co-decision procedure, greater involvement of the European Parliament and national parliaments in the EU's legislative process, the formal elimination of the pillar system, the creation a single legal personality for the EU as the successor of the European Communities (EC), the creation of a long-term President of the European Council (2,5 years, renewable once) and the High Representative of the Union for Foreign Affairs and Security Policy (along with the European External Action Service), EU citizens' right to initiative (a million citizens may sign a petition compelling the Commission to submit a proposal). The Treaty also made the Charter of Fundamental Rights legally binding.<sup>3</sup> Although the idea to have a European constitutional treaty was rejected, its very contents are practically covered by the Lisbon treaty. This, I believe, prompts further discussion concerning the necessity of constitutional language when speaking of European founding treaties. Moreover, the argument of similarity between the Reform Treaty with the former draft Constitutional Treaty was also present in

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- 1 Officially—Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The Treaty of Lisbon, in fact, amended the text of the *Treaty on EU* and the former Treaty of EC was renamed as the *Treaty on the functioning of the EU*. Therefore, as a result of this reform—the EU, founded on these two Treaties, became an entity with legal personality and succeeded the European Community.
  - 2 A 1987 decision of the Irish Supreme Court established that ratification by Ireland of any significant amendment to the Treaties of the European Union requires an amendment to the Irish Constitution. All constitutional amendments in this country require approval by referendum. Ireland is the only EU member state that has held a public referendum on the Treaty of Lisbon (ratification of the Treaty in all other member states was decided upon by the national parliaments). One of the compromises in order to meet the second Irish referendum was an Irish opt-out (at least for three years) from the change from unanimous decisions to qualified majority voting in the sector of police and judicial affairs.
  - 3 Unlike the Constitutional Treaty, the Treaty of Lisbon according to the mandate for the Intergovernmental Conference expressly renounces the former constitutional concept according to which all existing treaties should be replaced by a single text called 'Constitution'. Accordingly, the existence of two founding treaties was preserved (Treaty on European Union and Treaty on Functioning of the European Union (ex Treaty establishing European Community)).

requests for constitutional assessment of the Lisbon Treaty to the Czech, German and Latvian Constitutional courts (although the constitutionality of the former Treaty establishing a Constitution for Europe was not contested in these countries).<sup>4</sup> According to President Václav Klaus, the ‘constitutional ambitions’ of the Reform Treaty have not disappeared only because the latter document does not codify European symbols—flag, anthem and motto. According to the President, one cannot claim that this omission fundamentally distinguishes the Treaty of Lisbon from the rejected proposal for a European Constitution.<sup>5</sup>

Any discussion on the ‘constitutional dimensions’ of the European Communities should begin with the fact that the European Court of Justice (ECJ), back in the 1960s, ‘discovered’ a *constitutional order* in the EC Treaty because of its primacy and direct effect. This constitutional reasoning implied that EC law can create certain rights for individuals of the member states (in the same way as national constitutions or legislation) by establishing so called ‘European freedoms’ (free movement of persons, goods, capital, services and labour). But where did it find this ‘constitutional’ dimension of the EC and why had it decided to use this ‘constitutional’ terminology? As the ECJ itself later pointed out in its jurisprudence, this constitutional dimension of the Communities comes from the ‘constitutional traditions of member states’. This reasoning and the constitutional terminology were later introduced into the Maastricht treaty. In my opinion, this means that the ‘constitutional paradigm’ of the EC legal framework was borrowed from national constitutional thought.

Because of the influence of the ECJ’s ‘constitutional language’ and changes introduced by the Maastricht treaty in early 1990s the subject of ‘European Constitutional law’ was broadly accepted in the curriculum of various European Universities. Here, the ‘constitutionality’ of EC/EU was linked not only with the primacy and direct effect of EC law, but also with the delegation of certain (national) sovereign powers towards the European level. Therefore, the use of ‘constitutional’ terminology to define the EC/EU legal establishment has been present in the economic, judicial, political and academic *language* for decades.

