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**Constitutionalism Beyond the Constitution:
The Treaty of Lisbon in the Light of Post-National Public Law**

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**Constitutionalism Beyond the Constitution:
The Treaty of Lisbon in the Light of Post-National Public Law**

*By Sergio Dellavalle**

Abstract

The Lisbon Treaty marks the end, at least for the foreseeable future, of the project of a European Constitution. But does it also mean a rejection of the tradition of Western constitutionalism? The author addresses the question outlining, first, the main elements of the modern Western conception of constitutionalism. In a second step the analysis concentrates on which of these contents are nonetheless present in the Lisbon Treaty. The claim is made that, regardless of its persistent deficits, the basic law of the EU has to be considered as belonging to the legacy of constitutionalism, paving the way to a constitutionalism beyond national constitutions. Lastly, the inquiry is concluded with some considerations on the main features of a multilevel public law system.

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I. Introduction

The mandate for a *Reform Treaty*, formulated in the Presidency Conclusions of the European Council's meeting held on the 21st and 22nd of June 2007, left no doubt about the radical change that had been envisaged compared with the recent past: "the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned".¹ While the idea of a Constitution for Europe increasingly characterized the debate on the reform of institutions and fundamental norms of the Union during the previous decade, the failure of the Constitutional Treaty, noticed with no mercy in the same document of the European Council, seemed to upset definitively the political climate. In the new situation, the Conclusions of the European Council looked like an obituary for the very vision of a constitutionalism made to Union's measure as well as for the hopes that many had connected with this vision. After celebrating the burial of the European Constitution – quite in a less solemn way than its signature in 2004 – the new Reform Treaty or Treaty of Lisbon was prepared with astonishing rapidity and then signed in the Portuguese capital the 13th of December 2007. It is written following a clearly post-constitutional attitude and marks, at least at a first glance, the return to a rather traditional understanding of the primary law of the European Union – a return which the numerous detractors of the Constitutional Treaty from its very outset strongly hoped for.

In spite of the massive retreat accomplished on the way to Lisbon, also the treaty named after the metropolis on the Tagus did not remain unchallenged in its ratification process. Indeed, before it eventually came into force on the 1st of December 2009, a second referendum in Ireland was needed on the 2nd of October 2009, after its rejection in a first attempt on the 13th of June 2008, in order to obtain the constitutionally required approval by the citizens. The Lisbon Treaty has also been object of an highly controversial decision by the German Federal Constitutional Court.² Its ratification by the Czech Republic, moreover, was delayed for a long time until its President Vaclav Klaus signed it – joining as the last among all member states of the Union – on the 3rd of November 2009, finally removing the last obstacle to its entry into force. Leaving aside

¹ *Brussels European Council 21/22 June 2007. Presidency Conclusions*, 11177/07, Annex I, I.1., at 15.

² BVerfG, 2 BvE 2/08 vom 30.6.2009, http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html. Citations refer to the official English translation, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. For a first evaluation of the decision, see the comments contained in the special issue of the "German Law Journal", 10 (8/2009).

any reflection on the political meaning of these difficulties for the present of the European integration as well as for its future development, I will concentrate – in a rather normative way – on the consequences that the giving up of the idea of a European Constitution may have for the whole project of Union’s constitutionalism. More in detail, four questions will be at the centre of the analysis:

a) which elements of the traditional idea of constitution, that were present in the Constitutional Treaty, have been sacrificed in the Treaty of Lisbon?

b) What, on the contrary, remains of the unsuccessful antecedent?

c) Which consequences can be drawn from the answers to both precedent questions in order to specify the characteristics of a realistic project of European constitutionalism? Or is it maybe necessary, if this analysis should show that no elements of modern constitutionalism has been maintained in the Treaty of Lisbon, to refrain from the very idea of applying the principles of modern constitutionalism to European integration?

d) Does a better understanding of the future of Union’s constitutionalism have a heuristic relevance also for the reflection on the development of a public law going beyond the borders of the nation-state?

In order to respond to these questions, I will move from a short overview on the contents of the concept of “constitution” (I.). In a second step, I will work out which of these contents were thought to be included into Union’s primary law through the Constitutional Treaty, which of them were then cancelled in the transition to the Treaty of Lisbon, and which, on the contrary, have been maintained (II.). Lastly, the inquiry will be concluded with some considerations on national and European constitutionalism, as well as on the indispensability of a public law beyond the nation-state (III.)

II. The Contents of the Concept of “Constitution”

If we take into account the Western tradition and restrict further our view to modernity, in the concept of “constitution” are contained mainly four elements,³ which correspond to the political and social functions that documents with constitutional scope gradually assumed during the

³ On the history of the concept of “constitution”, see: Mario Dogliani, *Introduzione al diritto costituzionale*, Il Mulino, Bologna 1994; Heinz Mohnhaupt, Dieter Grimm, *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart*, Duncker & Humblot, Berlin 1995.

centuries: 1) the “constitution” as definition of the competences of the public power and of its organization; 2) the “constitution” as safeguard of the rights of the individuals against abuses carried out by the public power; 3) the “constitution” as a normative guarantee of the legitimation of the public power by the individuals subject to it; 4) the “constitution” as the foundation of the identity of the political community. To qualify a legal document as characterized by “constitutional” scope, not all four mentioned elements need to be contained in it. In our tradition, yet, they have been combined step by step, so that the liberal-democratic constitutions of the nation-states are typified precisely by their merging.

1. *The Constitution as Definition of the Competences of the Public Power and of Its Organization*

Among the elements that define a “constitution”, the specification of competences and organization of the public power, going back to the ancient Greece and Rom, is by far the oldest. Precisely for that reason, however, it is also the less appropriate in order to characterize the specific *modern* conception of “constitution”. The definition of the normative and institutional framework of the public sphere misses namely that explicit reference to the centrality and inalienability of the rights of individuals as counterpart of power, which played a fundamental role in the progressive strand of modern constitutionalism.

While labeling a promulgated norm as a “constitution”, the public power underlined first its outstanding inherent value as well as its paramount importance for the social life of the community. This is the meaning that can be attributed to the *constitutiones* as the emperor’s laws of the Roman era and of the Middle Ages. Yet, the adoption of a “constitution” – particularly if this not only states the superior value of a norm, but also specifies the organization of the public power – has an even more relevant connotation. Indeed, the public power, being endowed with the authority to unilaterally impose or forbid actions, is always characterized by a somehow worrying trait for the individuals. Regardless of the foundation of public power on the influence of the ancestors or on a mythological past, its constitutional codification can contribute – besides the reinforcement of its aura – also to amend the incumbent arbitrariness of public authority by specifying which use of it is permissible and which is not, as well as by laying down its lawful instruments. Thus, the constitutional codification of public power can be seen as the first step to its “domestication”. Such a semantic of “constitution” is traceable back – once kept in mind that

ancient and modern terminologies overlap only partially – to Plato’s⁴ and Aristotle’s⁵ *politeia*, as well as to the *status rei publicae* to which Cicero referred.⁶ Not accidentally, the idea of the “constitution” as the founding document of a public power that by defining itself also restrains its spheres and forms of intervention emerged, provided the necessary semantic cautiousness, in the ancient Greek *poleis* and in the Roman republic, to disappear later during the imperial era and the Middle Ages. In the Greek *poleis* and in the Roman republic the public order was based, namely, on the principle of *isonomy* (ἰσονομία) as the “equality within the range of the law”,⁷ guaranteed by a fundamental normative order shared by rulers and ruled. This conception vanished as a consequence of the reform imposed by Augustus, according to which the emperor had to be considered as the only sovereign – an understanding that, passing through the Middle Ages, characterized the European absolute monarchies up to the 19th century and, to some extent, also comparable regimes up to the present.

With modernity reappeared not only the idea of isonomy, albeit on a different philosophical basis, but also the conception of “constitution” as the document laying down characteristics, structure and limits of public power. An important example of this evolution is represented by the *Instrument of Government*, adopted in 1653 by the *Commonwealth* of England, Scotland and Ireland.⁸ This document, one of the first written constitutions of modernity, established the supreme legislative and executive power in the person of the Lord Protector Oliver Cromwell.⁹ On the other hand, however, it also stated that the Lord Protector shared legislative power with the Parliament¹⁰ as well as that his prerogatives were in general limited, in order to avoid the involution to tyranny, by parliamentary competences. In particular, no law should be promulgated nor amended, nor taxes should be levied without the consent of the Parliament.¹¹ Abuses of public power were so prevented by a sound institutional architecture, building a system of checks and balances that somehow anticipated the link between the

⁴ Plato, *Republic*, Harvard University Press, Cambridge (Mass.) 1980, in particular Book V.

⁵ Aristotle, *Politics*, Harvard University Press, Cambridge (Mass.) 1967, Book IV, 1, 1289a; Book VII.

