

The Lisbon Treaty within and without Constitutional Orthodoxy

*Evgeni Tanchev**

I. Introductory Remarks

In this brief report the Reforming (Lisbon) Treaty and the Founding treaties as amended by the Treaty of Lisbon are treated from two perspectives – within the context of classical dogmatic (orthodox) constitutionalism monopolizing written constitutions for nation states and beyond the nation state classical monistic constitutionalism. Since the constitution phraseology has been blamed an obstacle to ratification and all the references to the treaty as a written constitution have been taken out from the position of orthodox constitutionalism perspective it seems that we are back on the international *sui generis* treaty track and in the unwritten constitution train of academic thought.

However if we move away from dogmatic interpretation of constitutionalism which sticks to the presumption that constitutions are reserved for nation states alone then we will embark in another realm that admitting that constitutions go beyond nation states. Here some metaphors and analogies might be brought to address the issue that a written constitution beyond a nation state would not be identical and would not be a replica of a nation state constitution. To illustrate, I will select only few metaphors – a lesson from UFOlogy, the famous Chinese argument from the Bentham's Book of Fallacies, and Professorial deformation exam distortion. I will avoid the so called constitutional occultism which has been already used in monitoring and evaluating national constitutions compliance to the European standards of constitutional democracy by some constitutional experts.¹

However paradoxical it might seem the panacea to save the indispensable constitutional reform after the defeat of TCE was found in formally taking out whatever reference to the term constitutional and by dropping out any constitutional apparatus

* Professor, Judge at the Constitutional Court of the Republic of Bulgaria.

1 The so called constitutional occultism in monitoring constitutions shifts away from the test of analyzing constitutional texts. After stating that the institutional framework complies to the international and European standards in normal conditions the experts turn to prophecies and bring issues like what if a despotic party or a ruler comes to power that will subvert constitutional democracy or some force major happens? It is well known fact that no constitution might stop a dictatorship that does not adhere to the rule of law. These experts do not bring any rational grounds why they turn to negative prophecies and exclude any positive developments that might entrench and enhance the democratic constitutional framework.

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from the text of the Lisbon Treaty while preserving the maximum possible of its substance. The bring a constitutional reform by a treaty, to go further on the road of constitutionalization of the EU legal order the constitution turned to be the primal reason and top priority scapegoat. In other words to save the constitutional reform the constitution and any constitutional wording had to be sacredly sacrificed.

II. The Lisbon Treaty within Constitutional Orthodoxy – back on the track of unwritten constitution?

Like in the sport discipline of triple jumping the EC constitution making underwent three stages with every consecutive attempt stepping and learning from the previous ones experience. Starting from the 80ies of the last century in 1984 Altiero Spinelli came with a federal draft constitution which was not taken seriously by the politicians and was not even voted in any EC institution. Ten years later in 1994 Herman constitutional draft was voted with a special resolution of the European parliament but never was given further consideration. Still a decade later a successfully created constitutional treaty adopted by the European Convention agreed by the heads of the member states at the IGC in 2004 and approved by more than half of the member states failed at the 3rd phase of the sui generis constituent power to be ratified in the referendums in France and the Netherlands. So in this triple jump exercise each one of the attempts of the formal constitution making went further and what has seemed to be the death of the constitutional draft has marked the beginning of and influenced the next attempts. In this train of thought it seems now that the EU will find a formal constitution on the next jump and the EU will be pioneering to introduce a new sporting discipline – quadruple jumping. So the emerging future CEU will probably follow the phoenix effect by rising not ex nihilo but from the ashes of the previous ones and in this way keeping the trend that the consecutive constitutional attempts draw on the experience of the failed ones.