In this paper, I would like to discuss three different dimensions of European integration and constitutionalism thereof: (i) *economic* constitution, (ii) European *human rights* and (iii) European *political* constitution. All three dimensions of European integration will be discussed through the constitutional point of view. The draft Constitutional Treaty and the Reform Treaty will be examined primarily as a *political* instruments, including the two other dimensions of European integration. The paradigm of ‘Constitution for Europe’ will be juxtaposed to the softer idea of ‘European constitutionalism’.<sup>6</sup>

4 Czech and Latvian Constitutional courts have also reviewed a question on whether the Lisbon Treaty should be ratified by popular referendum in these respective countries. English translation of 7 April 2009 judgment of Latvian Constitutional Court [interactive]. [accessed 15-01-2010]. <[http://www.satv.tiesa.gov.lv/upload/judg\\_2008\\_35.htm](http://www.satv.tiesa.gov.lv/upload/judg_2008_35.htm)>. Judgments of Lisbon I (26.11.2008) and Lisbon II (03.11.2009) of the Czech Constitutional Court [interactive]. [accessed 15-01-2010]. <<http://www.concourt.cz/view/726>>.

5 For arguments of the Czech President Václav Klaus, see judgment of 26 November 2008 of the Czech Constitutional Court (so called judgment of Lisbon I).

6 One has to admit that the tradition to have ‘a constitution’ as a basic document of various international or

## 1. The ‘Soft’ European Constitution as an Economic and Judicial Exercise

We all know that the ‘great venture’ of European integration began at the end of the 1950s and started with the modest ‘European Economic Community’ (together with two other Communities). If we choose to call this economic integration an ‘economic constitution’, we could agree that there have never been any unique understandings of this notion. At least two different concepts can be mentioned here: the *liberal* and the *positivistic-étatique* which may define the European economic constitution. I believe that only the liberal market-oriented vision of European economic integration deserves recognition as a notion of ‘economic constitution’, for only the latter concept echoes the traditional elements of ‘economic constitution’, namely, a market economy with ‘freedoms’ and undistorted competition. These elements of a market-oriented economic constitution, of course, can be found in the original text of the EEC treaty.

On the other hand, a completely different concept of European economic integration can be found in Article 100 of the older EEC Treaty, now transferred to article 113 of the TFEU<sup>7</sup>. According to this article, the ‘establishment and functioning of the common market’ may be promoted not only by the ‘neutral’ economic logic of the free market and competition, but, first of all, by legislation of ‘harmonized’ rules in all member states. Although harmonized legislation, as provided in this article, is justified only through the liberal idea of ‘establishment and functioning of the common market’, in practice it justifies the positivistic approach towards European integration. This positivistic ‘harmonized’ way of economic integration was often misused by the European Commission and the Council. Directive 85/577 on ‘Doorstep Selling’ is a good example of this misuse. Of course, in different periods, harmonization directives have been adopted with different frequency. Nevertheless, during some decades, harmonization legislative practices were broadly accepted. Therefore, the European Commission may currently intervene not only in the area of indirect taxation, employment policy and consumer protection, but also in the domain of immigration, education, vocational training, youth, culture, public health, environmental protection, advertising—spheres originally beyond the needs of the establishment and functioning of a common market.

To keep the idea of a *European economic constitution* within the EU alive, we need at least an appropriate balance between these two concepts of European integration. If EU harmonization policy is just the unification of economic rules, then *competition* in the European common market (and the common market itself) may be basically destroyed. An example of this paradox in European harmonization policy is that many directives

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NGO institutions was well established especially after the World War II. E. g.: Constitution of the International Organization for Migration.

7 Art. 113 (ex art. 93 TEC). ‘The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.’

and regulations have already been adopted not only on the basis of conferred powers of ‘indirect taxation’ (VAT, excise duty, environmental and energy taxation), but also in the sphere of personal tax, company tax and capital duty. Official justification for the harmonization of taxation policy on the EU level is grounded on the same argument—that different taxes in member states may create an obstacle to the free movement of goods and the free supply of services within the internal market, and because they may distort competition.<sup>8</sup> However, the very idea of a free and common market is not about unification of taxes but free conditions to compete within different legal establishments and between different business strategies. A good example of this ‘competition logic’ is the United States of America. The United States, a sovereign country, maintains different taxation systems in different states. It is difficult to conceive how Europe, with its fixed and ‘harmonized taxes’, could compete in the global economy. In this regard, Christian Joerges is absolutely correct in asking the question: what is left of the European economic constitution?<sup>9</sup>

Another European constitutional tradition, developed through more than 50 years, is related to the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) in Strasbourg.<sup>10</sup> The protection of human rights against abuses of public power, according to the European tradition, has always been a constitutional matter. The efforts of the Council of Europe and, in particular, those of the ECtHR, towards the ‘constitutionalization’ of different legal systems is realized through judicial interpretation in attempt to find a common minimum standard for human rights. The ECHR was designed under the influence of the Universal Declaration on Human Rights and the Strasbourg court was created in order to adopt its ‘minimum human rights standards’ through the idea of the *universality* of human rights. Of course, this judicial reasoning, as justification for the imposition of legal standards by *rational* arguments, differs significantly from the ‘harmonization’ of legal systems via instrumental legislation. The court in Strasbourg is, in fact, challenging and reviewing each state’s constitutional background on human rights, for instance—family and privacy rights, the right to life or political rights.

