

The Treaty of Lisbon - After all another Step towards a European Constitution?

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«L'esprit humain invente plus facilement les choses que les mots:
de là vient l'usage de tant de termes impropres...»

(Alexis de Tocqueville, De la démocratie en Amérique I, Paris, 1986, p. 243.)

I. Introduction

The Europeans, like the Americans more than two centuries ago, experience great difficulties in setting a framework for the founding instruments of the European Communities and the European Union. As a matter of fact, their legal nature has been a controversial issue since the very beginning of European integration. Even in the sixties¹, some scholars – whose number had significantly increased throughout the eighties² and afterwards³ – had supported the idea of the constitutional character

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1 In the sixties, see, for instance, *Ophüls*, Die Europäischen Gemeinschaftsverträge als Planungsverfassungen, in: *Kaiser*, Recht und Politik der Planung in Wirtschaft und Gesellschaft, 1965, 229 et seq; *Münch*, Prolégomènes à une théorie constitutionnelle des Communautés Européennes, Riv. Dir. Eur., 1961, 127 et seq; *Constantinesco*, La spécificité du droit communautaire, RTDE, 1966, 9; *Feld*, The European Community Court: its Role in the Federalizing Process, Minn. L. Rev., 1965, 423 et seq.

Later on, in the seventies, see *Ipsen*, Constitutional Perspectives of the European Communities, in: *Dagoglou*, Basic Problems of European Communities, 1975, 190 et seq; *Wohlfarth*, Elemente einer europäischen Verfassung. Betrachtungen zur rechtlichen Entwicklung der Gemeinschaft, 1972, 585 et seq.

2 In the eighties, see *Nicolaysen*, Ansichten zur Gemeinschaftsverfassung, EuR, 1987, 299 et seq; *Weidenfeld et al.*, Wege zur Europäischen Union – Vom Vertrag zur Verfassung?, 1986, 19 et seq; *Glaesner*, Kooperation und Konflikt zwischen den Gemeinschaftsorganen im Spannungsfeld der Gemeinschaftsentwicklung, in: *Magiera*, Entwicklungsperspektiven der Europäischen Gemeinschaft, 1985, 223 et seq; *Bieber*, Zur Verfassungsentwicklung der Europäischen Gemeinschaft, 1988, passim; *Pescatore*, Die Gemeinschaftsverträge als Verfassungsrecht - ein Kapitel Verfassungsgeschichte in der Perspektive des europäischen Gerichtshofs, systematisch geordnet, in: Festschrift für Hans Kutscher, 319 et seq; *von Simson*, Wach-

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of the Treaties at least in a material sense. Notwithstanding, in a formal point of view, the signature and the ratification by the Member States aimed in the opposite direction⁴.

The Treaty Establishing a Constitution for Europe (TECE)⁵ put, apparently, a full stop to that controversy, by stating in the Article I-1 "(...) *this Constitution establishes the European Union (...)*". As a matter of fact, if one takes the deep and wide debate that occurred during the European Convention^{6 7} and the IGC 2004 into ac-

stumsprobleme einer europäischen Verfassung, in: Festschrift für Hans Kutscher, 481 et seq; *Mathies*, Die Verfassung des Gemeinsamen Marktes, in: Gedächtnisschrift für Christoph Sasse, vol. I, 1981, 115 et seq; *Stein*, Lawyers, Judges, and the Making of a Transnational Constitution, *AJIL*, 1981, 1 et seq.

- 3 See, amongst many others, *Pernice*, *Fondements du droit constitutionnel européen*, 2004, 3 et seq; *Martins*, *Curso de Direito Constitucional da União Europeia*, 2004, 121 et seq; *Möllers*, *Verfassungsgebende Gewalt – Verfassung – Konstitutionalisierung. Begriffe der Verfassung in Europa*, in: *Bogdandy* (ed.), *Europäisches Verfassungsrecht – Theoretische und dogmatische Grundzüge*, 2003, 1 et seq; *Pernice*, *Multilevel Constitutionalism in the European Union*, *Eur.L.Rev.*, 2002, 511 et seq; *Lenaerts/Desomer*, *New Models of Constitution-making in Europe : The Quest for Legitimacy*, *CMLR*, 2002, 1217 et seq; *Outeda*, *El proceso de constitucionalización de la Unión Europea – de Roma a Niza*, 2001, maxime 243 et seq; *Martins*, *A natureza jurídica da revisão do Tratado da União Europeia*, 2000, 303 et seq; *Pernice/Mayer*, *De la Constitution composée de l'Europe*, *RTDE*, 2000, 623 et seq; *Walter*, *Die Folgen der Globalisierung für die europäische Verfassungsdiskussion*, *DVbl.*, 2000, 1 et seq; *Piris*, *L'Union européenne a-t-elle une constitution? Lui en faut-il une?*, *RTDE*, 1999, 599 et seq; *Weiler*, *Federalism and Constitutionalism: Europe's Sonderweg*, Working Paper, 2000, in: <http://www.jeanmonnetprogram.org/papers>; *Koenig*, *Ist die Europäische Union verfassungsfähig?*, *DöV*, 1998, 268 et seq; *Gerkrath*, *L'émergence d'un droit constitutionnel pour l'Europe*, 1997, 149 et seq; *Weiler*, *European Neo-constitutionalism: in Search of Foundations for the European Constitutional Order*, in: *Bellamy et al.*, *Constitutionalism in Transformation: European and Theoretical Perspectives*, 1996, 105 et seq.
- 4 Under the terms of Article 48 EUT, the revision of the EU Treaty depends on a consensus of the representatives of the Member States assembled in an Intergovernmental Conference that is organised in a diplomatic way and on the ratification of all Member States according to their constitutional law. This is a rather rigid procedure, internationally featured, in which the acceptance and the entry into force of the amendments depend on a double consensus of the Member States.
- 5 The Treaty Establishing a Constitution for Europe is published in OJ C 310, of 16 December 2004.
- 6 The European Convention was convened by the European Council of Laeken (December 2001) in order to ensure the preparation of the forthcoming IGC would be as broadly-based and transparent as possible.
- 7 Considering that the project of the European Convention was a constitution see, among others, *Jacqué*, *Les principes constitutionnels fondamentaux dans le projet de traité établissant la Constitution européenne*, in: *Rossi*, *Vers une nouvelle architecture de l'Union européenne – Le projet de Traité-Constitution*, 2004, 50 et seq; *Manzella*, *La Constitution européenne: une véritable constitution?*, in: *Rossi*, *Vers une nouvelle architecture*, 63 et seq; *Martins*, *Curso de Direito Constitucional*, 159 et seq; *Idem*, *Vers une Constitution post-nationale – fédérale, confédérale ou vraiment sui generis?*, *ERPL*, 2003, 39 et seq; *Jose Martin y Perez*

count, the inclusion of the term *Constitution* in the founding document of the European Union must not be meaningless. Words are not just words, when it concerns such a word.