At first glance this is a proof of the famous Chinese's argument so eloquently described in the "The Handbook of Political Fallacies" by J. Bentham, while in fact historical evolution brings the opposite proofs.² For mankind has lived within millenniums without state, for centuries in a state, for and less in half dozen centuries within a nation state and in less than half that time has had a formal written constitution. But no progress would ever be possible if a priori we shall predict the future as a mere repetition of the old phenomena concluding that if something has not happened it will never ever happen. Of course, today not even one is to challenge the proposition that since for millenniums mankind lived without a nation state having a written constitution no constitution should ever appear in human civilization. It

2 *Bentham*, The Handbook of Political Fallacies, The Academy Library, 1962, 43-54.

would sound like the early Bolingbroke and Burke 18th century conservatism outcry used to be that constitutions are never made or created but they grow in the society. For according to E. Burke the constitutions must not be created artificially by the constitutional legislator but they grow from tradition, custom and convention.³ The approbation by the long practice is the most important source of constitutional legitimacy in the evolutionist and conservative tradition.⁴

Formal (written) constitutions are products of a constituent power that before the EU constitution making was perceived to belong to the nations alone and no other polities. The critics' most common argument against constitution making in the EU, especially after Maastricht, has been brought in the famous German Constitutional Court judgment in Brunner case. The constitutions do not appear from the middle of nowhere being anonymously created but belong to the nation state. Constitutions' origin is *pouvoir constituant* which is vested in the nation alone. Ergo since there is not one European people, there can be no *pouvoir constituant* and no written constitution as well.

In the EU the exceptional situation produced a hybrid three stage constituent power consisting of three components during the failed attempt to adopt the TCE that has been trapped and successfully defeated in a referendum by democratic means⁵ :

- community method exemplified by the convention for the Future of Europe,
- intergovernmentalism of the IGC,
- national in the ratifications of the EU member nation states.

3 See *Burke*, Selections, 1914, 263.

4 See *De Maistre*, Considerations on France, 1974, 92.

5 Was the defeat of TCE a triumph of procedural democracy and a truly democratic experience for in a national referendum by a majority two nations defeat a constitution intended for incomparably larger popular majorities which by the requirement of unanimous ratification now have been put in a position of a minority of the whole EU population choosing the other option. Champions of direct democracy have exaggerated the referendum device as true input of people in the decision making disciplining the rulers and leading to more responsive and responsible governance. What has been often neglected and sometimes ignored on purpose however is that by referendums rulers might avoid responsibility in political decision making and even dilute responsibility by avoiding themselves to take decisions shielded by less informed popular majorities. It's not the first and probably it won't be the last when a democratic device has been used against democracy itself. There is a famous instrument of representative government that the best way to escape responsibility and to avoid taking decisions is to refer the issue to a commission and delegate it with the decision. In this way of bogging the issues mandating a commission that postpones a decision is but another way for what should have been responsible politicians to refuse to consume their own mandate at the expense of avoiding responsibility before the people. In classic democratic theory's terms by referring the question to be decided by the people politicians have opted not to serve people by deciding themselves in the institutions elected and designed to serve the same people.

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Since the outcome of the democratic constitution making was defeated by truly democratic means an international treaty that will not need to be ratified by referenda was devised as a compromise and a way out from the complicated situation.

At first glance there is no relationship of the Founding treaties as amended by the Lisbon treaty to a written constitution moreover that any constitutional reference is hard to find.

Is then the EU constitutional order back on the same track it was before 2004? In the context of orthodox constitutional theory we have to use a series of theoretical speculations in order to locate the EU legal order both in and out from or bridging the constitutional and international public law constructs.

1. How the Founding Treaties are related to a constitution?

Traditionally authorities in the legal science extrapolate and emphasize the differences between the international treaties and the written constitutions.⁶ It is a well known fact that a constitution of the modern nation state is an offspring of the people and national sovereignty in the nation state regarded as a universal and free association of the citizens living in a certain territory. The constitutions are indispensable in providing limited and responsible government, framing the political power structure, dividing the powers between the constituted political institutions and protecting human and citizen rights. The constitutions are created by a constituent power and draw their legitimacy from popular sovereignty and basic human rights. In principle, a democratic constitution is undisputed prerequisite and a cornerstone to the rule of law in the nation state.