⁶ Cicerone, *De legibus*, Utet, Torino 1986, Book I, 6, 20: “Quoniam igitur eius rei publicae, quam optimam esse docuit in illis sex libris Scipio, tenendus est nobis et servandus status, omnesque leges adcommodandae ad illud civitatis genus [...]”.

⁷ Hannah Arendt, *On Revolution*, Viking, New York 1963, at 23.

⁸ *Instrument of Government* (1653), in: Samuel R. Gardiner, *The Constitutional Documents of the Puritan Revolution 1625–1660*, Clarendon, Oxford 1979 (1st ed. 1906), at 405.

⁹ In particular *id.*, at art. I et seq., as well as at art. XXXII et seq.

¹⁰ *Id.*, at art. I.

¹¹ *Id.*, at art. VI.

foundation of a polity on a constitution and the guarantee, by the same constitution, of a proper division of powers, which was solemnly asserted, almost one and a half centuries later, in the art. 16 of the *Déclaration des Droits de l'Homme et du Citoyen* proclaimed by the French Parliament in 1789.

2. *The Constitution as Safeguard of Individual Rights*

The constitution realizes the “domestication” of public power by delineating, on the one hand, its institutional architecture, as well as by stating, on the other, inalienable rights of the individuals, which shall be protected against any abuse by the established powers. Though already outlined in the late Middle Ages, the latter characteristic is specific for modernity: only after the transition to modern forms of social and political life could arise the idea that individuals – and not the totality embodied in the historical or mythological community, or in the sovereign monarch – represent the ontological foundation of politics as well as of its institutions.

The first anticipation – very partial indeed – of this approach has been laid down in the *Magna Charta Libertatum* of 1215, which attributed to “all free men”,¹² albeit actually only to the members of the aristocracy, some fundamental rights. Among these were the safeguard of property as well as of personal freedom, in particular against abuses perpetrated by the king and its government. The surveillance on the respect of the rights proclaimed by the *Magna Charta* was entrusted to a group of twenty-five barons elected by their peers, who, in cases of violation of the rights committed by the monarch, were authorized to resist against the king’s power and to constrain him, even if necessary by the use of force, to refrain from his liberticide attitude.¹³ Furthermore, the *Magna Charta* required the convocation of an assembly composed by the members of higher clergy and secular aristocracy, as well as its consent as a *conditio sine qua non* for the introduction of new taxes.¹⁴ Therefore, already long time before the promulgation of the *Instrument of Government*, the approval by a parliamentary assembly – albeit of poor representativeness and consisting merely of privileged subjects, not of citizens – had been recognized as necessary in order to legitimate the transfer of resources from the individuals to the public power.

¹² *Magna Charta Libertatum* (1215), at art. 2.

¹³ *Id.*, at art. 61.

¹⁴ *Id.*, at art. 14.

The number of the right-addressees as well as of the safeguarded rights were significantly increased, always in England, by the *Bill of Rights* of 1689. Nevertheless, also here, as in the *Magna Charta*, the rights did not find their ontological foundation in the original attributions of the individuals, but in the homeostasis of the political community as a whole. Only a commonwealth in which the public power, refraining from tyrannical abuses, recognizes the need of its own control by parliamentary institutions, representing at least a part of the subjects, can be considered as an organic and sound body politic. The acknowledgement of a catalogue of rights is yet part of a strategy toward a self-containment of a public power understood as a given and incontestable reality, as a *factum brutum* ennobled by history and religious traditions. The turnabout came at the end of the 18th century as the rights were not seen anymore as a concession made by the given power, but as an essential endowment of the individuals – of *all* individuals – even before they enter into society. From this perspective, not the body politic as a totality – a *holon* – possesses its own interests and objectives, for the proper implementation of which it is opportune or even necessary that some rights of the single subjects are at least partially respected. On the contrary, the only essential purpose of society would consist in the safeguard of the individual rights which represents, in the Lockean tradition, the very reason for the transition from the state of nature to social order. Therefore, not the individuals are thought to serve the well-balanced development of the *holon*, lastly also by means of a limited exercise of liberties and a partial recognition of rights coming from the monarch's grace; rather, the civil society itself is an instrument, built for a better protection of what essentially belongs to every human. It is in the *Virginia Bill of Rights* of 1776 that the principles of a public power *e parte civium*¹⁵ are formulated for the first time, stating explicitly that “all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety”.¹⁶ Coherently, it is also asserted that “all power is vested in and consequently derived from the people”,¹⁷ so that the “government is or ought to be instituted for

¹⁵ On the concepts of “power *e parte principis*” and “power *e parte civium*” see: Norberto Bobbio, *L'età dei diritti*, Einaudi, Torino 1990, at 124.

¹⁶ *Virginia Bill of Rights* (1776), at Sect. 1.

¹⁷ *Id.*, at Sect. 2.

the common benefit, protection and security of the people, nation or community”.¹⁸ The same principles have been reaffirmed, only three weeks later, in the *Declaration of Independence of the United States of America*,¹⁹ and then specified in the *Déclaration des Droits de l’Homme et du Citoyen* of 1789, paving the way to the liberal and democratic strand of republican constitutionalism.

3. *The Constitution as Normative Guarantee of the Legitimacy of Public Power*

After public power had overcome first the condition of arbitrariness by its regulation through norms, and then the pretension of deriving its legitimacy from myths or even from the divine law, it needed to be justified in its existence by recurring to a profoundly innovative way, namely by the consent of those who are subject to it. This happened through the turn to the individualistic paradigm in political philosophy, introduced by the most innovative representatives of the natural law’s conception in early modernity.²⁰

A first fashion of involvement of the citizens, yet, was already developed long before the turn to the individualistic paradigm in political philosophy, in particular in ancient holistic forms of government including popular participation, such as the Greek *poleis* and the Roman republic. Here the fundament of public life, however, was not the will of individuals deliberately joining in order to ground a political society, but rather a shared myth on the origin of the community or the fiction of a kinship which, starting from common ancestors, pretended to encompass all members of the polity. A similar approach can be found as well in the constitutional tradition influenced by the Reformation, in particular in its Calvinist and puritan version. Also in this understanding popular participation was not rooted in the autonomy of individuals, since at the basis of social and political order was the natural sociability of humans as well as the project of a society which claimed to be *objectively* just insofar as it respected God’s laws. Nevertheless, human consent was required as a testimony of the compliance with the message of salvation, so that the structure of public power had to comprehend institutions guaranteeing popular representation. In this tradition, therefore, public power is not only “domesticated” in the sense

¹⁸ *Id.*, at Sect. 3.

¹⁹ *Declaration of Independence of the United States of America* (1776), para. 2.

²⁰ Thomas Hobbes, *De Cive* (1642), Royston, London 1651; Thomas Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil*, Crooke, London 1651; John Locke, *Two Treatises of*

mentioned before, but also integrated by parliamentary institutions. This feature can be observed, once again, in the *Instrument of Government*, in which competences and composition of the Parliament were laid down in great detail.²¹

The transition from the conception demanding popular consent as a validation of the support given by the citizens to an order thought to be objectively *just*, to the requirement that the order should be *legitimated* “from the bottom up” has been gradual. Some radical expressions of the Calvinist-puritan constitutionalism can be considered indeed as an anticipation of the requisite of a proto-democratic legitimation of public power. Of particular interest is, in this regard, the *Agreement of the People* of 1647, the constitutional document which, in Cromwell’s England, anticipated by about six years the *Instrument of Government*: indeed, while this latter was largely centered on the figure of the Lord Protector and paid only secondarily attention to the competences of the Parliament, the former document was almost entirely concentrated on the representative assembly, to which a broad authority with regard to the legitimation of public power was recognized.²² The same attitude imbued – some years earlier – the founding documents of the New England Colonies, in particular of Massachusetts²³ and Connecticut,²⁴ in which the principle of the self-organization of the community was implemented by the attribution of at that time very far-going competences to the representative assemblies.

However, it was only as a consequence of the overcoming of the pre-reflexive idea of an *objectively* just society and after the consolidation of the paradigm asserting the *primacy of individuals* with their endowments, such as rights, interests and reason, that a post-metaphysical conception of public power consolidated, according to which its authority is not legitimated but by the free will and consent of the citizens. In a society which did not pretend anymore to be the realization of a superior idea of the “good life” or to be based on the natural laws of human

Government (1690), Awnsham-Churchill, London 1698; Jean-Jacques Rousseau, *Du contract social, ou principes du droit politique* (1762), Garnier-Flammarion, Paris 1966.

²¹ *Instrument of Government*, *supra* note 8, at art. VI et seq.

²² *Agreement of the People*, in: Gardiner, *The Constitutional Documents*, *supra* note 8, at 359, in particular at art. III and art. VIII. Here the *Agreement* – assigning to the Parliament the by far most relevant role in legitimating public power – seems to be at least partially in contradiction with the *Instrument of Government*, in which sovereignty is partly vested *originally* in the person of the Lord Protector (*Instrument of Government*, *supra* note 8, at art. I and art. III).