Of course, this *rational* reconsideration of various national conceptions in attempt to find some common European minimal standards for human rights is not always coherent and sometimes allows for differences between the ‘old’ and ‘new’ democracies of Europe.<sup>11</sup> Nevertheless this judicial (*rational*) European constitutionalism supplements

8 See also: in <[http://www.taxes.eu/laws\\_for\\_taxes](http://www.taxes.eu/laws_for_taxes)> and <[www.europa.eu.int/taxation](http://www.europa.eu.int/taxation)>.

9 See also: Joerges, C. *What is Left of the Economic Constitution? A melancholic Polemic*. Introductory lecture on 5 July 2004 to the Summer Course of the Academy European Law – Session on European Law. Florence. Distributed paper.

10 Very similar arguments on the constitutionalization of European law may be delivered in favour of the jurisprudence of the ECJ, but this subject will not be developed in this paper.

11 See also: *Ždanoka v. Latvia*, March 16, 2006 judgment of Grand Chamber of ECHR. In this judgment, the Court by evaluating a ban for former high communist officials to stand for Parliamentary elections stated that ‘while such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context

the European *economic* (market-oriented) constitution and advocates the paradigm of *soft* European constitutionalism.

## 2. The Treaty of Lisbon as a Step towards Political Integration

The *economic* and *judicial (human rights)* dimensions of European integration and constitutionalism were discussed in the previous section, but the motor of European integration, of course, is a *political* exercise. The *political* dimension of the creation of the European Communities in the documents of the 1950s is very clearly articulated, but in reality, the political dimension of European constitutionalism has rapidly accelerated with the idea of direct elections to the European Parliament (1979), the adoption of the Single European Act in 1986 (qualified majority vote), and especially—with the Treaty on European Union (TEU) in 1992 (two additional pillars, European citizenship and European Monetary Union). One might say that this political dimension formally culminated in 2004 with the signing of the former Treaty establishing a Constitution for Europe and, finally, when the Reform Treaty came into force in 2009.

In this section, I would like to discuss the decision to exclude constitutional terminology from the text of the Reform Treaty. This requires a brief review of the concept of a constitution, which is primarily associated with the sovereign state. One may draft a constitution to justify the independence of one country from another, as it was the case in Norway at the beginning of the nineteenth century or, for instance, in my own country, Lithuania, as it broke free of the Soviet Union. A constitution may also reflect an attempt to limit the powers of a dominant authority and create a new social ideology, as it was the case with the French Constitution of 1791. A constitution may also be the expression of a desire to unify and centralize a state, as it was with the USA in 1787 or Germany in 1871. All these examples reveal that the modern concept of a constitution is related to the nation-state. Even the contemporary idea of ‘denationalization’ of constitutional law<sup>12</sup> (first of all promoted by economic, judicial (human rights) and political European integration) is grounded in and drawn from national constitutional traditions.

Therefore, we should firstly recognize some elements of modern constitutionalism so we can hence analyse certain provisions of the Lisbon Treaty and determine how these provisions reflect the elements of constitutionalism. As already stated, these elements can be gleaned from the national constitutional traditions and may be listed as follows:

- 1) the supremacy and direct effect of the constitution;
- 2) the procedural ‘strictness’ of amending a constitution;
- 3) separation of powers;
- 4) commitment to democracy and human rights protection;
- 5) assurance of judicial independence, including judicial review;

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which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime’.

12 See also: de Búrca, G.; Gerstenberg, O. The Denationalization of Constitutional law. *Harvard International Law Journal*. 2006, 47: 243–262.

- 6) parliamentarism;
- 7) national (popular) sovereignty;
- 8) certain socio-political contract and moral minimum for the society in question.