The international treaties are based on the consensus reached between the representatives of the foreign sovereign states to achieve certain goals. They are drafted and after successful negotiations are signed by the governments of the foreign states in a solemn atmosphere, being quite different from the publicity of a robust public constitutional debate. No doubt, comparison between an exhaustive definition of the constitutions and international instruments will add a long list of different features and qualities and will lead to the widely shared common belief that the constitutions and international treaties are not only different but also opposing legal instruments. During the first stages of the European communities' evolution for more than three decades after the Treaty of Rome a metaphoric usage of the term constitution encompassing the primary law would have meant nothing more than a symbolic significance which can be compared to the qualifying of the structure of the Christian church as a constitution during the middle age. The integration process after the Single European Act and especially after the Treaty on the European Union, has added two new pillars (though still intergovernmental), has surpassed the economic

6 C. Schmitt, *Constitutional Theory*, Duke Univ. Press, 2008, 120.

cooperation and has evolved on the path of a gradual laying of the foundations of a political union. Clearly enough the European Union does not have all of the features of a pre-federal or con-federal state, but it has surpassed the international organizations known so far in history.

Orthodox constitutionalists always bring the argument of a constitution being a fundamental law of the nation state in order to avoid any possibility of a constitutional drafting in the European Union.⁷ After half a century the European integration has not created a federal state identical to the known models of federalism in the world.⁸ None of the confederations ever created resembles the European Union at the present stage of its development. In contrast to the federalism and confederalism political integration in the European Union in the two new pillars added by the Treaty of Maastricht is of an intergovernmental nature.⁹ According to the orthodox constitutionalists present and future institutionalisation of the European integration is and will preserve the shape of an international and a functional intergovernmental organization.¹⁰ Anticipations of further limitations of the sovereignty of the nation state feed apprehensions and lead to the reaffirmation of realism and new functionalism, whose ideas has had adherents among the politicians and academics during all the stages of the European integration process.¹¹

7 This thesis has many adherents in the academic circles and has been extensively expounded by the Judge P. Kirchhoff of the German Constitutional Court in the famous Brunner case decision, BVerfGE 89,155.

8 For a dichotomic classification *Riker*, Federalism. Origin, Operation, Significance, 1964; or other classifications: *McWinney*, Comparative Federalism, 1965, 16-17; *Elazar*, Federalism and European Integration: A Commentary, in: *Cappelletti/Secombe/Weiler* (eds.), Integration through Law, 1986, v.1, b.1, 603 -616; *Wheare*, Federal Government, 1980, 35-39.

9 Confederalism is founded on an international treaty as a union of sovereign and equal states, sharing common values and striving to achieve common political goals. The confederation member states preserve their legal personality in the international law. Compared to federalism the institutional structure of a confederal state remains quite limited including a representative institution for common policy, but does not envisage a fully fledged separation of powers, *Malinverni*, The Classical Notions of Confederation and of a Federal State, in: The Modern Concept of Confederation, Council of Europe, 1995, 39 (40).

In the modern time confederalism was relatively unstable leading to a dissolution of the union or its evolution to a federal state USA, Switzerland 1815 -1848, Germany 1815 - 1866 - 1867, see for more details *Aubert*, The Historical Development of Confederations, in: The Modern Concept of Confederation, 17-39.

10 *Haas*, Technocracy, Pluralism and the New Europe, Berkeley, DPSRS, 1963, 64-66; *Ibid.*, The Uniting of Europe, 1958.

11 Genetically the integration was a victory of functionalism over federalism. European integration has been voluntary economic sector unification and not a political union which has been a foundation of federalism. The snow ball effect and spillover has brought to the situation that even before the Maastricht Treaty, the communities brought to intergovernmental forms of political cooperation. According to federalists the action has been always quicker than the thought, and thus producing chaos, might be interpreted as a concession to the predominance of functionalism in the process of integration.