Moreover, the failure of the TECE⁸, due to the negative referenda in France and in the Netherlands, in May and June 2005, respectively, does not necessarily exclude the constitutional character of its successor – the Treaty of Lisbon⁹.

Politically, the IGC Mandate annexed to the European Council conclusions of June 2007, which provided the exclusive basis and framework for the work of the IGC, expressly set out that “*the TEU and the Treaty on the Functioning of the Union will not have a constitutional character*”, and in accordance with “*the terminology used throughout the Treaties will reflect this change*”¹⁰. However, legally speaking, the lack of the word *Constitution* and the constitutional terminology is not decisive. One can always argue that the former Treaties do not contain nor such a word neither such a terminology, and this fact has not prevented the doctrine, and even the case law of the European Court of Justice¹¹, to support their constitutional character.

In the scope of this article, I will not discuss the concept of European constitution that is far from being univocal and unambiguous¹². By contrast, I will depart from a

de Nanclares, El proyecto de Constitución europea: reflexiones sobre los trabajos de la Convención, Rev. Der. Com. Eur., 2003, 530 et seq; *Grard*, Traité constitutionnel, une réalité juridique, RDP, 2003, 1259 et seq.

By contrast, supporting the non constitutional character of the project, see, among others, *Dony*, De Rome à Rome: du traité à la Constitution?, in: *Dony/Bribosia* (eds.), Commentaire de la Constitution européenne, 2005, 440 et seq; *Puder*, Constitutionalizing the European Union – More than a Sense of Direction from the Convention on the Future of Europe, Fordham Int. L. Journal, 2002/2003, 1594 et seq; *Tirantafyllou*, Le projet constitutionnel de la Convention européenne - Présentation critique de ses choix clés, 2003, 122 et seq; *Kokott/Rüth*, The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?, CMLR, 2003, 1320 et seq.

8 On the consequences of this failure, see *Walker*, After finalité? The future of the European constitutional idea?, in: *Amato/Bribosia/de Witte* (eds.), Genèse et Destinée de la Constitution Européenne, 2007, 1245 et seq; *Shaw*, What happens if the Constitutional Treaty is not ratified?, in: *Pernice/Zemanek* (eds.), A Constitution for Europe: The IGC, the Ratification Process and Beyond, 2005, 77 et seq; *Biernat*, Ratification of the Constitutional Treaty and Procedures for the Case of Veto, in: *Pernice/Zemanek* (eds.), A Constitution for Europe, 97 et seq; *Piris*, Le Traité Constitutionnel pour l'Europe: une analyse juridique, 2006, 248 et seq.

9 The Treaty of Lisbon is composed by the Treaty of the European Union, the Treaty on the Functioning of the Union, 37 protocols and 65 declarations. It is published in OJ C306 of 17 December 2007. A consolidated version is available on the European Union website. www.europa.eu.int.

10 The full text of the IGC Mandate is available on the website of the European Union. www.europa.eu.int.

11 ECJ, Case 294/83 *Les Verts v. EP* [1986] E.C.R. 1339.

12 See *Calliess*, Mitverantwortung der Rechtswissenschaft für die Verwendung des Verfassungstopos – Die Europäische Verfassung als Opfer der symbolischen Tragweite des Begriffes? in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung? – Kolloquium zum

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generalised idea that the reinforcing of democracy, the rule of law and the protection of fundamental rights represent to some extent a step forward in the European Constitutionalism discourse.

This article focuses on three aspects that can be evaluated in favour of the constitutional character of the Treaty of Lisbon. Firstly, I will draw attention to the unity of the European Union; secondly, I will pursue the values of the Union and finally I will conclude with the protection of the fundamental rights.

II. Unity of the European Union

1. Background

In the perspective of the respect of democracy, the rule of law and the protection of fundamental rights, the current tripartite structure of the European Union (Article 1, par. 3, TEU)¹³, created by the Treaty of Maastricht¹⁴, causes serious difficulties, especially because of the intergovernmental pillars (i.e. the Common and Foreign

10. Geburtstag des WHI, 49 et seq, available on the website www.ecln.net; *Kadelbach*, Perspektiven der Ratifikation – Verfassung oder Vertrag?, in: *Pernice* (ed.), Der Vertrag von Lisabon, 75 et seq; *Häberle*, Europäische Verfassungslehre, 2005, 65 et seq; *Möllers*, Verfassungsgebende Gewalt, 3 et seq; *Dickstein*, Der Verfassungsbegriff der Europäischen Union. En même temps une contribution à la naissance de l'État européen, 1998, 27 et seq; Gerkrath, L'émergence d'un droit constitutionnel, 67 et seq.

13 See *Schröder*, European Union and European Communities, Jean Monnet Working Paper 9/03; *Wessel*, The Constitutional Relationship between the European Union and the European Community: Consequences for the Relationship with the Member States, Jean Monnet Working Paper 9/03; *Allot*, The concept of European Union, Cambridge Yearbook of European Legal Studies, vol. 2, 1999, 31 et seq; *de Witte*, The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?, in: *Heukels* et al., The European Union after Amsterdam – a Legal Analysis, 1998, 51 et seq; *Heukels* et al., The Configuration of the European Union: Community Dimensions of Institutional Interaction, in: *Curtin* et al. (eds.), Institutional Dynamics of European Integration - Essays in honour of Henry G. Schermers, vol. 2, 1994, 195 et seq; *Demaret*, The Treaty Framework, in: *O'Keefe* et al., Legal Issues of the Maastricht Treaty, 1994, 3 et seq; *Cloose* et al., Le traité de Maastricht - genèse, analyse, commentaires, 1993, 114 et seq; *Constantinesco*, La structure du Traité instituant l'Union Européenne - les dispositions communes et finales; les nouvelles compétences, CDE, 1993, 251 et seq; *Curtin*, The Constitutional Structure of the Union: A Europe of Bits and Pieces, CMLR, 1993, 17 et seq; *Martins*, O Tratado da União Europeia - contributo para a sua compreensão, 1993, 20 et seq; *Weiler*, Neither Unity Nor Three Pillars - The Trinity Structure of the Treaty on European Union, in: *Monar* et al., The Maastricht Treaty on European Union, 1993, 49 et seq; *Everling*, Reflections on the Structure of the European Union, CMLR, 1992, 1056 et seq.