1. Supremacy of the constitution as the ‘supreme law of the land’ and its *direct effect* must go together, for if a certain provision of the constitution cannot be invoked by the citizens before ordinary courts, then its supremacy is but a fiction.<sup>13</sup> Article I-6 of the rejected treaty states that ‘the Constitution and law adopted by the Union’s institutions in exercising competences conferred on it, shall have primacy over the law of the Member States’. However, when this document was rejected, it was decided not to include the primacy clause in the text of the Lisbon Treaty, for it could result in a negative reaction, at least in certain member states. Nevertheless, it was included in the text of the ‘Declaration concerning primacy’.<sup>14</sup> Therefore, earlier steps to reaffirm the primacy of EU law over national law have rather diminished according to the Lisbon Treaty. Even if the primacy of EU law over national legislation is, to some extent, accepted in the member states, national constitutional courts still treat the national constitution as the ‘supreme law of the land’.<sup>15</sup> To avoid possible conflicts of jurisdiction, the idea of mutual respect and reciprocity is widely accepted between the ECJ and national constitutional courts.<sup>16</sup>

2. The procedural ‘strictness’ of constitutional alteration. Written national constitutions are adopted through more complicated procedures than ordinary legislation and a qualified majority vote in the parliament or even a *popular referendum* is required to amend it. This *constituent* character of the Constitution reveals the real master of the constitution, which is a *natio* or *populus* of the country. The convention on the Future of Europe also entailed discussions on the possibility of organizing a common popular referendum in all member states for the adoption of the Treaty establishing a Constitution

13 For instance, the so-called ‘Stalin’ or ‘Brezhnev’ Constitutions were non-enforceable before the courts and ‘human rights’ mentioned therein were only fictional ones.

14 ‘The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (I)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’ *Official Journal of the European Union*. C 306/256. 17.12.2007.

15 It was also reaffirmed in the 30 June, 2009 Lisbon judgment of German Constitutional court and in the judgment of 26 November 2008 (judgment of Lisbon I) of the Czech Constitutional court: ‘*In the event of a clear conflict between the domestic Constitution and European law that can not be cured by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its material core, must take precedence*’.

16 Czech Constitutional court in the same judgment communicated the expectation that ‘*even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of member states will not be placed in a hierarchy in any way; it should continue to be a dialog of equal partners, who will respect and supplement each other’s activities, not compete with each other*’.

for Europe. Nevertheless, this ‘constitutional’ route was rejected and it was decided to use the traditional way of adopting it as an international treaty. The very same procedure was followed for the ratification of the Lisbon Treaty. The majority of EU member states have chosen to use parliamentary ratification for both treaties. In Lithuania, both treaties were ratified according to the same procedure as for any other international agreement<sup>17</sup> and this was done practically without any substantial discussion in Lithuanian society. The use of this procedure certainly reduced the possible ‘constitutional’ character of both documents. Only in Ireland the Lisbon Treaty was ratified after a public referendum.

3. The separation of powers. It was once stated in the *Déclaration des droits de l’homme et du citoyen* that a society, in which the separation of powers is not defined, does not have a Constitution. I think that the drafters of the 1789 French declaration would be glad to know that political powers are currently divided not only in the central government of a unitary state, but that this division is often multi-layered, encompassing municipalities, regions, federal subjects and even the European level. One of the main goals of the Convention on the Future of Europe was to clarify the competence of the European Union in relationship to the competence of the member states. In this respect, Article I-11 of the former draft Constitutional Treaty reaffirmed the principle of (attributive) conferred powers of the EU, developed by ECJ jurisprudence. Nothing new was decided in Lisbon. According to Article 3b (2) of the Treaty on EU (as amended in Lisbon): ‘under the principle of conferral, 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’. Nevertheless, in my opinion, the division of powers within the European Union faces two main problems: the limits of the ‘principle of conferred powers’ and the dominant role of the executive in the EU institutional structure.

The latter problem, which is sometimes described as a *democratic deficit* in the EU, may be solved, at least theoretically, by two converse strategies: either by broadening the role of the European Parliament in the European decision-making process or by reducing the scope of European competences. Since I do not believe that it is possible, in the nearest future, to substantially expand the role of European Parliament (including the already expanded co-decision areas under the Lisbon treaty) by making it analogous to a national parliament, the only realistic strategy would be to restrain our Europeanization ambitions. I do not believe that the only possible ‘European project’ entails putting as much as possible under the European umbrella. The more we consolidate in this manner, the more ‘democratic deficit’ we will have, for we still do not have a so-called ‘European demos’ that could legitimate the existence of a strong European Parliament. As the German Constitutional Court rightly stated in its Lisbon judgment: ‘an increase of integration can be unconstitutional if the level of democratic legitimization is not commensurate to the extent and the weight of supranational power of rule’ [262]. On the other hand, it is very difficult to imagine that one day British, French, German or Lithu-