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The arguments of federalists or non orthodox constitutionalists follow several tracks. Some of them are putting a lot of effort into proving that our scientific apparatus produces inadequate means to the explanation of the current state of the integration process. They insist upon the thesis that the European Union has surpassed the orthodox percept of an international organization and is evolving towards quasi con-federal structure or a non state entity uniting sovereign states, international organization sui generis, prefederal union or non state association of states with its own rational evolution, creating unique structural and constitutional features.¹² Consequently a multilevel constitutional structure emerges globalization and transitory nature of the nation state and state sovereignty have been brought too by some authorities in the field in order to emphasize that the European Union will need a written constitution.¹³ Bringing new features of statehood besides the territory and the nation in the institutional structure and the functioning of the European Union and speculation on the crisis of the territory and nation as a statehood element have been another argument brought in the discussion.¹⁴

After reconstructing the traditional forms of the state there has been some speculation that the European Union is a unique post-modern state¹⁵.

- 12 *Schuppert*, On the Evolution of a European State: Reflections on the Conditions of and the Prospects for a European Constitution in Constitutional Policy and Change in Europe 1995, 324-368, 330, 344-348; For German doctrine treating the European Union as a functional international organization, being a regime and not a federation or concordat interlocking system see *Hrbeck*, Federal Balance and the Problem of Democratic Legitimacy in the European Union, in: *Außenwirtschaft* 50, 1995, Heft I, 43 (46-49); *Zuleeg*, The European Constitution Under Constitutional Constraints: The German Scenario, *European Law Review*, 1997, 19 (20-21).
- 13 *MacCormick*, Beyond the Sovereign State, *Modern Law Review*, 1993, 1; Sovereignty: Myth and Reality, 11 *Scottish Affairs*; Sovereignty, Democracy and Subsidiarity, in: *Bellamy*, Democracy and Constitutional Culture, 1995; *Himsworth*, In a State No Longer: The End of Constitutionalism?, 1996, 639-660; *V. Schmidt*, The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State, *EUI Working Paper*, RSC N95/5; For critique on sovereignty in the Public International law see *Henkin*, *International Law: Politics, Values and Functions*, General Course on Public International Law, Academy of International Law, 1989, 44 - 49 ; See *Habermas*, *Citizenship and National Identity in Between Facts and Norms*, 1996, 490-515.
- 14 Globalization has casted a new focus on territory as the basic element of the state. In the ideas of *Poggi* this constellation has been developed as a crisis of territoriality: *Poggi*, *The State, Its Nature, Development and Prospects*, 1990, 183-189. The power of transnational organization has been as if separated (severed) from the state territory and their decisions within the legal boundaries of action have had direct impact on national legal persons within the member states, see *V. Schmidt*, *The New world Order, Incorporated: The Rise of Business and the Decline of the Nation State*, *EUI, RSC, N 95/5*.
- 15 For extensive treatment see *Caporaso*, *The European Union and the Forms of State: Westphalian, Regulatory, or Postmodern?*, *Journal of Common Market Studies*, Vol. 34, 1996, 28-52.

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The discourse on how the founding treaties relate to a constitution of the European Union would be incomplete and incorrect if the role and jurisprudence of the European Court of Justice is ignored. Measured by standards of the continental (civil law) legal system judicial activism has succeeded in laying down and affirming the principles of EC law and has been a watchman for the preservation of the Treaties. Jurisprudence of the Court of Justice and the community legislation enacted by the communities institutions were instrumental to the affirming of the integration process through law and not as political union exemplified by the federalism. In this sense the “constitution of Europe” has emerged as a result of legal and not statehood evolution. A decisive factor in the gradual transformation of the founding treaties to a constitution of the European Union was the process of constitutionalization of the founding treaties.

2. The Constitutionalization of the Founding Treaties

The constitutionalization of the founding treaties goes beyond securing the supremacy of the international law in the municipal legal order. Most of the constitutions provide that international norms under certain conditions become part of the national legal order and acquire legal force of a parliamentary legislation, or by superseding the statute law stand second to the constitution only.¹⁶

The constitutionalization is the process of gradual transformation of the founding treaties into a supreme and fundamental law penetrating the national legal order, having supremacy to the legal systems including constitutions of the EU Member States. By this process the Treaties legally bind the sovereign EU Member States by a vertical legal regime with enforceable rights and obligations to all the institutions of government and national legal persons.