14 The Treaty of Maastricht was signed in February 1992 in Maastricht and entered into force in November 1993.

Security Policy (CFSP) and the Police and Judicial Cooperation in Criminal Matters (PJCCM)).

In fact, the current decision-making procedure in the intergovernmental pillars is mainly anchored in the Member States or in the institutions where they are represented¹⁵. The participation of the Parliament, which represents the peoples of Europe, is rather diminutive. The sources of secondary law¹⁶ are relatively inoperative, which affects the efficiency of the Union and, consequently, its democracy. In addition, the CFSP is completely excluded from the jurisdiction of the Court of Justice and the PJCCM is under severe limitations¹⁷. Therefore, the rule of law and the fundamental rights are not fully respected.

2. Treaty of Lisbon

The Treaty of Lisbon seeks for solving this problem by creating a unitary structure – the European Union – that succeeds to the European Communities and to the intergovernmental pillars (Article 1 TEU). The European Union also acquires legal personality (Article 47 TEU). However, the procedures of decision, the sources of secondary law and the jurisdiction of the European Court are not unified. There remain some substantial differences between the matters of the former Communities and the areas of the former intergovernmental pillars.

Thus, when one reads Title V TEU, related to general provisions on the Union's External Action and specific provisions on the Common Foreign and Security Policy (which includes the Common Security and Defence Policy), searching for this procedural unity, the ordinary legislative procedure does not apply to these matters; the sources of secondary law are not the regulations, directives and decisions, but general guidelines, decisions and systematic cooperation between Member States (Article 25 TEU) and the jurisdiction of the Court of Justice is expressly excluded (Article 24 TEU). In other words, the amendments introduced by the Treaty of Lisbon in these matters will not contribute to approximate the former second pillar to the common Union legal order¹⁸.

By contrast, the area of freedom, security and justice (Article 67 *et seq* TFEU), which is a very sensitive one with regard to human rights, pursues the approxima-

15 See Articles 13 to 16 and 23 TEU concerning the CFSP. With regard to PJCCM, see Article 34 TEU.

16 In regard to CFSP, the sources of the secondary law are common strategies; joint actions and common positions (Article 12 TEU). Concerning the PJCCM, they are common positions; framework decisions; decisions and conventions (Article 34 (2) TEU).

17 See Article 35 TEU.

18 It does not mean that the Treaty of Lisbon does not make a serious effort, in order to create a more coherent and efficient Union' External Action. See *Thym*, *Aussenverfassungsrecht nach dem Lissaboner Vertrag*, in: *Pernice* (ed.), *Der Vertrag von Lissabon*, 167 *et seq*.

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tion, initiated in Amsterdam¹⁹, to the common decision-making procedures, to the ordinary sources of secondary law and to the extent of the Court of Justice jurisdiction²⁰.

The ordinary legislative procedure (Article 294 TFEU) will apply to some matters (Articles 75; 78, par. 2; 79, par. 2; 81, par. 2; 82, par. 1 e 2; 83; 84; 85, n° 1; 87; 88, n° 2, TFUE), with some exceptions, comprised, for instance, in Articles 76; 81, par. 3; 86, par. 1; 87, par. 3; 89 TFUE.

The common sources of secondary law – regulations, directives and decisions – may be adopted in the area of freedom, security and justice, and, if it is the case, they prevail over the national law, and, under some circumstances, they are directly applied to the Member States.

The Court of Justice will have full jurisdiction over the area of freedom, security and justice, with two exceptions previewed in Article 276 TFEU. That is the review of the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State and the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security are excluded. Otherwise, the jurisdiction of the

19 See *Müller-Graff*, Institutionelle und materielle Reformen in der Zusammenarbeit in den Bereichen Justiz und Inneres, in: *Hummer* (ed.), Die Europäischen Union nach dem Vertrag von Amsterdam, 1998, 259 et seq; *Monar*, Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation, *Eur.L.Rev.*, 1998, 326 et seq; *van Simaey*s et al., Le nouvel espace de liberté, de sécurité et de justice, in: *Lejeune*, Le Traité d'Amsterdam. Espoirs et déceptions, 1998, 227 et seq; *Winkler*, Schrittweiser Aufbau eines Raumes der Freiheit, der Sicherheit und des Rechts, in: *Bergmann* et al. (eds.), Der Amsterdamer Vertrag vom 2. Oktober 1997. Eine Kommentierung der Neuerungen des EU- und EG-Vertrages, 1998, 55 et seq; *Harings*, Die Zusammenarbeit in den Bereichen Justiz und Inneres, in: *v. Bogdandy* (ed.), Konsolidierung und Kohärenz des Primärrechts nach Amsterdam, 1998, 88 et seq; *Valle*, La refundación de la libre circulación de personas, tercer pilar y Schengen: el espacio europeo de libertad, seguridad y justicia, *Rev. Der. Com. Eur.*, 1998, 56 et seq; *Colvin* et al., Human Rights and Accountability after the Amsterdam Treaty, *EHRLR*, 1998, 199 et seq; *Ukrow*, Die Fortentwicklung des Rechts der Europäischen Union durch den Vertrag von Amsterdam, *ZEuS*, 1998, 178 et seq; *Tezcan*, La coopération dans les domaines de la justice et des affaires intérieures dans le cadre de l'Union européenne et le Traité d'Amsterdam, *CDE*, 1998, 674 et seq; *Masclat*, Le développement de la libre circulation des personnes et le renforcement de la coopération dans les domaines de la justice et des affaires intérieures, in: *Le Traité d'Amsterdam et les perspectives d'évolution de l'Union européenne*, 1997, 75 et seq; *Labayle*, Un espace de liberté, de sécurité et de justice, 1997, 863 et seq; *den Boer*, Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communitarization, *MJ*, 1997, 311 et seq; *Rupperecht*, Justiz und Inneres nach Amsterdamer Vertrag, *Int. 4/97*, 264 et seq; *Müller-Graff*, Justiz und Inneres nach Amsterdam – Die Neuerungen in erster und dritter Säule, *Int. 4/97*, 270 et seq.

20 On the area of freedom, security and justice in the Treaty of Lisbon see *Ruffert*, Der Raum der Freiheit, der Sicherheit und des Rechts nach dem Reformvertrag – Kontinuierliche Verfassungsgebung in schwierigem Terrain, in: *Pernice* (ed.), Der Vertrag von Lissabon, 163 et seq.