²³ *Mayflower Compact* (1620); *Massachusetts Body of Liberties* (1641), in: William H. Whitmore (ed.), *The Colonial Laws of Massachusetts*, Rockwell & Churchill, Boston 1890, at art. 58 et seq.

²⁴ *Fundamental Orders of Connecticut* (1637), in: Adolf Rock (ed.), *Dokumente der amerikanischen Demokratie*, Limes, Wiesbaden 1947, at 52, at art. 10.

sociability, the legitimation-chain coming “from the bottom up” became the only possible justification of the very existence of binding public laws.²⁵ The clear affirmation of the epistemic centrality of the citizens’ will in the construction of the society with its rules and institutions has been thus strictly associated – in the conceptual approach as well as in history – with the declaration of individual rights. The role played by the *Virginia Bill of Rights* has been already mentioned above.²⁶ The here contained provision that the “majority of the community has an indubitable, inalienable and inderogable right to reform, alter, or abolish [the government]”,²⁷ passing through the *Declaration of Independence of the United States of America*²⁸ and the *Déclaration des Droits de l’Homme et du Citoyen*²⁹, found later an adequate realization in the competences attributed, within the Franco-American strand of modern constitutionalism, to the representative assemblies with regard both to the law-making function as well as to the control of the executive.

4. *The Constitution as the Foundation of the Identity of the Political Community*

Insofar as the political community was considered as a given fact, the belonging of the single individuals to the *holon* as well as existence and content of the collective identity were unquestioned. The problem arose at the moment when structure and competences of the public power were submitted to the scrutiny of citizens freely committed to create a body politic in order to guarantee their life conditions and fundamental rights. The first document attesting such an approach was the *Mayflower Compact* of 1620, still impressive for its synthetic, groundbreaking expressiveness. In this text, the philosophical vision of the social contract acquires historic concreteness. The idea that a group of individuals, freely and in conditions of equality and reciprocity, establishes a political community to better pursue the common goals passed then into the American constitutional tradition. During this process, it was progressively deperated from its original religious component as well as from the substantive understanding of social

²⁵ See Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd ed., Mohr, Tübingen 1929, at 102 et seq.

²⁶ See *supra*, note 16, 17 and 18.

²⁷ *Virginia Bill of Rights* (1776), at Sect. 3.

²⁸ *Declaration of Independence of the United States of America* (1776), at para. 2: “Governments are instituted among Men, deriving their just powers from the consent of the governed”.

²⁹ *Déclaration des Droits de l’Homme et du Citoyen* (1789), at art. 6: “La loi est l’expression de la volonté générale”.

ethics connected with it, to make eventually place for a collective identity centered on citizenship.

Moving to the European continent, the conception of collective identity changed subtly, yet significantly its genetic code. Within historically consolidated societies, collective identity did not have to be *constituted* via deliberation; rather it had to be *re-founded* so as to involve broader population strata. The American *We the People* mutated into the French reference to the *nation* as the fundament of any public power.³⁰ Into the concept of the *nation* merged – not without tensions – the idea of popular participation with that of a pre-reflexive and quasi-natural belonging.

During the transition from the Revolution to the Restoration in continental Europe, at the beginning of the 19th century, the nation-concept crossed the Rhine, finding in Adam Müller the thinker able to adapt its original semantic content to the political project of a reactionary renewal.³¹ The idea of a “national constitution” – already developed in the middle of the 19th century and then brought to its zenith in the following century – amalgamated the distinct and at least partially contradictory elements of a collective identity based on popular participation on the one hand, as well as of an existential and exclusive self-affirmation of a pre-political *ethnos* on the other.³²

III. Lisbon Treaty and Constitutional Tradition

Once indicated the main elements of the Western constitutional tradition, with particular regard to modernity, it is now possible to concentrate on the question of how the Treaty of Lisbon elaborates each of them. In doing this, some continuities and discontinuities between the Lisbon Treaty and the Constitutional Treaty will be pointed out, yet without any pretension of exhaustivity.

³⁰ *Id.*, at art. 3.

³¹ Adam Müller, *Die Elemente der Staatskunst* (1809), Fischer, Jena 1922, I, 2, at 37.

³² A significant example can be found in the constitutional theory of Carl Schmitt, in which popular participation, being expressed mainly in plebiscitarian form, assumes the characteristics of an existential self-affirmation. See: Carl Schmitt, *Verfassungslehre*, Duncker & Humblot, München/Leipzig 1928, III, 17, I, 1, at 223.

1. *The Definition of the European Public Power and its Deficits*

The claim that the European Union's public power has to be better specified and delimited makes sense only if it can be proved that the public power at the level of the EU has its own specific character, namely that it has distinct competences, institutions and procedures, so that it cannot be simply considered as an extension to a new field of the intact sovereignties of the member states. In fact, important evidences speak for the existence of an at least partially autonomous EU public power even long before the beginning of the processes that brought to the Constitutional Treaty and then to the Treaty of Lisbon. The establishment, from the very outset of the integration through the Treaties on the Communities, of supranational institutions endowed with considerable authority, the existence of decision-making processes not traceable back to intergovernmental cooperation, a large normative autonomy within the fields of competence, the doctrines of the direct effect and of the primacy of Community law elaborated by the European Court of Justice (ECJ),³³ finally the broad scope of the matters the competence on which had been transferred from the sovereignty of the nation states to the EU institutions – all these elements are sufficient to demonstrate that from the signature of the Treaties of Rom up to the ratification of the Nice Treaty a nucleus of public power *sui generis* was created first at the Community and then at the Union level.

Neither was this nucleus of public power diminished, after Nice, by the Constitutional Treaty nor by the Treaty of Lisbon. Instead, the main attempt of both was, in most cases, to consolidate the *status quo*. Indeed, the clarification on exclusive, shared and supporting competences, introduced by the Constitutional Treaty³⁴ and then almost literally restated in the Treaty of Lisbon,³⁵ did not change substantially the *acquis communautaire*, although it surely plays a role in making it clearer.³⁶ In the details of the dispositions, furthermore, we notice even an enhancement of the EU public power in some fields, in particular in home and foreign affairs,

³³ Joseph H. H. Weiler, *The Constitution of Europe*, Cambridge University Press 1999, at 19.

³⁴ *Treaty establishing a Constitution for Europe* (quoted *infra* as CT), O.J. 2004/C 310/01, at art. I-11 et seq.

³⁵ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (quoted *infra* as T-Lis), O.J. 2007/C 306/01, at art. 2, 12), 2 A et seq.; *Treaty on the Functioning of the European Union* (quoted *infra* as TFEU), O.J. 2008/C 115/47, at art. 2 et seq. The references to the articles of the TFEU are based on the "Table of Equivalences", Annex B of the T-Lis, referred to in T-Lis, at art. 5.

³⁶ The expectancies at the beginning of the Convention on the Future of Europe were, however, significantly more ambitious. See: S. Dellavalle, *Between Citizens and Peoples: Reflections on the New European*

as well as in common security and justice. Within the general scope of the specification of Union's competences, the few limitations will probably have only marginal effects. The emphasis put on the principle of conferral of competences by the member states,³⁷ for example, may be an indication suggesting a change in the political climate, but does not modify substantially the normative situation. More incisive could be the rewording of the flexibility clause,³⁸ which inserts precise limits to its application³⁹ – limits, however, that had been already proposed in the Constitutional Treaty.⁴⁰

Therefore, if it can be claimed with good reasons that a specific EU public power exists since long time and that rather an – admittedly slight – augmentation is provided by the amendments introduced by the Treaty of Lisbon, the eminently constitutional question arises about organization and delimitation of such an autonomous power. Albeit at the moment of the transition to a more ambitious constitutional project prestigious voices have been raised against the necessity of a reform of the Treaties now in force, which were considered as sufficient to meet the challenges of the EU at the dawn of the new century,⁴¹ the prevailing approach among both scholars and politicians was – and is – that a rationalization of the primary law of the EU is at least advisable for an organization now composed of 27 members. A quite ambitious answer to this request was delivered with the Constitutional Treaty, and passed later – but only partially – into the Lisbon Treaty.⁴² The most manifest innovation introduced by the Constitutional Treaty, namely the transition from the plurality of Treaties to only one text of primary law, has not been taken up, however, by the Treaty of Lisbon. Besides the symbolic meaning, the reorganization of the primary law of the EU in a single normative text implied positive

Constitutionalism, in Russell A. Miller, Peer Zumbansen (eds.), “Annual of German & European Law”, Vol. II/III, 2004/2005, at 180.