The European Court of Justice has been an indispensable vehicle in the process of constitutionalization, affirming through different stages community law as autonomous supranational legal order.¹⁷ The role of the Court can be compared to the judicial review in the United States in securing the growth of the US constitu-

16 On the hierarchy of legal acts see *Tanchev*, Източниците на правото в Сравнителното конституционно право, в Съвременно право 1995, кн.1 и 3; *Tanchev*, Източниците на правото, София, 1997; Law in the Making, ed. Al. Pizzorusso, 1988; Sources and Categories of European Union Law, *Winter*, 1996; *Diez-Picazo*, Sources of Law in Spain: An Outline, EUI, Working Paper, N 94/10, Florence.

17 According to *Sweet* there are two stages from 1962 till 1979 and from 1979 till present; *Sweet*, Constitutional Dialogues in the European Community, EUI, Florence, R SC 95/38 1995; Though on different ground *Ludlow* and *Weiler* speak for 3 stages: *Ludlow*, History of the European Union, East-West Forum, 1995; According to Schuppert there are six phases: *Schuppert*, note 12 supra, 334-341; see also *Dehousse*, From Community to Union, Europe after Maastricht- An Ever Closer Union, 1994.

tion, making the formal constitutional amendment unnecessary while adapting the content of the constitutional provisions to the new realities.

The constitutionalization is a mechanism through which the unwritten constitution is taking shape through the Court's jurisprudence. In the words of Judge Mancini "If one were asked to synthesize the direction in which the case - law produced in Luxembourg has moved since 1957, one would have to say that it coincides with the making of a constitution for Europe."¹⁸

Basic elements of constitutionalization encompass the defence and promotion of the supremacy, direct, immediate and universal effect of the community law, which the court has affirmed sometimes against the will of the Member States. Besides that the European Court of Justice has affirmed that the national institutions and judges should abide the interpretations of EC law, provided by its preliminary opinions and jurisprudence.¹⁹

The constitutionalization of the founding treaties has been a gradual process, influenced and having an impact on the political evolution in the process of integration transforming the EC international legal order in some sort of constitutional legal order.²⁰ The jurisprudence of the Court has affirmed the autonomy of EC legal order, its supremacy, direct, immediate and universal effect²¹, doctrine of implied powers of the communities' institutions and pre-emption in the areas defined by the founding treaties, protection of human rights etc.²²

Gradually the founding treaties have acquired a status of higher law or supremacy, which was an indisputable feature of constitutions for ages.²³ The legal nature of constitutionalization of the EC primary law has surpassed the classical international law *pacta sunt servanda* principle and has transformed the supremacy of inter-

18 *Mancini*, The Making of a Constitution for Europe, 26 CMLR, 1989, 595; See also *Caporaso*, note 15 supra, 37: "Constitutionalization is a process of transition from a state where the countries are governed by contracts to a state where they are bound by constitutional principles which are closer to the municipal law than to the international law".

19 See *Sweet*, Constitutional Dialogues in the European Community, EUI, Florence, R SC 95/38 1995.

20 *Weiler*, The Constitution of Europe: Do the New Clothes Have an Emperor?, 1999, 292-298.

21 These indisputable features of EC law were formulated by the Court during the sixties, N.V. *Algemeine Transport - en Expedite Onderneming van Gend & Loos v. Netherlands Fiscal Administration*; Case 26/62; *Costa v. ENEL*; Case 6/ 64.

22 *Stein*, Lawyers, Judges and the Making of a Transnational Constitution, *American Journal of International Law*, 1975, N 1, 1-27; *Pescatore*, The Doctrine of Direct Effect, *European Law Review*, 8, 1983, 155-157; *Weiler*, The Community System: the Dual Character of Supranationalism, *Yearbook of European Law* 1, 1981; *Easson*, Legal Approaches to European Integration in Constitutional Law of the European Union, F. Snyder, EUI, Florence, 1994-1995.