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17 Law on the ratification of the Treaty establishing a Constitution for Europe, 11 November 2004; Law on the ratification of Treaty of Lisbon amending the Treaty on EU and the Treaty establishing the EC, 8 May 2008. *Official Gazette*. 2008, No. 56-2123.



anian nationals will care more about European matters and thus relegate their regional or national identities to a lower tier. In this context, it would be difficult to substantially broaden the role of the European Parliament in the nearest future. Although the Lisbon Treaty broadened the legislative competence of the European Parliament, it didn't solve the very problem of the domination of the executive by balancing the traditional concept of division of powers within the EU structure.<sup>18</sup>

In literature, the principle of conferred powers is often related to the so called 'Kompetenz-Kompetenz' problem (i.e., who has the last word on EU competence). I do not see how the text of the Lisbon Treaty helps us in solving this problem either. The question of defining the limits of EU competence and whether member states have sufficient tools to keep European political machinery in check is as open as ever.<sup>19</sup> I would like to agree with Paul Craig that if an individual does not agree with a ruling of the ECJ on EU competence, she might 'argue before a national court that the ECJ's view is not final and conclusive, and that it should be for the national court to make the final determination of the boundaries of the categories of competence'<sup>20</sup>. In any case, the solution of this problem should not be left to the EU institutions themselves, but should rather be addressed by the competence of member states according to Article 48 of the EU Treaty and the 'Declaration in relation to the delimitation of the competence' in the Lisbon Treaty.

4. Commitment to democracy and human rights protection. A formal commitment to democracy is very well articulated in the texts of the founding treaties. According to Article 2 of the Treaty on the European Union 'the Union is founded on the values of respect for human dignity, freedom, *democracy*, equality, the rule of law and respect for human rights' (italics mine). However, the greatest problem with the Union's democratic character under the Lisbon Treaty is the already noted 'democratic deficit' related to the predominance of the executive in the legislative structure of the EU. *Democracy* (or rather the lack thereof in EU structures), according to the German Constitutional court in *Solange II*, is one of the constitutional principles that justifies a possible review of the constitutionality of the Union's acts by the German *Verfassungsgericht*.

Another important 'constitutional' feature of the Lisbon Treaty is likely related to the decision to recognize the legal effect of the founding treaty on the EU Charter of Fundamental Rights (see Art. 6 of the Treaty on EU). The Charter remains a separate document and was not included in the text of the Treaty itself as it was in Chapter II of the former draft Constitutional treaty. It should also be noted that the scope of this Charter may not exceed the implementation of Union law (Art. 51 of the Charter), meaning that the Charter may not be applied to fields that the member states have not delegated to the EU. Moreover, according to additional protocol of the Treaty—the Charter only

18 One may argue the contrary: that the Lisbon Treaty in fact strengthened the EU's executive power by introducing the President of the European Union and the High Representative of the Union for Foreign Affairs. On the other hand, it should be added that so called 'information competence' of the national parliaments was extended by the additional protocol of the Lisbon Treaty.

19 On the principle of conferred powers see also Art. 2, 3a, 3b, 9 of the Treaty on EU.

20 Craig, P.; de Búrca, G. *EU law. Text, cases and materials*. 2<sup>nd</sup> edition. Oxford University Press, 1998, p. 124.

reaffirms already recognized rights, ‘but does not create new rights or principles’. In this regard, it is still difficult to predict the future role of this document and to determine how consequent the Charter may be for European citizens in the day to day protection of their rights. My answer so far is that the Charter’s importance could be very limited, since the main basis for the protection of human rights for ordinary European citizens is national law and the ECHR.<sup>21</sup> It is therefore ironic that the constitutional dimension of the Lisbon Treaty concerning its introduction of the Charter of Fundamental Rights is rather unclear.