³⁷ As a consequence of the repeal of art. 5 of the *Treaty Establishing the European Community* (quoted *infra* as TEC), O.J. 2006/C 321 E/37, and of its substitution by art. 5 of the *Treaty on European Union* as amended by the Lisbon Treaty (quoted *infra* as TEU-Lis), O.J. 2008/C 115/13. The wording of art. 5, TEU-Lis, had been already anticipated by the Constitutional Treaty (CT, at art. I-11). The references to the articles of the TEU-Lis are based on the “Table of Equivalences”, Annex A of the T-Lis, referred to in T-Lis, at art. 5.

³⁸ TEC, at art. 308.

³⁹ TFEU, at art. 352, in particular at para. 3.

⁴⁰ CT, at art. I-18.

⁴¹ See Joseph H. H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, in: Kalypso Nicolaidis, Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, Oxford University Press 2001.

⁴² For a more detailed analysis see: Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, not Hearts*, in: 45 (2008) *Common Market Law Review* 617; Franz C. Mayer, *Die Rückkehr der Europäischen Verfassung?*

consequences on the rationalization of normative provisions, institutional structures and procedures.⁴³ A large part of these rationalizations have been maintained in the Treaty of Lisbon, albeit within a configuration still composed of two primary law's texts. Among the preserved rationalizing changes are: the fusion of Title VI TEU⁴⁴ and Title IV TEC⁴⁵; the overcoming of the "pillar" structure; the transfer of the Community and its competences into the Union,⁴⁶ so that the term "Community" is cancelled from the primary law and the Union inherits its legal personality;⁴⁷ the merging of the functions of the High Representative, provided for by the TEU, and those of the Commissioner for External Relations, provided for by the TEC, into the single figure, albeit doubled with regard to the exercise of competences and accountability, of the High Representative;⁴⁸ lastly the clarification of the procedures of accession⁴⁹ and – even more significant – of withdrawal.⁵⁰ Considering the steps undertaken on the way to rationalization, it is largely obscure why the division of the primary law into two distinct Treaties – the *Treaty on the European Union* and the *Treaty on the Functioning of the European Union* – had to be preserved. Although the first concentrates primarily on the fundamental principles, institutional provisions and common foreign and security policy, and the latter focuses rather on institutional and procedural details, the distinction of the functions is not so relevant to require two different texts. Even less convincing is the persisting, although the "pillar" structure should be officially overcome, of particular institutional and procedural regimes depending on the special competences respectively implemented – a peculiarity which even the more courageous Constitutional Treaty did not dare to remove.

Not free from possible negative consequences are some other innovations, already contemplated by the Constitutional Treaty. To be mentioned, in this category, is for example the insertion of the European Council among the organs of the Union,⁵¹ through which on the one

Ein Leitfaden zum Vertrag von Lissabon, in: 67 (2007) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1141.

⁴³ Jürgen Bast, *The Constitutional Treaty as a Reflexive Constitution*, in: 6 (2005) *German Law Journal* 1433.

⁴⁴ *Treaty on European Union*, consolidated version of the 29th of December 2006 (quoted *infra* as TEU-2006), O.J. 2006/C 321 E/5, at art. 29 et seq.

⁴⁵ TEC, at art. 61 et seq.

⁴⁶ TEU-Lis, at art. 1, para. 3.

⁴⁷ *Id.*, at art. 47. Already present in the CT, at art. I-7.

⁴⁸ TEU-Lis, at art. 18; see CT, at art. I-28, where however the High Representative changed his name in "Union Minister for Foreign Affairs".

⁴⁹ TEU-Lis, at art. 49; see CT, at art. I-58.

⁵⁰ TEU-Lis, at art. 50; see CT, at art. I-60.

⁵¹ TEU-Lis, at art. 15; see CT, at art. I-21.

hand activities and decisions of the EU heads of state and government can be better tied to aims and procedures provided for by the Treaties, as well as to fundamental criteria of judicial scrutiny and political accountability. On the other hand, however, the introduction of the European Council among the organs of the EU could also creep in an explicitly intergovernmental element into the substantially supranational mechanisms of the European integration. In addition, conflicts between the institutions could arise from the establishment of a Presidency of the European Council.⁵² Furthermore, the principle of the primacy of Union's law is relegated in a declaration⁵³ and the majority voting procedures in the Council remain, in spite of an attempt to simplification, quite intricate and therefore far away from the necessary transparency.⁵⁴

Public power, however, should be not only precisely defined, but also – in particular from the perspective of a liberal constitutionalism – adequately limited. As the history of constitutionalism shows, the achievement of this goal depends closely on an appropriate division of powers. Yet, exactly with regard to this issue EU primary law is still lacking essential qualities. Unresolved remains the old problem of the double nature of the Council, which merges composition and competences of an executive organ with fundamental tasks of a legislative institution. In this sense, the new wording of the art. 16 TEU-Lis, that reinforces the legislative quality of the Council and cancels the ambiguous reference, rather underlying one-sidedly executive competences, to the “power to take decisions” contained in art. 202 TEC, actually does not modify substantially the *status quo*. The question becomes especially sensitive in the cases in which the Council, an institution of unquestionable executive descent, has the competence to adopt legislative acts with a limited involvement of the European Parliament (EP).⁵⁵

No less serious is the on-going confusion concerning the quality of legal acts. The TEC did not distinguish legislative from non-legislative acts, comprehending in a single category binding rules of larger scope, which demand deliberative procedures including an adequate participation

⁵² TEU-Lis, at art. 15, para. 5 et seq.; see CT, at art. I-22.

⁵³ T-Lis, Declaration No. 17, with reference to the case-law of the ECJ; see CT, at art. I-6. The question of primacy is however all but settled, in particular insofar as the protection of fundamental rights within the EU, regardless of its ongoing improvement, remains germinal and partial (see *infra* III.2).

⁵⁴ TEU-Lis, at art. 16, para. 4; TFEU, at art. 238, para. 2. The rules of majority voting are made even more complicated by the delay of the entry into force of the new provisions as well as by the “Ioannina Compromise”, as provided for in the Declaration No. 7 of the T-Lis.

⁵⁵ See *infra* III.3.

by the citizens, together with applicative norms and administrative acts in general.⁵⁶ The Constitutional Treaty removed the deficit by introducing, first, exactly the now missing distinction between legislative and non-legislative acts, and second a new denomination in order to avoid further misunderstandings.⁵⁷ The Treaty of Lisbon collocates itself somewhere in the middle, yet substantially rejecting the turn to higher clearness.⁵⁸ In particular it maintains, to calm down the susceptibility of nation-states, the denomination of legal acts contained in the former Treaties.⁵⁹ Nevertheless, four articles have been added after the art. 288 TFEU (former art. 249 TEC), in which some parts of the Constitutional Treaty are resumed. Especially, the elucidation is inserted concerning the specificity of legislative acts.⁶⁰ However, the fact that regulations, directives and decisions can be both legislative as well as non-legislative acts, distinguished only on the basis of the different procedures of their formulation, is destined to create, in the most favorable hypothesis, a disturbing confusion, or, in the less favorable case, severe problems with regard to the competence of exercising control by national parliaments on the respect of subsidiarity, to the obligation of publicness for the sessions of the Council and to the scrutiny of legal acts by the judiciary.⁶¹

Lastly, in spite of the unification of the institutional structure, the ECJ still has no competence in the fields of foreign policy and common security.⁶² At a first glance, this restriction just confirms the *status quo*. However, insofar as it is not based anymore on the distinction – abolished by the Treaty of Lisbon – between Union and Community, the limitation further imposed on the competences of the ECJ implies that the Union’s judiciary, according to the Treaty of Lisbon, misses the faculty to review acts formulated by exactly that organization, for which it should assure the compliance with the law, and within the scope of that Treaty, the respect of which it should substantially contribute to safeguard. The consequence is a

⁵⁶ TEC, at art. 249.

⁵⁷ CT, at art. I-33 et seq.

⁵⁸ For the criticism raised by the EP see: *European Parliament resolution of 11 July 2007 on the convening of the Intergovernmental Conference (IGC): the European Parliament's opinion*, 11626/07, G.3., at 4.

⁵⁹ *IGC 2007 Mandate*, 11218/07, I.3., at 3.

⁶⁰ TFEU, at art. 289, para. 3.

⁶¹ Dougan, *The Treaty of Lisbon 2007*, *supra* note 42, at 638, 675.