Court of Justice over the existing Third Pillar *acquis* is postponed for up to 5 years (Art 10 of the Protocol on transitional provisions).

Moreover, when one compares the legal regime of the area of freedom, security and justice with the legal regime of other matters regulated by the TFEU, one can find some more exceptions.

In this context, one has to mention the legislative initiative of a quarter of Member States (Article 76, par. b), TFEU); the safeguarding clauses in the judicial cooperation in criminal matters, which admit the suspension of the adoption of a directive when a member of the Council (which means a Member State) considers that it would affect fundamental aspects of its criminal justice system (Articles 82, par. 3, and 83, par. 3, TFEU); the enhanced cooperation relating to the judicial cooperation in criminal matters as a consequence of the failure of the adoption of a directive (Articles 82, par. 3, and 83, par. 3, TFEU); the exclusive responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security (Article 72 TFEU) and the right of Member States to determine unilaterally quotas of immigration of third countries nationals (Article 79, par. 5 TFEU). All these exceptions represent concessions to the sovereignty of the Member States, and consequently, they cannot be evaluated as a step forward to the European Constitution.

Last but not least, the United Kingdom, Ireland and Denmark still benefit from an opt-out clause in the area of freedom, security and justice (Protocols No 20 e 21).

To sum up, the formal unitary structure of the European Union is, in practical terms, submitted to some substantial exceptions. As a result, it can hardly be used as a strong argument in favour of the European Constitution. However, one has to admit that it would not be different in the context of the TECE.

III. Values of the Union

1. Preliminary remarks

Everyone would agree that every democratic society is founded on values, even though when they are not textually expressed in the constitution. In other words, every constitution presupposes a certain idea of law that is based on values and principles. Thus, the European Constitution could not be any exception: it must be set in a solid axiological basis.

It does not mean, however, that these values are an exclusive of the Union. On the contrary, the Union is part of a “constitutional network”²¹ that is composed by international entities, such as the Council of Europe, as well as by internal communities,

²¹ See *Canotilho*, *Direito Constitucional e Teoria da Constituição*, 2003, 1369 et seq and 1426 et seq.

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such as the Member States. As a result, it shares the values with those entities. As a matter of fact, the European Union belongs to a common European cultural heritage²² (or to the European *corpus juris*). The current Treaties do not expressly mention any values, yet they are implied in Article 6 (1) TEU that states “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States”. Each principle is based on the corresponding value²³.

2. Treaty of Lisbon

The Treaty of Lisbon, by contrast, explicitly indicates the values that founded the Union. They are human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons that belong to minorities. The Treaty also expresses that “*These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail*” (Article 2 TEU).

This provision came *ipsis verbis* from the TECE and might not be underestimated in the discourse of European Constitutionalism, as long as, contrarily to the current Article 6 TEU, it can be invoked before European and national courts.

First of all, the axiological basis of the Union must influence the interpretation and the application of every provision of both Treaties – TEU and TFEU –. That means the Court of Justice and the national courts, when they apply Union law, must take the values of the Union into account.

22 One of the aims of the Union after the Treaty of Lisbon is to safeguard and enhance the Europe’s cultural heritage (Article 3 (3) par. 4 TEU).

23 On the values that currently founded the Union, see *Martins*, Os valores da União na Constituição Europeia, in *Colóquio ibérico: Constituição europeia*, Bol. Fac. Dir. Univ. Coimbra, *Studia Jurídica* No 84, 2005, 497 et seq; *Quadros*, Einige Gedanken zum Inhalt und zu den Werten der Europäischen Verfassung, in: *Brenner et al.*, *Der Staat des Grundgesetzes – Kontinuität und Wandel*, 2004, 1125 et seq; *Idem*, O conteúdo e os valores da Constituição Europeia, in: *Uma Constituição para a Europa*, 2004, 189 et seq; *Constantinesco*, Valeurs et contenu de la Constitution européenne, in: *Uma Constituição para a Europa*, 2004, 161 et seq; *Sorrentino*, Brevi riflessione sui valori e sui fini dell’Unione Europea nel progetto di costituzione europea, *Dir. Pubbl.*, 2003, 810 et 811; *Bieber*, Ingérence ou manifestation d’une responsabilité commune ? – La protection des valeurs de l’Union européenne à l’égard des Etats-membres, in: *Institut Suisse de Droit Comparé* (ed.), *L’intégration européenne: historique et perspectives*, 2002, 95 et seq; *Martins*, Les valeurs communes et la place de la Charte en Europe, *ERPL*, 2002, 130 et seq; *Schorkopf*, Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 abs. 1 und Art. 7 EUV, 2000, 36 et seq.

Secondly, the institutions of the Union, as long as they legislate or when they adopt administrative acts or even in their administrative practices, must respect the values of the Union.

Thirdly, the candidates to Member States and the Member States must also respect the values of the Union. With accordance to Article 49 TEU, the accession to the Union of a new Member State depends after all on the respect of the values referred to in Article 2 TEU. Under the terms of Article 7 TEU, the existence either of a clear risk of a serious breach or of a serious and persistent breach of a Member State of the values referred to in Article 2 TEU may lead to the suspension of certain rights of the Member State deriving from the application of the Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council²⁴.

Last but not least, the values of the Union explain some amendments of the Treaty of Lisbon.

a) Human dignity

Starting with human dignity, it is “*not only a fundamental right in itself, but constitutes the real basis of fundamental rights*”²⁵, whether contained in the Treaties or in the Charter of Fundamental Rights.

The initial predominant economic goals of the European integration had hidden this fact. Human dignity is the ultimate ground of several rules of the Treaties. Provisions like Articles 18 *et seq* TFEU on non discrimination and Union citizenship or Articles 67 *et seq* TFEU on the area of freedom, security and justice shall be interpreted on the basis of the value of human dignity.

The Title I of the Charter on Dignity starts with a provision that reads: “*human dignity is inviolable. It must be respected and protected*”. Thus, human dignity is the front door to the rights to life (Article 2) and to the integrity of the person (Article 3) and the prohibitions of torture or inhuman and degrading treatment or punishment (Article 4) and of slavery and forced labour (Article 5).