5. Assurance of judicial independence (including judicial review). The Treaty of Lisbon has not brought anything new regarding this subject. It reaffirms the two-instance European judicial system that has already existed under the EC Treaty: the Court of Justice of the European Union includes the Court of Justice, the General Court (known as the Court of First Instance) and specialized courts (under the Treaty of Nice, the EU Civil Service Tribunal was created as a specialized European judicial body). The Lisbon Treaty also reaffirms the competence of the ECJ to interpret any founding treaty, including the Charter of Fundamental Rights. The preliminary ruling is still to be the main instrument of judicial review by the ECJ regarding any act of an EU institution. The ECJ, as before, has no jurisdiction with respect to the provisions of common foreign and security policy (Art. 22, ex Art. 11 TEU). Article 263 of the Treaty on the Functioning of the European Union repeats a provision of Article 230 of the former EC Treaty concerning the ECJ’s competence to rule on ‘lack of competence’ of any EU institution. Therefore, the Lisbon Treaty reaffirms the principle of judicial independence concerning the EU judiciary. It also maintains the judicial review competence of the European courts concerning interpretation and application of the Union’s acts, but does not solve the problem of the relationship between the ECJ and the national constitutional courts of the member states in the *Kompetenz-Kompetenz* problem mentioned above.

The Italian Constitutional court, for example (in Frontini, 1973) reserves the competence to review the constitutionality of European acts with regard to fundamental human rights. The German Constitutional court, in its turn, declares competence to review the constitutionality of the Union’s acts<sup>22</sup> or even of provisions of the founding treaties not only with regard to fundamental rights, but also regarding constitutional principles (such as democracy, rule of law, separation of powers, social state, federalism and peaceful international cooperation), including oversight of the compliance of the legal acts of the Union with the limits of its competences.<sup>23</sup> The Czech Constitutional court

21 Article 6 of the Lisbon Treaty also includes the provision of the former Art. I-9 of the draft Constitutional Treaty that the Union accedes to the European Convention on Human Rights and that this Convention together with the constitutional principles common to the member states constitute the general principles of the Union’s law.

22 This competence was reaffirmed by the Verfassungsgericht in the Lisbon judgment (30.06.2009) according to the Solange II formula: ‘The Federal Constitutional Court no longer exercises its jurisdiction to decide on the applicability of secondary Union law and other acts of the European Union <...> merely as long as the European Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law’.

23 The same judgment of the Verfassungsgericht asserts that ‘the Act approving an international agreement and

in its Euro-arrest warrant judgment also stated that ‘the Constitutional Court acquires an opportunity to evaluate to a certain extent the constitutionality of the interpretation of already existing EU law norms by the Court of Justice, without coming into direct conflict with it’<sup>24</sup>, which was also reaffirmed in the judgment of Lisbon I, saying that ‘the Czech Constitutional Court also intends to review, as *ultima ratio*, whether the legal acts of European bodies remain within the bounds of the powers that were provided to them’ [215]<sup>25</sup>. And finally, the Polish Constitutional Tribunal in its Accession judgment also ruled out the jurisdiction of the Court of Justice to evaluate the limits of conferral of competences on the EU, as, according to the Tribunal, that is a question of interpretation of (Polish) domestic constitutional law.<sup>26</sup>

6. *Parliamentarism* is one of the main achievements of the development of modern democracy and constitutionalism. This principle affirms that representative democracy is of crucial importance in the government of a modern democratic state. The parliament not only represents the will of people in its legislation, but also maintains a check on executive power through the instruments of parliamentary oversight. The European Parliament is a rather new European institution. The Treaty of Lisbon (same as the draft Constitutional treaty) strengthened the role of the European Parliament within the European institutional structure and this is, of course, a move towards the ‘constitutionalization’ of the European Union.<sup>27</sup> On the other hand, the European Union still lacks, even with the Treaty of Lisbon, a political decision-making body that would come into being on the basis of an election by all citizens of the Union and which could uniformly represent the will of the people.

As already mentioned in this paper, the insufficient role of the European Parliament in legislation and oversight is usually referred to as a ‘democratic deficit’. However, ‘deficit’ is somewhat problematic. This description is true in that right now many important (even ‘constitutional’) issues in the EU are not decided on the basis of a very transparent legislative procedure. The problem is that the more we expand the competence of the European Parliament within the EU structure, the more we move towards the creation of a European quasi-state. I am not sure that we are ready for this stage of European cen-

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the national accompanying laws must therefore be such that European integration continues to take place according to the principle of conferral without the possibility for the European Union of taking possession of *Kompetenz-Kompetenz* or to violate the Member States’ constitutional identity which is not amenable to integration, in this case, that of the Basic Law <...> The Federal Constitutional Court has already opened up the way of the *ultra vires* review for this, which applies where Community and Union institutions transgress the boundaries of their competences <...> The *ultra vires* review as well as the identity review can result in Community law or Union law being declared inapplicable in Germany’.