⁶² TFEU, at art. 275. This notwithstanding, the art. 275 TFEU provides for the ECJ to have “jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”.

problematic lack of balance between the powers – with a clear advantage for the executive, which misses, in the foreign and security policy, also adequate parliamentary control.⁶³

2. *The Charter of Fundamental Rights and Beyond*

The Communities were not grounded on the affirmation of common rights and values, but as organizations centered on the specific goal of economic integration and development. Within a field of normative indeterminacy, it was the ECJ that assumed the task of putting the question of the protection of fundamental rights on the agenda of the Community's and then of the Union's law and institutions.⁶⁴ In its approach to the issue, the ECJ went, between the Fifties and the Nineties of the past century, through three different phases.⁶⁵ The first period was characterized by the refusal by the Court to extend its jurisdiction so as to comprehend the question of fundamental rights; the second, on the contrary, was led by the assumption that the control on the respect of fundamental rights had to become part of the tasks of the Community's judiciary; the third phase, finally, expanded the judicial review of the ECJ to comprehend also member states insofar as these apply Community law or, following the more far-reaching interpretation of the Court, issue legal acts within the scope of the Treaties.⁶⁶

The legal basis of the jurisdiction of the ECJ remained, in any case, uncertain. The vagueness concerned in particular the protection of fundamental rights in their meaning as universal human rights, for which the wording of the Treaties did not provide, for long time, for any normative support. For that reason, the ECJ had to rely, in order to found its human rights jurisdiction, on the common constitutional traditions of the member states and on the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as on the case law of the European Court of Human Rights (ECtHR). Neither provided art. 6, para. 2 of the TEU, inserted into Union's primary law by the Maastricht Treaty, for a solid legal basis so as to guarantee a consistent and far-reaching protection of human rights at Union's level; rather, it limited itself to a consolidation of the *status quo*, maintaining therefore the prevailing condition of normative incompleteness and uncertainty. More reliable was the fundament in Community's

⁶³ See note 93.

⁶⁴ Weiler, *The Constitution of Europe*, *supra* note 33, at 23.

⁶⁵ Jürgen Kühling, *Fundamental Rights*, in: Armin von Bogdandy, Jürgen Bast (eds), *Principles of European Constitutional Law*, Hart Publishing, Oxford 2009 (2nd ed., forthcoming).

⁶⁶ Dougan, *The Treaty of Lisbon 2007*, *supra* note 42, at 663.

and Union's law with regard to the safeguard of fundamental rights in their meaning as citizens rights (or as rights of persons whose situation was comparable to that of citizens).⁶⁷ Also here, however, the national courts as well as the ECJ had to deal with a legal basis of poor systematicness, so that citizens rights were first derived, in order to be judicially protected, from the freedoms provided for by the Treaty on the European Economic Community, enriched, as a consequence of the Maastricht Treaty, by the entitlements acquired with the citizenship of the Union.

In spite of the commitment of the ECJ, the protection of fundamental rights in the EU – understood in both their meanings, as universal human rights and as citizens rights – was weak in its legal foundation as well as unsatisfying in its social, political and administrative praxis.⁶⁸ So as to overcome the shortcomings, two solutions were stressed. The first one comprehended mainly executive-administrative measures, promoting policies implemented by specific Union's institutions with a direct impact on member states as well as on the attitude of Union's organs towards the safeguard of fundamental rights and on the approach of the Union to third countries. The second answer addressed, on the contrary, prevalently the judicial protection of fundamental rights and, moving from the promulgation of a Union's catalogue of fundamental rights, aimed principally at the development of a more far- and deep-going case law by the ECJ. The first solution⁶⁹ was largely realized by the establishment in Vienna of the European Union Agency for Fundamental Rights (FRA),⁷⁰ which in 2007 replaced the former European Monitoring Centre on Racism and Xenophobia (1997–2007), widening its scope and tasks. The second way for realizing a better protection of fundamental rights within the Union was implemented, on the other hand, by the decision to put into writing a *Charter of Fundamental Rights*, which was solemnly proclaimed on the 7th of December 2000 in Nice.

Irrespective of the valuation of its specific contents, the *Charter* surely represented a huge progress on the way to a systematic clarification of which rights should be considered as “fundamental” within the political and legal culture of the Union – “fundamental” in the sense

⁶⁷ See: Stefan Kadelbach, *Union Citizenship*, in Bogdandy/Bast, *Principles of European Constitutional Law*, *supra* note 65.

⁶⁸ Philip Alston, Joseph H. H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, Harvard Jean Monnet Working Paper 1/99, Harvard Law School, Cambridge (MA).

⁶⁹ This first solution was strongly supported by Alston and Weiler in their groundbreaking contribution on the topic (*An 'Ever Closer Union' in Need of a Human Rights Policy*, *supra* note 68).

⁷⁰ Council Regulation (EC) No. 168/2007 of 15 February 2007 (O.J. L 53/2 22.2.2007).

that they have to be recognized either to all human beings as such, or to all Union citizens, or, finally, to all citizens of third countries legally residing within the territory of the EU. Yet, since the *Charter* was not inserted into the Treaties, the Union still did not possess a catalogue of rights in its primary law. The Constitutional Treaty provided for an overcoming of this normative opaqueness by including the *Charter* directly into the primary law text as its Part II, assigning therefore to the document full binding force.⁷¹ The Lisbon Treaty does not show such a courageous attitude: it does not provide, namely, for the inclusion of the *Charter* into the primary law's main text; nevertheless, it guarantees its legally binding force by a reference contained in the amended TEU, stating that the *Charter* "shall have the same legal value as the Treaties".⁷²

If thus the uncertainty concerning the legal meaning of the *Charter* has ended with the coming into force of the Treaty of Lisbon, so that the primary law of the Union finally includes a catalogue of fundamental rights, nevertheless not all problems regarding their adequate protection are made herewith obsolete. The first question which remains open is the application scope of the *Charter*. The most evident difficulty concerns the limitation of the validity of the *Charter* in the United Kingdom and in Poland, provided for in the specific Protocol annexed to the Treaties, which states a partial opting-out of the two countries. In particular, the Protocol aims at preventing a *Charter*-based control of legality by the ECJ or national courts on legislative or administrative acts issued by institutions of the two countries,⁷³ as well as at avoiding that the application of Title IV of the *Charter* establishes for the two concerned member states rights not already guaranteed in the national legislations.⁷⁴ At least in symbolic terms, the opting-out Protocol on the *Charter* represents a significant backlash against the idea of a European Union as a community of rights and values. Impossible is, on the other hand, to predict for the time being the practical consequences of the limitation, which will probably

⁷¹ CT, Part II, at art. II-61 et seq.

⁷² TEU-Lis, at art. 6, para. 1.

⁷³ T-Lis, *Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*, O.J. 2008/C 115/313, at art. 1.

⁷⁴ *Id.*, at art. 2. In order to overcome the reluctance of the Czech Head of state and government to ratify the Lisbon Treaty, the European Council has decided, in its meeting of the 29th and 30th of October 2009, to extend the validity of the Protocol No. 30 also to the Czech Republic (*Brussels European Council, Presidency Conclusions*, 15265/1/09, Concl 3, Annex 1). So as to avoid a further delay of the entry into force of the Lisbon Treaty, the wording of the Treaties has not been changed, at least for the time being: therefore, the new Protocol shall be included into the Treaties in occasion of the conclusion of the next Accession Treaty.

depend to a considerable extent on the political atmosphere surrounding the European integration project.

Therefore, whereas the supporters of the reinforcement of the legal and political significance of the *Charter* can reasonably hope that the limitation introduced by the United Kingdom and Poland will have rather marginal effects, far more important are some other reservations contained in the wording either of the Treaty or of the *Charter*, which make evident, beyond any doubt, how narrow is the way of a specific Union protection of fundamental rights. The new wording of art. 6 TEU, according to the Treaty of Lisbon, states namely explicitly, resuming art. 51, para. 2, of the *Charter*, that its adoption “shall not extend in any way the competences of the Union as defined in the Treaties”.⁷⁵ Since the protection of fundamental rights is not part, at least *expressis verbis*, of the “objectives” of the Union,⁷⁶ nor of its competences,⁷⁷ the emphasis put on the non-extensibility of the Union’s competences as a consequence of the safeguard of fundamental rights due to the adoption of the *Charter* could result in a restraint imposed to the development of the Union into a political and legal space of shared rights. Moreover, the *Charter* at the art. 51, para. 1, specifies that its “provision [...] are addressed [...] to the member states only when they are implementing Union law.” If literally interpreted, this provision would curb the present praxis of judicial review, which now extends to the member states insofar as they act within the scope of the Treaties.⁷⁸

Concluding, two considerations can be made. First, the introduction – albeit indirect – of the *Charter* into the *corpus* of the primary law of the EU does not imply the adoption of a catalogue of rights in the federal tradition. Second, the legal *status* contains, even after the coming into force of the Treaty of Lisbon, several fields characterized by relevant ambiguity, which will be clarified not so much through judicial practice, but rather as an outcome of the ongoing political debate on nature and aims of the Union. If this should turn – against the present tendency – towards a more explicitly federal understanding of the European integration, then no normative element now contained in the wording of the *Charter* will preclude its interpretation

⁷⁵ TEU-Lis, at art. 6, para. 1.