24 On the suspension procedure, see *Martins*, Curso de Direito Constitucional, 239 et seq; *Pérez*, La intervención democrática en la Unión europea después del asunto austríaco y la reforma del Tratado de Niza, Bol. Eur. Univ. de La Rioja, 2001, 45 et seq; *Schmitt von Sydow*, Liberté, démocratie, droits fondamentaux et État de droit: analyse de l'article 7 du traité UE, RMUE, 2001, 285 et seq; *Schorkopf*, Die Massnahmen der XIV EU-Mitgliedstaaten gegen Österreich, 2001, 99 et seq; *Idem*, Homogenität in der Europäischen Union, 104 et seq; *Verhoeven*, How Democratic Need European Union Members Be? Some Thoughts after Amsterdam, Eur.L. Rev., 1998, 217 et seq.

25 Quoted from Explanation on Article 1 – Human Dignity in Explanations relating to the Charter of Fundamental Rights published with the Charter.

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This is not any specificity of the Union, since, currently, every international human rights instrument, as well as the domestic catalogues of fundamental rights is founded on human dignity. In fact, it imposes the recognition for every human being everywhere and all the time of a minimal core universally accepted of human rights.²⁶

b) Freedom

Continuing with the value of freedom, it also inspires several parts of the Treaties, as well as the Charter.

First of all, the value of freedom inspires the aims of the Union, such as the area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured (Article 3 (2) TEU). It also inspires the most traditional aim of the Union, which is the establishment of the internal market (article 3 (3) TEU) characterised by the abolition between the Member States of the obstacles to the free movement of goods, persons, services and capital (Articles 26 (1) TFEU). Otherwise, it bases the provisions on free competition (Articles 101 *et seq* TFEU).

Secondly, the second chapter of the Charter of Fundamental Rights on Freedom concentrates on basic civil and political freedoms, such as right to liberty (Article 6), association (Article 12), expression (Article 11), propriety (Article 17), private and family life (Article 7), as well as some provisions which have gained more particular prominence in the EU context, such as the freedom to conduct a business (Article 16) is also inspired by the value of freedom.

c) Democracy

Democracy is another value that has always influenced the Union and previously the Communities. The claims for a more democratic institutional framework have always existed, but they have gained more weight and force after the election of the European Parliament by direct and universal suffrage. Henceforth, every revision has tried to create a more democratic, transparent and efficient Union. The Treaty of Lisbon does not represent any exception.

In fact, the value of democracy explains without doubt some amendments of the Treaties, as well as some provisions of the Charter. Starting with Title II TEU concerns provisions on democratic principles (Articles 9-12) and clarifies, for the first

26 See *Frowein*, Human Dignity in International Law, in: *Kretzmer/Klein* (eds.), *The Concept of Human Dignity in Human Rights Discourse*, 2002, 21 *et seq*; *Zajadto*, Human Dignity and Human Rights, in: *Hanski/Suksi* (org.), *An Introduction to the International Protection of Human Rights*, 1999, 15 *et seq*.

time in the history of the European integration, some aspects that had never been explicitly included in the Treaties.

According to Article 9 TEU, the institutions, bodies, offices and agencies of the Union shall observe the principle of equality of its citizens whenever they enact.

Under the terms of Article 10 (1) TEU, the functioning of the Union shall be founded on the principle of representative democracy. The citizens are represented in the European Parliament (Article 10 (2) TEU) and the Member States are represented in the European Council and the Council. The institutions shall observe the principles of openness and closeness of their decisions as possible to the citizens (Article 10 (3) TEU). Otherwise, the principles of transparency, publicity and coherency (Article 11 (1) (2) TEU) and the participation of the representative associations and the civil society (Article 11 (2) TEU) are expressly mentioned.

Still concerning the representative democracy, the Treaty of Lisbon pursues the recognition that the political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union (Article 10 (4) TEU). Furthermore, the Treaty of Lisbon develops the principle of participative democracy. With regard to Article 11 (4) TEU, no less than a million citizens who are nationals of a significant number of Member States may have the initiative to invite the European Commission to submit any appropriate proposal. Additionally, in accordance with Article 12 TEU, the national parliaments shall actively contribute to the good functioning of the Union.

Another issue that shall be mentioned as a consequence of the value of democracy is the deep and wide institutional reform accomplished by the IGC 2007 (that I will not discuss in detail here).

It is a fact that this reform is founded on the will to surpass the democratic deficit of the Union. As Gráinne de Búrca points out, the voting in the Council and the membership of the Parliament are more related to demographic criteria; the size of the Commission is reduced and majority voting in the Council is extended. The Treaty of Lisbon retains and in some cases reinforces most of the democracy-enhancing provisions of the TECE. Provisions on the role of national parliaments, subsidiarity, the citizens petition, and the provision introducing the more representative Convention method as a part of the ordinary (though not the only) Treaty-revision procedure will also contribute to a more democratic Union²⁷.

To sum up, the Treaties intend to create a more open and closer Union to its citizens, as well as a more efficient and transparent one, in order to respect the value of democracy.

²⁷ *De Búrca*, The EU on the Road from the Constitutional Treaty to the Lisbon Treaty, in Jean Monnet Working Paper /08, 9-10, available on the site www.jeanmonnetprogram.org

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d) Rule of law

Directly connected to democracy is the value of the rule of law, according to which the exercise of public powers, in name of the people, implies that the holders of the institutions, organs and agencies shall be previously submitted to legal rules. The rule of law intends to conciliate the necessity of realising public tasks with respect for individual rights.

The rule of law imposes the separation of powers, the independence of courts, the legality of the Administration, the access to judicial protection and the reparation of damages caused by the State to the individuals. The rule of law binds the legislator to respect the Constitution and fundamental rights.

The rule of law does not solely apply to the State, but also to every entity that exercises public tasks. As the Union exercises public tasks, it is susceptible to violate individual rights. Therefore, the rule of law shall orientate all of its activities.

Some amendments introduced by the Treaty of Lisbon are precisely justified by the value of rule of law. That is the case of some institutional provisions, the extension of the Court of Justice jurisdiction, the declaration concerning supremacy and the binding value of the Charter of Fundamental Rights.

For the first time in the history of the European integration, the Treaty of Lisbon qualifies, in a constitutional terminology, the functions of each institution and defines their exercise. Thus, the European Parliament, jointly with the Council, shall exercise legislative and budgetary functions. The European Parliament shall also exercise functions of political control and consultation (Article 14 (1) TEU). The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall also carry out policy-making and coordinating functions (Article 16 (1) TEU). Moreover, the Treaty determines that the European Council does not exercise legislative functions (Article 15 (1) TEU).