24 File no. Pl. ÚS 66/04, Collection of Decisions of the Constitutional Court, volume 41, judgment no. 93, promulgated as no. 434/2006 Coll.

25 This statement was also repeated in the Court’s judgment of Lisbon II (03.11.2009), see par. 172.

26 The ECJ itself has already decided that in a particular case a European act may exceed the competence that the EU has on the basis of the founding treaties. This happened for the first time in 2000, when it annulled the Council directive on the regulation of tobacco advertising, because in its opinion this regulation was not within the competences that the EU has on the basis of transfer of competences from member states (decision of 5 October 2000, *Germany v. the Parliament and the Council*, C-376/98, Recueil, p. I-8419).

27 It was already mentioned that cases of co-decision procedure and involvement of the European Parliament in the legislation process were increased under the Lisbon Treaty.

tralization. From this vantage point, any expansion of the competence of the European Parliament may appear controversial. I would like to further develop this critique with a focus on the problem of popular sovereignty in the EU.

7. The main element of the constitutional dimension in any legal document rests in its relationship with popular sovereignty. The Lisbon Treaty rejected the idea of codifying the Union's symbols (flag, anthem and motto) into the text of the document. A strong example of national sovereignty can be found in the popular statement that constitutions are made by the people and for the people. Whether a particular constitution is a *real constitution* can be revealed in how much it reflects the particular society's *contrat social*, including a certain moral minimum and how much the people may influence the political structures defined by the document. Civic involvement in the adoption of the former draft Constitutional Treaty as well as that of the Treaty of Lisbon was rather weak in most member states. From this perspective, the constitutional element mentioned above was not well developed for either treaty.

If we read the Preamble of the former draft Constitutional Treaty using our 'constitutional glasses', we could expect to find a *body* competent in adopting such an ambitious document. Alas, the result is utterly disappointing. Instead of words like 'we, the people(s) of Europe', the only voices we find speaking in the first person here are the heads of member states. According to the Preamble of the former Constitutional Treaty, *they* were drawing inspiration from the European cultural inheritance; *they* believed in Europe; *they* were convinced in its common destiny and the 'great venture' and, of course, *they* were grateful to the members of the European Convention 'for having prepared this draft-Constitution on behalf of the citizens and States of Europe'.<sup>28</sup> The text of the Lisbon Treaty, on the other hand, does not include such a solemn Preamble. Instead, we are left with the sterile Preambles of the Treaty on EU and Treaty on Functioning of the EU (the former Treaty on EC), where again—only the member states are mentioned as the masters of these treaties.

Yet, one may even question whether *there is* a body (as there indeed is one in a national state) appropriate for adopting the 'Constitution for Europe' in the first place? I think it would be rather difficult to answer this question in the affirmative. Here we face the already mentioned question regarding the existence of the so-called 'European demos'. Notwithstanding the fact that the preamble and the text of the Treaty on EU contain the concept of 'citizens of the Union' (as created by the Maastricht treaty), we still might question how much this notion reflects the idea of 'we, the people of Europe' in a constitutional sense? The citizenship of the Union is solely derived from the will of the member states and does not constitute a people of the Union, which would be competent to exercise self-determination as a legal entity giving itself a constitution. According to the German Constitutional court—member states, not European demos, are the masters of the treaties and they may withdraw from the Union if their people wish to do so (see Art. 50 (1) TEU). Moreover, according to the Verfassungsgericht, Germany would be constitutionally barred from taking part in a Treaty amendment, according to which a

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28 Of course, heads of member states here act as representatives of their respective countries.

member state could be obliged, against its will, to take part in a military operation of the European Union.<sup>29</sup>

We could think of a *European demos* if we could imagine the existence of certain ‘European social-political contract’ among the citizens of different EU member states. It is clear enough that we do not know a lot about the socio-political structures of our 26 neighboring countries. We do not have common European political parties to vote for in the European Parliament and we use different national electoral procedures for the European elections. News from Brussels and Strasbourg are not in the first pages of our newspapers. Therefore, it would be difficult to find a ‘European political conscience’ in contemporary Europe.<sup>30</sup>