⁷⁶ However, the word “objective”, contained in art. 2 TEU-2006, has been cancelled in the new art. 3 TEU-Lis.

⁷⁷ In the sense of an extension – albeit very indirect – of aims and competences of the EU to the protection also of fundamental rights could be potentially interpreted art. 2 and art. 3, para. 2, TEU-Lis.

⁷⁸ Dougan, *The Treaty of Lisbon 2007*, *supra* note 42, at 663.

as something which it is not (yet), at least at the present, namely as a catalogue of rights founding a federal Union.

3. *Supranational Instruments of Democratic Legitimation*

At the beginning of the integration process, the legitimacy of the public power that was taking form in the Communities was entirely derived, according to the principles of international law, from the democratic procedures within the member states. In the following decades, yet, this legitimation-chain was affected by an increasing inadequacy not only because of the rise of the competences first of the Community and then of the Union, but also – and above all – as a consequence of the reintroduction of the majority vote in the Council with the European Single Act (ESA) of 1987. At that point, a creation of a proper autonomous basis for democratic legitimation within the institutional framework of the EU itself began to grow into a no longer postponable question. The autonomous basis for EU democratic legitimation could not consist, in principle, but in the European Parliament (EP), in particular in an enhancement of its competences.⁷⁹ This notwithstanding, the doctrine of the double source of democratic legitimacy of the EU, arising both from the member states as well as from the citizens of the Union and the parliamentary assembly that represents them, though being already from the late Eighties the only acceptable solution for the democratic deficit of the Union, has been strongly opposed for a long time both by scholars⁸⁰ and politicians. The consequence of this resistance was the situation before the coming into force of the Lisbon Treaty, characterized by serious shortcomings with regard to the definition of the EP as well as to its legislative and control competences. Concerning its definition, in the TEC the EP was yet defined as the assembly “of representatives of the peoples of the states brought together in the Community”.⁸¹ On the other hand, as regards its functions in the legislative process and in the political scrutiny of the other EU institutions, it was simply evident, even without going into detail, that the EP was still missing many of the prerogatives of representative assemblies according to the Western constitutional tradition.

⁷⁹ For a more detailed analysis see: Dellavalle, *Between Citizens and Peoples: Reflections on the New European Constitutionalism*, *supra* note 36.

⁸⁰ The conceptual basis was given by the so-called *no demos thesis*. As a prominent example of the *no demos thesis* see: Dieter Grimm, *Braucht Europa eine Verfassung?*, in: 50 (1995) *Juristenzeitung* 581. For a critique see: S. Dellavalle, *Una costituzione senza popolo? La Costituzione Europea alla luce delle concezioni del popolo come “potere costituente”*, Giuffrè, Milano 2002, at 140.

⁸¹ TEC, at art. 189; at art. 190, para. 1.

With regard both to the definition and to the competences of the EP, the Constitutional Treaty (CT) was thought to introduce some relevant changes, which have been substantially resumed in the Treaty of Lisbon. Above all, the EP is finally recognized as the representative organ of the citizens of the Union, so that the principle of double legitimation is officially inserted into the EU primary law.⁸² Second, the codecision procedure is ennobled to the status of “ordinary legislative procedure”,⁸³ obtaining this way a higher position than other procedures of legislative production of legal acts, now considered as exceptions, albeit the exceptions provided for by the Treaty of Lisbon are still too numerous for the fulfillment of essential criteria of a non-curtailed democratic legitimacy.⁸⁴ Lastly, besides the sphere of representative democracy the Treaty of Lisbon contains some provisions concerning principles and practices of what in the CT had been called as “participatory democracy.”⁸⁵

Serious deficiencies remain however, so as they were present – in an almost unchanged form – also in the CT. Focusing attention in particular on the competences concerning the production of legal acts and considering only marginally the control functions exercised by the EP towards other institutions of the Union, the forms of the involvement – or non-involvement – of the EP according to the Treaty of Lisbon can be reduced, besides the “ordinary legislative procedure”, to further six categories,⁸⁶ each of them characterized by specific consequences on democratic legitimacy.⁸⁷

a) the cases in which the “consent”, i. e. what before the Lisbon Treaty was named “assent”, of the EP is required;⁸⁸

⁸² TEU-Lis, at art. 14, para. 2; see CT, at art. I-20, para. 2.

⁸³ TFEU, at art. 294; see CT, at art. I-34, and art. III-396.

⁸⁴ The missing of a clear normative “hierarchy” between the different legislative procedures – in particular between the “ordinary legislative procedure” and the manifold “special” procedures – has been criticized by the EP: *European Parliament resolution of 11 July 2007, supra* note 58, G.7., at 4.

⁸⁵ CT, at art. I-47; the wording of this art., but not the definition of the form of democracy introduced herewith, has been almost completely inserted into the TEU-Lis, at art. 11.

⁸⁶ The cooperation procedure ex art. 252 TEC has been cancelled by the T-Lis which resumes, in this point, the CT.

⁸⁷ The references contained in the following notes, albeit making no claim to completeness, are nevertheless sufficient, in number and relevance, to make clear how deep-going the legitimacy deficit in the EU still remains.

⁸⁸ TEU-Lis, at art. 7, para. 1 and 2; art. 14, para. 2; art. 17, para. 7; art. 48, para. 3, 6 and 7; art. 49; art. 50, para. 2; TFEU, at art. 19, para. 1; art. 25; art. 82, para. 2, d); art. 83, para. 1; art. 86, para. 1 and 4; art. 127, para. 6; art. 129, para. 5; art. 177; art. 218, para. 6, a); art. 223, para. 1; art. 311; art. 312, para. 2; art. 328, para. 1; art. 352, para. 1.

b) the fields in which the EP has to be consulted and unanimity is required for the vote in the Council;⁸⁹

c) the cases in which the EP is not involved in the procedure and unanimity is required for the vote of the Council;⁹⁰

d) the matters in which the EP is consulted and the Council votes with majority procedure;⁹¹

e) the cases in which the EP is not involved and the Council votes with majority procedure;⁹²

f) the fields in which the competence belongs primarily to the European Council and only secondarily to the Council, while the EP is either merely consulted, or not involved at all.⁹³

The provisions included in the category a), albeit limiting the parliamentary capacity to contribute to the deliberation, do not produce a legitimacy deficit as relevant as in the rest of the typology, since they respect at least partially the principle of double legitimation.⁹⁴ Evident and serious is the democratic deficit in the categories d) and e), in which the citizens of the member states which have been outnumbered in the majority voting within the Council are simply bypassed: although they are obliged to comply with the norms issued by the EU organs, the citizens of the outnumbered member states, in these cases, have not agreed to the norms through their governments controlled by the national parliaments, nor can they rely upon the involvement in the deliberation of a parliamentary assembly that represents and binds them as Union's citizens. In order to claim proper democratic legitimation even in the cases of majority voting of

⁸⁹ TFEU, at art. 19, para. 1; art. 22, para. 1 and 2; art. 25; art. 77, para. 3; art. 91, para. 2; art. 113; art. 115; art. 126, para. 14; art. 153, para. 2; art. 192, para. 2; art. 207, para. 7; art. 212, para. 2; art. 219, para. 1; art. 257; art. 262; art. 281; art. 308; art. 311.

⁹⁰ TEU-Lis, at art. 31, para. 1; art. 37, para. 2; art. 41, para. 3; TFEU, at art. 64, para. 2; art. 108, para. 2; art. 140, para. 3; art. 155, para. 2; art. 203; art. 207, para. 4; art. 218, para. 1 and 2; art. 245, para. 1; art. 246; art. 252; art. 257; art. 301; art. 342; art. 346, para. 2.

⁹¹ TFEU, at art. 95, para. 3; art. 103, para. 1; art. 109; art. 126, para. 14; art. 129, para. 6; art. 188; art. 218, para. 6; art. 322, para. 2;

⁹² TEU-Lis, at art. 7, para. 3 and 4; art. 31, para. 2; art. 37, para. 3; TFEU, at art. 26, para. 3; art. 31; art. 64, para. 2; art. 107, para. 3, e); art. 112; art. 121, para. 2 and 4; art. 126, para. 6; art. 134, para. 3; art. 138; art. 143, para. 2 and 3; art. 144, para. 3; art. 148, para. 2 and 4; art. 155, para. 2; art. 182, para. 4; art. 207, para. 4; art. 215, para. 1; art. 218, para. 1 and 2; art. 219, para. 2 and 3; art. 243; art. 246; art. 286, para. 8.

⁹³ This is the case with regard to the Title V, TEU-Lis, concerning the common foreign and security policy (TEU-Lis, at art. 21 et seq.). Consultation of the EP “on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy” is provided for in art. 36 TEU-Lis.