Another issue that reflects the influence of the value of the rule of law is the extension of the Court of Justice jurisdiction to some matters that have always been excluded for or submitted to limitations, namely the above-mentioned parts of the area of freedom, security and justice. In addition, the Treaty of Lisbon extends the access of the individuals to the European Courts, stating that any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures (Article 263, par. 4, TFEU)²⁸.

28 Under the terms of Article 230, par. 4 of the TEC, any natural or legal person may bring an action for annulment against a decision, which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. This provision has been interpreted in a rather strict way by the Court of Justice. See ECJ, Case C-50/00 P *Union de Pequeños Agricultores v Council* [2002] E.C.R. I-6677.

In fact, the concept of the rule of law imposes the existence of independent and impartial courts in order to ensure the respect of the legal order altogether, as well as the right to access to justice. Therefore, every legal act shall be submitted to judicial control. Notwithstanding, there remain some parts of the Treaty that are excluded from the jurisdiction of the Court of Justice, such as the above-mentioned CFSP matters. In addition, the Court of Justice jurisdiction over the existing Third Pillar *acquis* is postponed for up to 5 years (Article 10 of the Protocol on transitional provisions).

The declaration concerning primacy shall be evaluated in the perspective of the concretisation of the rule of law, and, consequently, in the pursuing of European Constitutionalism. It reads:

“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 by the said case law”.

Contrary to the TECE, which consecrated a provision on Part I to the principle that the Union Law prevailed over the law of Member States (Article I-6), the Treaty of Lisbon limits this reference to a declaration, which has not the same legal value as the Treaties. Concerning the rule of law, it signifies, without doubt, a downgrading. However, it does not prevent the full application of the principle.

Finally, the rule of law explains the recognition of the rights, freedoms and principles set out in the Charter of the Fundamental Rights of the European Union with the same legal value as the Treaties (Article 6 (1) TEU) that will be discussed below.

e) Equality

To conclude, the value of equality founds one of the most structural principles of the Communities – the principles of equality and non discrimination. Since the very beginning of the integration, the prohibition of non discrimination on ground of nationality and the equality of remuneration between men and women have played

However, the Court of First Instance (CFI, Case T-177/01 *Jégo Quéré v. Commission* [2002] E.C.R. II-2365) and some scholars have supported a more flexible approach to the admissibility requirements laid down in Article 230, par. 4, TEC.

See *de Quadros/Martins*, *Contencioso da União Europeia*, 2007, 155, 162/163; *Waelbroeck*, *Le droit au recours juridictionnel effectif du particulier trois pas en avant, deux pas en arrière*, CDE, 2002, 3 et seq; *Gilliaux*, *L'arrêt Unión de Pequeños Agricultores: entre subsidiarité juridictionnelle et effectivité*, CDE, 2003, 177 et seq; *Schwarze*, *The Legal Protection of the Individual against Regulations in European Union Law*, EPL, 2004, 285 et seq.

At the end of the day, the Treaty of Lisbon relaxes the criteria developed in the case-law of the Court of Justice for individual concern, where an individual has no remedy for contesting a provision of Union law before a national court.

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an important role in European Community Law²⁹. The successive revisions of the Treaties (specially, the Treaty of Amsterdam)³⁰ and the case law of the European Court of Justice enlarged the scope of application of these principles³¹. The Treaty of Lisbon draws special attention to equality. Firstly, one of the aims of the Union is the combat against social exclusion and discrimination, and the promotion of equality between men and women (Article 3 (3) TEU). Secondly, as above mentioned, the Union shall observe the principle of the equality of its citizens in all its activities (Article 9 TEU), which has consequences at several levels. Thirdly, the TFEU expressly recognises the equality between men and women (Article 157). Finally, Chapter III of the Charter of Fundamental Rights entitled Equality starts with a basic equality-before-the-law guarantee (Article 20), pursues with a provision prohibiting any discrimination based on any ground such as sex, race color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (Article 21, par. 1). This provision is inspired in Article 13 TEC. The Charter also recognises the classical prohibition of any discrimination on grounds of nationality (Article 21, par. 2) and consecrates gender equality in all areas, including employment, work and pay and it explicitly admits positive actions in this field (Article 23). As a matter of fact, the value of equality came out stronger after the Treaty of Lisbon.

29 See *Lenaerts*, L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples, CDE, 1991, 21-22.

30 See *Dubout*, L'article 13 du traité CE – La clause communautaire de lutte contre les discriminations, 2006, passim; *Guild*, The European Union and Article 13 of the Treaty Establishing the European Community, in: *Moon* (ed.), Race Discrimination - Developing and Using a New Legal Framework, 2000, 65 et seq; *Chiti*, Il Principio di Non Discriminazione e il Trattato di Amsterdam, Riv. Ital. Dir. Pubbl. Com., 2000, 851 et seq; *Flynn*, The implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?, CMLR, 1999, 1127 et seq; *Bell*, The New Article 13 EC Treaty: A sound Basis for European Anti-Discrimination Law, MJ, 1999, 5 et seq; *Waddington*, Throwing some light on Article 13 EC Treaty, MJ, 1999, 1 et seq; *Idem*, Testing the Limits of the EC Treaty Article on Non-Discrimination, Ind. L. Journal, 1999, 133 et seq; *Lengauer*, The New General Principle of Non-Discrimination in the EC Treaty as Amended by the Treaty of Amsterdam, Austrian Rev. Int. Eur. Law, 1998, 369 et seq.

31 See *Martin*, Égalité et non-discrimination dans la jurisprudence communautaire – Étude critique à la lumière d'une approche comparatiste, 2006, 35-220; *Hernu*, Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de Justice des Communautés Européennes, 2003, passim.

IV. Protection of Fundamental Rights

1. Charter of the Fundamental Rights of the European Union

In the point of view of the European Constitutionalism, the most impressive amendment introduced by the Treaty of Lisbon is without any doubt the already mentioned recognition of the rights, freedoms and principles set out in the Charter of the Fundamental Rights of the European Union with the same legal value as the Treaties (Article 6 (1) TEU). Although the text of the Charter is not contained in the Treaties, as it was in the TECE³², this amendment cannot be underestimated.

The binding character of the Charter is submitted to some limitations. In fact, according to Article 6 (1) TEU, it shall not extend the competences of the Union as defined in the Treaties and the rights, freedoms and principles shall be interpreted in accordance with the general provisions in Title VII and with regard to the explanations referred to in the Charter.

In a constitutional context, these limitations are not easily understood, especially, when one takes the universality of fundamental rights into account.