8. Continuing on the subject of the European *demos*, it is important that a Constitution fix certain socially significant common values and establish a social contract, something reflective of the society for which it was drafted. Can we find such values in contemporary Europe or could we arrive at a certain ‘European social contract’? Such values as respect of human dignity, freedom, democracy, solidarity, cultural diversity, tolerance, pluralism, competition, minority rights and the rule of law are indeed the values of a modern democratic state in the West. But are these values and principles not too broad, when put into practice? Can we find a single response in all EU member states on how to put these ideas into practice when dealing, for example, with matters such as the model of a secular state, abortion, euthanasia, the rights of homosexuals, genetic engineering or minority rights? In other words, do we wish to have unanimity on such issues? Even without the ‘first amendment’ clause in the text of the founding treaties, it is clear that the ‘moral minimum’ concerning matters mentioned above may differ from one member state to another, because of cultural diversity.<sup>31</sup>

## Conclusions

It is certainly true that there is no alternative to the contemporary projects of European economic, human rights and political integration. It is also clear that the political dimension of this integration dominates the whole process. And I am afraid that the European political elite have currently put too much emphasis on the political (institu-

29 The judgment of Lisbon.

30 One has to admit that the new instrument of the Union’s citizens’ initiative, introduced by the Lisbon Treaty, may strengthen common European conscience and encourage the formation of European political parties, NGOs or even harmonization of certain electoral requirements.

31 On the other hand, it would be incorrect to negate that, for instance, direct elections of the European Parliament and formation of political factions in the European Parliament could serve as a foundation for a certain ‘European political contract’. Moreover, as the resignation of the entire European Commission in 1997 and especially—the resignation of Mr. Rocco Buttiglione from the Barosso Commission in 2004 showed, that moral convictions of people of EU member states—indirectly but *actually* matters in the EU political nominations. I agree with Tom Eijsbouts that the latter example shows certain *real* constitutional features of European Union, but I do not think that we can already witness the existence of a ‘European moral minimum’ or a ‘European political contract’ as such. See also: Eijsbouts, T. ‘Europe’s Single and Powerful Amphibious Model’. In *Les principes fondamentaux de la Constitution européen*. Dossier de droit européen n° 15. Kadous, Ch.; Auer, A. (éd.). 2006, p. 85–87.

tional-structural) reforms and have exaggerated the role of European legislation (especially, ‘harmonisation directives’) in building the European Union. I am certain that the nations of Central and Eastern Europe have much experience living in societies that were believed to have transformed themselves using only political and positivistic legal instruments. From this perspective, we may note that (1) the idea of European economic constitution is less ambitious, but more transparent and that (2) the judicial path in establishing European human rights standards is longer but more convincing. Therefore, my conclusion is that the political constitutionalization of the European Union after the Lisbon Treaty has not reached the stage of a ‘European Constitution’ and that the terms of ‘European constitutionalism’ and ‘European constitutional order’ would better reflect the contemporary situation in European integration.

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## EUROPOS KONSTITUCIONALIZMAS V. REFORMUOTA EUROPOS KONSTITUCIJA

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**Santrauka.** Po 2005 m. nepavykusių Prancūzijos ir Nyderlandų referendumų atsirado būtinybė persvarstyti „Europos Konstitucijos“ idėją. Kaip šio persvarstymo politinis rezultatas atsirado Lisabonos sutartis (įsigaliojo 2009 m. gruodžio 1 d.), kuri iš tikrųjų

yra buvusios Konstitucinės sutarties teksto truputį „apkarpytas“ variantas. Nežiūrint į tai, kad Lisabonos sutartyje nebevertojamas „Konstitucijos“ terminas, tačiau kadangi ji perėmė apie 90 proc. buvusios Konstitucinės sutarties nuostatų, todėl šią Sutartį galima analizuoti remiantis tradicine konstitucine teise. Tokią galimybę dar labiau sustiprino Čekijos, Latvijos ir Vokietijos konstitucinių teismų sprendimai vadinamosiose „Lisabonos bylose“. Autorius straipsnyje laikosi nuomonės, kad nei ES sutartyse, nei teisės mokslė netikslinga vartoti „Europos konstitucijos“ termino, nes didele dalimi tai neatitinka tradicinės konstitucinės teisės sampratos. Vietoj „Europos Konstitucijos“ termino teisės mokslui autorius siūlo vartoti „Europos konstitucionalizmo“ terminą, kuris šiuo metu geriau atitinka Europos žmogaus teisių katalogo, Europos ekonominės integracijos ir Europos politinės integracijos sferose egzistuojančias konstitucingumo dimensijas.

**Reikšminiai žodžiai:** Europos konstitucionalizmas, ES Konstitucinė sutartis, Lisabonos sutartis, valstybės narės, nacionaliniai konstituciniai teismai, harmonizacija.

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