⁹⁴ However, reducing the procedural involvement of the specific representative organ of the EU – the only organ, moreover, which possesses an essentially legislative function – the risk of a creeping transfer of competences from the legislative to the executive is significantly increased.

the Council without adequate involvement of the EP, it would be necessary to assume that the deliberations of the Council are always binding all Union's citizens insofar as this organ would represent them in their supranational totality and identity. Such an assumption, however, does not correspond to essence and functions of the Council, that has been always representing, within the institutional architecture of the Union, rather the intergovernmental instance.

Also in the categories b), c) and f) the democratic deficit, albeit less manifest, nevertheless exists. Above all, it is in any case questionable that decisions taken at Union level do not require, before coming into force, an adequate involvement of the EP. Furthermore, even if we admit, against some important normative evidence, that a lower legitimacy standard could be accepted by emphasizing the legitimation deriving from the member states, it would be nonetheless necessary, so as to avoid an intolerable transfer of competences from the legislative to the executive power, that the representatives of the national governments, united to form the Council (or the European Council), are adequately controlled, if not yet by the EP, at least by the national parliaments. However, national parliamentary controls differ widely from country to country with regard both to procedures and standards, though they can be seen, generally speaking, as insufficient. The consequence is, also in this case, a lack of democratic legitimacy.

4. *The Uncertain Creation of a European Identity*

The identity of a polity can arise from two different sources: the will of an assembly of individuals to build a "body politic", becoming this way citizens of it, or the reference to common roots, to a pre-political substrate made of a shared culture and history. For a long time the European integration, being centered on economic development and not on the creation of a community of rights and values,⁹⁵ forwent both. A partial change was introduced by the Maastricht Treaty, the Preamble of which referred to the shared "principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law",⁹⁶ building so a fundament for the construction of a common identity. The Treaty of Amsterdam inserted then the reference, maintaining the same wording, into the *corpus* of the Treaty on European Union – as part of its art. 6 –⁹⁷ and provided through the addition of art. 7 for a specific safeguard of the

⁹⁵ See the Preamble of the TEC, which resumes, without substantial modifications, the original Preamble of the Treaty of Rome (1957).

⁹⁶ TEU-2006, Preamble, para. 3, which literally resumes para. 3 of the Preamble of the Maastricht Treaty.

⁹⁷ TEU-2006, at art. 6, para. 1.

stated principles. This notwithstanding, although the statement of shared principles can be considered as a preliminary condition for the consolidation of a collective identity, this was not yet asserted, in the sense of the establishment of an autonomous “body politic”, in the Treaties previous to Lisbon. The principles, namely, were defined as “common to the member states”⁹⁸ and sanctioned – as stated by the opening of the Preamble – by the heads of state and government, rather than being the basis for the political self-definition of Union’s citizens. Nor referred the previous Treaties to an alleged pre-political substrate, the consistence of which would be admittedly rather thin. The only indirect mention to what could be understood as a germinal identity regards the common foreign and security policy and has, therefore, a rather “exclusive” than “inclusive” character.⁹⁹

The situation was modified significantly by the *Charter of Fundamental Rights* which claims, for the first time, that “the peoples of Europe, in creating an ever closer union among them, are *resolved* to share a peaceful future based on common values”.¹⁰⁰ But it is with the Constitutional Treaty (CT) that the search for a common identity marked a real quality leap. In the CT were contained, namely, both the voluntaristic claim of the Union’s citizens as well as of the member states,¹⁰¹ and the pointing out of an alleged common substrate in history and culture.¹⁰² Both elements were then supported by symbolic features, presumably destined, in the intentions of the framers of the CT, to reinforce a pre-reflexive and substantially proto-national feeling of belonging among the Union’s citizens.¹⁰³ Compared with the lack of courage of the CT in tackling the legitimacy deficit of the Union’s institutions, the audaciousness in evoking a rather shaky collective identity nurtured the suspicion that the CT-framers wanted to counterbalance in the field of symbolism what they – in the spirit of a post-democratic neo-elitism – were not prone to concede with regard to the adequate guarantee of democratic participation and legitimacy.

⁹⁸ *Id.*

⁹⁹ *Id.*, at art. 2.

¹⁰⁰ CT, Part II, Preamble, para. 1 (italics by the author). Notably, the para. 2 introduces, besides the “principles”, the rather philosophical and ethical concept of common and “founding” values. And freedom – which was seen as a “principle” in art. 6 TEU – is now labeled as a “value”.

¹⁰¹ CT, at art. I-1, para. 1.

¹⁰² Of paramount importance was the mention of the “common destiny” of the peoples of Europe, which however was not considered – as typical for the national tradition – as an at least to a large extent “given fact”, but rather as something still to be “forged” (*id.*, Preamble, para. 3).

¹⁰³ CT, at art. I-8.

If the CT was thus characterized above all by an enhancement of what has been mentioned above¹⁰⁴ as the fourth component of the constitutionalism, it was precisely on this fourth component – i.e. on the affirmation of a collective identity – that the axe of the Lisbon Treaty fell harshly, cancelling the most elements introduced by the CT. No reference to the resolution – not only of the member states, but also of the Union’s citizens – to create, on the basis of their autonomous will, an “ever closer union”, nor to forge their “common destiny”¹⁰⁵ is contained in what is now the primary law of the EU. Also abandoned are flag, anthem, motto and Europe day as symbols of a rising common identity.¹⁰⁶ And – which is the most revealing sign of the turning away from the past constitutional project – every reference to the “constitution” as the founding document of a specific European polity is removed.¹⁰⁷

5. *Conclusions: A Conceptually Weak Treaty, but not a Refusal of the European Constitutionalism*

In the analysis of the relation between the Lisbon Treaty and the European constitutionalism we should distinguish two different questions: the first one is about whether the Lisbon Treaty really breaks with this recent, but relevant tradition. The second question arises only if the answer to the first one is negative. If namely the Lisbon Treaty collocates itself, albeit with many deficits, on the path delineated during the centuries by modern constitutionalism in general and, in the last decades, by EU constitutionalism in particular, which is then its role within this course? Does it mark a step forwards or backwards? Is it an approach to the task accomplishment, or a betrayal of it?

Among the distinct components of modern constitutionalism, only the idea of a strong collective identity – as we have seen – is absent, or at least very feeble, in the Lisbon Treaty,¹⁰⁸ having been almost completely removed compared with the CT. All remaining components, on the contrary, are present, though in a shape which is in many senses incomplete. The Lisbon Treaty maintains, first, the meaning of the EU primary law as the definition and limitation of

¹⁰⁴ See *supra*, at II.

¹⁰⁵ See note 102.

¹⁰⁶ *IGC 2007 Mandate*, *supra* note 59, I.3., p. 3.

¹⁰⁷ *Id.*

¹⁰⁸ Still part of the primary law – albeit not directly inserted into the body of the Treaties – will be the “voluntaristic” appeal contained in the *Charter* (see *supra* note 100), as well as the reference to the common

public power, even though within a primary law corpus which is still not unified, complex and burdened by a deficient division of powers. Second, it provides for an unmistakable clarification as regards the contents of fundamental rights and their safeguard, albeit also in this case in a less convincing fashion than in the CT. Furthermore, we can notice an improvement of democratic legitimacy, substantially in line with spirit and wording of the CT – an improvement, yet, which leaves some relevant questions open. Too evident are thus the elements of modern constitutionalism contained in the Lisbon Treaty to assert that this would denote the exit of European integration from the constitutional tradition in a broad sense. Rather, it indicates the abandonment, maybe definitive, of the attempt of importing, into the primary law of the Union, patterns and features derived from the *national* constitutional traditions, with their pointing out of a shared identity which should necessarily arise from the awareness of a common “destiny” and is consolidated by a characterizing symbolism.¹⁰⁹ On the other hand, however, the recent developments of the Union’s primary law – passing through the failure of the CT and landing in the provisional harbor of the Lisbon Treaty – are part of the project of a more differentiated and multi-faceted constitutionalism, which does not coincide anymore with the tradition of “national” constitution-making and constitutional interpretation. The next paragraph will briefly address the question of the far-reaching consequences, both for the European constitutionalism and for a general theory of public law, which can be suggested by the new occurrences within the field of Union’s primary law.

The conclusion that the primary law of the Union, even after the Lisbon Treaty, will possess many features of modern constitutionalism and should be considered, therefore, as belonging – in a very specific way indeed – to its tradition does not imply anyway that the compromise signed in the Portuguese capital has to be seen as the completion, at the Union’s level, of all promises contained in modern constitutionalism. The richness of contents and the broad normative horizon of the modern constitutional tradition have been shortly outlined in the first part of the analysis; the deficits presented in its second part as regards the recent events of

founding values (TEU-Lis, at art. 2; identical to CT, at art. I-2). Remarkably, the wording of TUE-Lis diverges, as regards the specification of the common values, from the Preamble of the *Charter*.