In spite of that fact, one has to remember that the legal status of the Charter and the question of its inclusion (or not) into the Treaties have been postponed since December 2000 (date of Nice IGC). As a matter of fact, since the Charter had not been included in the Treaty of Nice, it did not have any legal binding value. However, it has already been used by a range of institutional actors, such as the Commission, which decided by an internal decision of 13 March 2001 to conduct a form of compatibility review with regard to the Charter, the European Ombudsman, the Advocates General of the ECJ³³, the Court of First Instance³⁴. More recently, even

32 On the inclusion of the Charter into the TECE see *Schmitz*, Die Grundrechtecharta als Teil der Verfassung der Europäischen Union, *EuR*, 2004, 691 et seq; *Rideau*, Le greffe de la Charte des droits fondamentaux sur le projet de Constitution européenne, in : *Beaud et al.*, L'Europe en voie de Constitution, 2004, 347 et seq; *Lebaut-Ferraresel/Karpenshif*, La «constitutionalisation» de la Charte: un acte fondamental, in : *Philip/Soldatos*, La Convention sur l'avenir de l'Europe, 2004, 125 et seq; *Martins*, O Projecto de Constituição Europeia – Contributo para o debate sobre o futuro da União, 2004, 51 et seq; *Triantafyllou*, Le projet constitutionnel de la Convention européenne- Présentation critique de ses choix clés, 2003, 56 et seq; *Barbero*, La Carta de Derechos Fundamentales de la UE: su estatuto constitucional, *Rev. Der. Com. Eur.*, 2003, 943 et seq; *Turpin*, L'intégration de la Charte des droits fondamentaux dans la Constitution européenne, *RTDE*, 2003, 615 et seq; *Koukoulis-Spiliotopoulos*, Which Charter of Fundamental Rights was Incorporated in the Draft European Convention?, *ERPL*, 2003, 295 et seq; *Williams*, EU human rights policy and the Convention on the Future of Europe: a failure of design?, *Eur. L. Rev.*, 2003, 794 et seq; *Pinelli*, Diritti fondamentali e riassetto istituzionale dell'Unione, *Dir. Pubbl.*, 2003, 817 et seq.

33 See Conclusions of the Advocate-General *Tizzano*, ECJ, Case C-173/99 BECTU [2001] E.C.R. I-4881, par. 27 e 28; *Jacobs*, ECJ, Case C-270/99P Z./PE [2001] E.C.R. I-9197, par. 40; *Leger*, ECJ, Case C-353/99P Hautala [2001] E.C.R. I- 9565, par. 82 e 83; *Misho*, ECJ, Case C-20/00 e C-64/00 Booker [2003] E.C.R. I-7411, par. 26; *Maduro*, ECJ, Case C-181/03

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the Court of Justice³⁵ referred to the Charter in some of its judicial decisions. To some extent, the Charter is currently not more than soft law.

By contrast, the Treaty of Lisbon, consecrating the legal equivalence between the Charter and the founding Treaties of the Union, transforms the Charter into hard law. This solution was not accepted without any concessions to the Member States which were opposed to it. Poland and the United Kingdom benefit indeed from an opt-out concerning the application of the Charter of Fundamental Rights of the European Union provided for the Protocol No 30³⁶.

In the perspective of the European Constitution, it causes serious troubles, due to the reduction of the material scope of application of the Charter without any legitimate reason, except the individualism of two Member States. Otherwise, in the theory of the fundamental rights point of view, one can hardly understand, for instance, that the access to justice of the nationals of Poland and the United Kingdom is submitted to more restrictions than the nationals of other Member States (Article 1 of the Protocol). This assertion clearly violates the principle of equality between the citizens of the Union without any reasonable justification. Finally, it also causes damages to the rule of law³⁷.

Despite all these limitations, in comparison to the current absence of binding effect of the Charter, the Treaty of Lisbon still represents a step forward to the constitutionalisation of the Union.

2. Accession of the Union to the European Convention of Human Rights

Apart from the legal status of the Charter, the Treaty of Lisbon solves another important issue related to the protection of fundamental rights. That is the question of the accession of the Union to the European Convention for the Protection of Human Rights and Freedoms (ECHR).

a) Background

The proposal of the accession of the EU to the ECHR has been supported by some institutions, as well as by some scholars since the seventies. One of the most remarkable documents on this matter is a memorandum of the Commission from

Nardone [2005] E.C.R. I-199; *Kokott*, ECJ, Case 540/03 EP v. Council [2006] E.C.R. I-5769, par. 58.

34 See Case T-54/99, *Max.mobil Telekommunikation Service*, ruling of 31.1.2002, para 48, 57.

35 See C-540/03 EP v. Council [2006] E.C.R. I-5769, para 38.

36 For an analysis of this Protocol, see *Mayer*, *Schutz vor der Grundrechte-Charta oder durch die Grundrechte-Charta? Anmerkungen zum europäischen Grundrechtsschutz nach dem Vertrag von Lissabon*, in: *Pernice* (ed.), *Der Vertrag von Lissabon*, 88.

37 See *Mayer*, *Schutz vor der Grundrechte-Charta*, 88.

1979³⁸, where this institution pointed out some advantages of accession, such as the parallelism between the Community and the Member States with regard to the control of fundamental rights, the certainty of the bill of rights the Court should apply and the incorporation of the ECHR in the community legal order.

However, the Community has never acceded to the ECHR, as according to some Member States the technical and institutional difficulties related to the relationship between the judicial systems would overcome the advantages and could be insurmountable.

In order to put an end to this discussion the Belgian Presidency submitted the problem to the ECJ, which declared in 1996 that in the current stage of the European Law the Community had no competence to accede to the ECHR (opinion 2/94). Henceforth, it was clear that the capacity of the Community to accede to it could only be conferred by the Member States through the revision of the EU Treaty, but neither in Amsterdam nor in Nice the political will to introduce changes to the Treaty in this way was lacking. Therefore, the tension went on and even increased.

b) Treaty of Lisbon

Accession to the ECHR returned to the European agenda during the Convention on the Future of Europe that prepared the final proposal of the European Constitution delivered to the IGC 2004³⁹.

Article 9 (2) of the European Constitution, which reads «the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution», finally provides the legal basis for the Union to accede to the ECHR.