¹⁰⁹ This diagnosis does not exclude the possibility or even the opportunity or necessity – from a normative point of view – of a reinforcement of the *political* identity of the Union’s citizens as an identity based on the participation to democratic and deliberative procedures.

the Union's primary law have highlighted, however, how far this is yet from realizing its highest inherent potentials.

IV. European Constitutionalism and Public Law Beyond the State Borders

On the basis of the analysis carried out in the previous paragraphs, it is now possible to clarify the contribution of the Lisbon Treaty with regard both to the present and future development of EU constitutionalism as well as, more generally, to the perspectives of a public law beyond traditional categories.

a) The Lisbon Treaty marks the end of the attempt, which found its acme in the Constitutional Treaty, to bring EU constitutionalism closer to the tradition of classic national constitutional understanding. If we define the "constitution" – in a rather restrictive way and accepting an interpretation firmly rooted in the political and legal history of nation-states – as the document stating the historical and cultural identity of a social and political community identified as a "nation", then the EU does not have at present and will not have, at least not in the immediate future, a "constitution". The "constitution", in this case, would be in a proper sense only the normative text founding a polity centered on *national* identity, around which coagulated secondarily all other elements of modern constitutionalism. In order to avert misunderstandings (and unproductive irritations), it would be therefore advisable, with regard to the primary law of the European Union, to avoid for the future the term "constitution", using at its place the more neutral and general definition as *basic law*.

b) The giving up, for the EU primary law, of any reference to the national understanding of constitution does not imply, nevertheless, the refusal also of the belonging to the modern *constitutionalism* in its more general terms. If we namely define "constitutionalism" as the correlation of philosophical theories, legal documents and political praxis having as their content and aim the conceptual specification and concrete establishment of a primary public law as the normative basis of a polity, then the Lisbon Treaty – as well as all other developments of the EU primary law that have preceded it in the past, or will follow it in the future – is doubtlessly part of this intellectual, political and legal tradition.

c) The interpretation of the Lisbon Treaty as part of modern constitutionalism without considering it as a "constitution" in the common meaning of the word makes us more aware of the necessity of a post-traditional concept of constitutionalism, i. e. of a primary public law

beyond the boundaries of the “national” definition of constitution. Within what has been described as the “post-national constellation”,¹¹⁰ public law articulates itself comprehending distinct levels:

- the *local* or *regional* level, concerning the organization of the political community in the infranational or sub-state sphere;
- the *national* level, at which the primary public law assumes the characteristics of a “constitution” in the more widespread understanding of the term;
- the *supranational (Union)* level, comprehending the organization of public power within institutional structures supporting forms of continental economic and political integration; the most advanced example of this kind of primary public law is given by the European Union with its specific variant of constitutional tradition;
- the *transnational* level, which includes public law, generally administrative law, implemented by networks of executives and involving state (and sometimes also non-state) actors beyond the borders of nation-states;¹¹¹
- *international public law of delimited scope*, comprising treaties between sovereign states in order to tackle questions concerning the involved actors;
- *international public law of global scope*, which comprehends treaties between sovereign states in order to manage problems not only involving directly the signing parties, but characterized by a general range and therefore referring to what has been identified as “global internal policy” (energy, environment, trade, economy, etc.);¹¹²
- the *supra-state* level, in which states partially transfer their sovereignty to international organizations endowed with the limited, but fundamental task of safeguarding peace and universally recognized human rights.¹¹³

¹¹⁰ Jürgen Habermas, *Die postnationale Konstellation*, Suhrkamp, Frankfurt/M. 1998.

¹¹¹ Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton/Oxford 2004; Benedict Kingsbury, Nico Krisch, Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 (2005) *Law and Contemporary Problems* 15; Sabino Cassese (ed.), *Global Administrative Law*, Irpa, Roma 2008. Furthermore, see the special issue of the “German Law Journal”, 9 (2008), Issue No. 11.

¹¹² Jürgen Habermas, *Der gespaltene Westen*, Suhrkamp, Frankfurt/M. 2004, at 133, where however the level which is here called “international with global scope” is defined as “transnational”.

¹¹³ *Id.*, at 134, where Habermas refers to this sphere of public law as to a “supranational” level. Elsewhere, however, he speaks of *überstaatliche Instanzen* (supra-state authorities or levels of jurisdiction). See Habermas, *Eine politische Verfassung für eine pluralistische Weltgesellschaft*, in: 38 (2005) *Kritische Justiz* 222, 227.

d) The public law systems at the different levels – like the manifestations of public power to which these systems give legal form – possess specific characteristics insofar as they fulfill distinct social functions. At some of these levels, public law shapes an *autonomous* public power which organizes, on the basis of competences vested to it, the social life of the community. This is the case, typically, of the nation-state and of the political and legal institutions established on its ground. But also infranational institutions in federal states, however, as well as international organizations with global scope are characterized by an *autonomous* public power *sui generis*. In all these political and legal structures public power, albeit interacting with other public power institutions at different levels, is nevertheless insofar autonomous as it has a largely direct reference to a specific community – regardless of whether this is local or regional, national or global –, the social life of which it has to regulate and safeguard. In other words, the autonomous public powers are normatively original insofar as their legitimacy can be traced back directly to an empowerment by the community or the citizens involved.¹¹⁴ Exercising an immediate authority on the community organized by them, public powers here defined as “autonomous” are obliged, as a matter of principle, to find adequate legitimacy resources in the deliberative procedures displayed within the respective social community to which they refer.¹¹⁵ On the

¹¹⁴ This is self-evident for regional or national public powers. More complicated is the question as regards international organizations and “supra-state” institutions such as the UN. In this case, the normative primacy and direct validity of their rules and decisions make, even in the absence of compelling authority and of the monopoly on the use of force, the power of international organizations “autonomous”. However, the lack of the reference to a clearly identifiable social and political community as the source of the empowerment of public power at “supra-state” level forces us to locate – in a quite fictional way – such a source for international organizations in the humankind as a whole, with its shared interests and the rights belonging to every individual. See: Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, “Collected Courses of The Hague Academy of International Law”, Vol. 281, Nijhoff, The Hague 1999; Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, Beck, München 2001.

¹¹⁵ This normative requirement is, once again, difficult to realize with regard to international organizations with global scope, due to the lack of a specifiable social and political community as well as of functioning deliberative procedures at global level. A solution could consist in guaranteeing the involvement of the international civil society. See: Habermas, *Die postnationale Konstellation*, *supra* note 110, at 156; Andreas Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte*, Velbrück Wissenschaft, Weilerswist 2005. For a recent contribution to the idea of “cosmopolitan parliamentarism”, see: Daniele Archibugi, *The Global Commonwealth of Citizens*, Princeton University Press 2008. Some references to “cosmopolitan parliamentarism” can also be found in the work of Jürgen Habermas; see: Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft*, in: Winfried Brugger, Ulfrid Neumann, Stephan Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp, Frankfurt/M. 2008, at 360. For a critical overview see: Anheier, Helmut, Marlies Glasius, Mary Kaldor (eds.), *Global Civil Society 2004/5*, Sage, London 2004; Helen Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture*, Stanford University Press 2009; Jochen von Bernstorff, *Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder*

contrary, public powers derived from other public power sources – and therefore not autonomous – should limit themselves to the implementation, especially by means of administrative law, of decisions taken by autonomous public powers: coordinating their policies, derived public powers make them more effective. As a consequence of their lack of direct reference to a social and political community, derived public powers – such as the networks of global administrative law – have to draw legitimacy from an uninterrupted legitimation-chain originally arising from autonomous public powers relying on popular sovereignty. Concluding, if “constitutionalism” is specified – following its post-national understanding – as the theory and practice of a primary public law as normative fundament of a social and political community, then all forms of autonomous public power belong, more or less directly, to the tradition of modern constitutionalism and should therefore be consistent with its normative requirements.¹¹⁶

e) Since the public power of the European Union is itself characterized by all specific features of an autonomous public power, its political achievements and institutional architecture should be valuated on the basis of the criteria of modern constitutionalism. Seen from this perspective, the Lisbon Treaty marks a step forwards compared to the Treaties previously in force, but denotes a backlash towards the Constitutional Treaty. Plenty of political and institutional work remains: European public power is still affected by a lack of own adequate legitimacy sources, misses representativeness and citizens’ participation, does not point out properly the will of the Union citizens to shape a post-national political identity, provides for an incomplete protection of fundamental rights as well as for an insufficient division of powers. Not the death of the European Constitution should be a concern for the supporters of a full-fledged integration in Europe, but rather the enduring democratic anemia of what can be further called the “European Constitutionalism”.

Baustein westlicher Expertenheerrschaft?, in: Hauke Brunkhorst (ed.), *Demokratie in der Weltgesellschaft*, Nomos, Baden-Baden 2009.

¹¹⁶ For the normative requirements of modern constitutionalism, see *supra* at II.