38 This memorandum is published on EC Bul., supl. No 2/79, 3 et seq.

39 On the accession of the Union to the ECHR see, among many others, *de Búrca*, Fundamental Rights and Citizenship, in: *de Witte* (ed.), Ten Reflections on the Constitutional Treaty for Europe, E. book published in April 2003 by Robert Schuman Centre for Advanced Studies and European University Institute, San Domenico di Fiesole, 25 et seq; *Medeiros*, A Carta dos Direitos Fundamentais da União Europeia, a Convenção Europeia dos Direitos do Homem e o Estado português, in: Nos 25 anos da Constituição da República Portuguesa de 1976, 2001, 7 et seq; *De Schutter*, L'adhésion de l'Union européenne à la convention européenne des droits de l'homme comme élément du débat sur l'avenir de l'Europe, in: *Dony/Bribosia*, L'avenir du système juridictionnel de l'Union européenne, 2002, 205 et seq; *Krüger/Polakiewicz*, Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa, EuGRZ, 2001, 92 et seq; *Tulkens/Callewaert*, Le point de vue de la Cour Européenne des Droits de l'Homme, in: *Carlier/De Schutter* (eds.), La Charte des droits fondamentaux de l'Union européenne – son apport à la protection des droits de l'Homme en Europe, 2002, 219 et seq; *Vital Moreira*, A Carta e a adesão da União Europeia à Convenção Europeia dos Direitos do Homem (CEDH), in: Carta de Direitos Fundamentais da União Europeia, 2001, 89 et seq; *Benoît-Rohmer*, L'adhésion de l'Union à la Convention européenne des droits de l'homme, RUDH, 2000, 57 et seq.

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From the side of the ECHR, the Member States have already signed the protocol 14, which modifies the current Article 59 of the ECHR in the sense of accepting the Union as a member⁴⁰.

Actually, the development of the Union in the sense of a political entity, which exercises political power based on the model of the State, demonstrates the need for an international control in the field of human rights.

Politically speaking the Union's future accession to the ECHR will mean the European convergence in the area of fundamental rights and a real share of the same values all over Europe. The European Union will join the Council of Europe at a double level: the substantive one, by accepting a hard core of rights and liberties and the jurisdictional one by recognizing the European Court of Human Rights jurisdiction in the field of human rights.

Taking into account the innumerable difficulties that are associated to this accession, the Treaty of Lisbon could not confer to the Union the competence to accede to ECHR without providing any conditions. Therefore, Article 6 (2) TEU and Protocol No 8 relating to that provision seek to overcome the potential difficulties of connection between the different legal orders, which will be applied in the Union, concerning fundamental rights. As a matter of fact, the ECHR will compete, on the one hand, with the Treaties and the Charter, and, on the other hand, with the constitutional traditions common to the Member States.

Accordingly, the accession shall not affect the Union's competences or the powers of its institutions, as they are defined in the Treaties (Article 6 (2) TEU and Article 2 of the Protocol). The agreement of accession shall make provision for preserving the specific characteristics of the Union and Union law, assuring the participation of the Union in the control bodies of the European Convention and the constitution of the mechanisms necessary to ensure that proceedings by non-Member States and individuals are correctly addressed to Member States and/or to the Union (Article 1 of the Protocol). Furthermore, the agreement of accession shall ensure that nothing will affect the situation of the Member States in relation to the ECHR (Article 2 of the Protocol), and that nothing shall affect Article 344 TFEU, which foresees that Member States undertake to submit the disputes concerning the interpretation or the application of the Treaties to the methods of settlement provided therein.

V. Concluding Remarks

In the point of view of European Constitutionalism, the Treaty of Lisbon, likewise the former Treaties, does not indicate any clear and definitive direction, oscillating

⁴⁰ This Protocol has not entered into force yet.

between the building of a European Constitution and the remaining of some international features.

In comparison to the TECE, the constitutional terminology, such as the word *Constitution*, the symbols (anthem, flag, etc) and the language (foreign affairs minister, laws, etc), disappeared; the supremacy clause is transformed into a mere declaration; the Charter is not contained in the Treaty and there is no longer a unique document, but two different Treaties. However, a significant part of the TECE remains in the Treaty of Lisbon. The long-term President of the European Council; the High Representative in the Union for Foreign Affairs is practically the former Foreign Minister; the voting in the Council and the membership of the Parliament are more related to demographic criteria; the size of the Commission is reduced and majority voting in the Council is extended, the Charter becomes legally binding, the EU has legal personality and shall accede to the ECHR⁴¹.

It is true that some provisions relating to the entry into force, the revision and the right to withdraw from the Union are more compatible with an international treaty than with a constitution. One must remember that these features are not newly introduced by the Treaty of Lisbon, but they came from the TECE.

As a matter of fact, the Treaty of Lisbon does not contain fewer elements than the former Treaties, and even the TECE, into the direction of the building of a European constitution. The problem is that all the constitutional elements are frequently mixed with international ones, which is somewhat contradictory.

As mentioned above, the unity of the Union, the values and the reinforcing of protection of fundamental rights speak in favour of European constitutionalism. Simultaneously, however, there are some limitations which are hardly understandable in a constitutional context.

As I pointed out, the unity of the Union is more formal than substantial, as long as the procedures of decision are not unified; the sources of secondary law differ from one matter to another and the Court of Justice jurisdiction is submitted to some limitations.

With regard to the values of the Union, one shall not underestimate their explicit reference into the Treaty. They will, certainly, play an important role concerning the interpretation and the application of the Treaties. Additionally, they must be respected by the European institutions, as well as by the Member States. Nevertheless, its concretisation throughout the Treaty is several times in contradiction to the European constitutional idea.

As I underlined, the restrictions to democracy, fundamental rights and the rule of law are not rare. For instance, the maintenance of the unanimity voting in the Council in some cases represents, without doubt, a limitation to the value of democracy. In addition, the exclusion of the matters of the CFSP (the former second pillar of Union) to the common legal framework of the Union and the deviations admitted in

41 See *de Búrca*, *The EU on the Road*, 11.

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the area of freedom, security and justice certainly cause damages to the rule of law. The several opt-outs on relevant matters of the Treaties, such as the Schengen agreement, the area of freedom, security and justice and, last but not least, the Charter, are somewhat incompatible with the constitutional idea of the Union.

To be honest one has to assume that this situation is not new in the Union. It has always been so. As Alexis Tocqueville pointed out "*L'esprit humain invente plus facilement les choses que les mots: de là vient l'usage de tant de termes impropres*". The word *Constitution tout court* is surely not the most appropriate to explain what is going on in the Union before and after the Treaty of Lisbon. As the "thing" exists, it urges one to find another word to define it.