23 For the meaning of higher law during centuries see *Cappelletti*, Judicial Review in the Contemporary World, 1971, 25-32, and his *Comparative Constitutional Law*, Charlottesville, 1979, 5-11.

national law into a supranational legal order sharing formal juridical features of the national constitutional law.²⁴

Constitutionalization of the founding treaties in the Court's jurisprudence lead to the qualification of the EC primary law as a constitutional charter of the European Communities.²⁵

The European Court Opinion on the Draft agreement on a European Economic Area, delivered in December 1991 has been marked as a zenith of the description of the founding treaties as a constitution. The EEC treaty, albeit concluded in the form of international agreement, none the less constitutes the constitutional charter of a Community, based on the rule of law. As the Court of Justice has consistently held, the Community Treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals...The essential characteristics of the Community legal order which has been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".²⁶

In a more narrow sense the meaning of constitutionalization is a process differentiating of a complex of primary EC law norms and decisions of the Court comprising the unwritten constitution of the European Union.

The legal effect of constitutionalization on countries applying for full membership is the imperative requirement to adapt their national constitutions, when they ratify the founding treaties and join the European Union.

3. The Unwritten Constitution of the European Union

Since antiquity at least two meanings of the constitution evolved²⁷. The real (functional) constitution has been present since the ancient times and still is a feature of

24 For differentiation between the supremacy of the international norms and EC law direct effect see *Weiler*, The Transformation of Europe, in: *Weiler*, The Constitution of Europe, 41-42.

25 Case 294/83 1986 ECR 1339,

26 *Weatherill*, Law and Integration in the European Union, 1995, 184-185; See also Opinion 1/91, December 14, 1991; see for more details *Curtin*, The Constitutional Structure of the Union: A Europe of Bits and Pieces, CMLR, 1993, 17-69.

27 In Politics Aristotle uses the term polity which has been translated in English as constitution, meaning real constitution, since it concerns organization and division of political power between the institutions and not a higher law, supreme legal act; *Aristotle*, Politics, Book IV, ch. 1, Baltimore, 1970, 151; Contemporary authorities in the field differentiate 3 meanings of constitution. According to *Snyder* empirical constitution refers to the way in which a state is organized, material or substantive constitution is a set of fundamental legal norms making the legal order of the state, instrumental constitutions are written documents or fundamental legal acts which set forth the principal constitutional legal norms: *Snyder*, General Course on Con-

every state and even organized human entities and corporations. The real constitution refers to the institutionalised forms of different associations and is related to the structure and functioning of the institutions and their relationship to the members of the collective body. In this train of thought one cannot deny that European Union has a real constitution, consisting in the structure and functioning of its institutions, their relationship with the Member States and their citizens. Modern written constitutions appear at a much later stage of evolution, although some of the acts of Roman emperors bore the name of constitutions. A written constitution is a charter, a higher law comprising set of norms providing for organization, separation and functioning of political power, protecting basic rights of man and citizen in order to prevent abuse and concentration of absolute power, to guarantee civil, political and economic liberties. The written constitution acquired their meaning of a fundamental law and took their contemporary shape after the adoption of the constitutions of the fourth generation after the World War II. There are more than 180 constitutions of sovereign states today and the constitutions drafted since 1970 outnumber the constitutions created before that date.

Being the motherland of the western democracy Great Britain has still an unwritten constitution, though during the revolution it was the first to create the Instrument of Government. The English constitution was shaped by the predominantly evolutionary development of the English history.

It has been a common approach to compare the EU primary law to the UK unwritten constitution comprising a set of charters, bills, declarations, statutes of the parliament and constitutional conventions, containing fundamental legal norms. In this train of thought the founding treaties especially after Amsterdam were considered by some authorities to be the EU unwritten constitution.²⁸

The uncodified character of constitutional norms in a single document has been the most common feature of the unwritten constitutions. The unwritten constitution is a policonstitutional act, comprising of provisions, contained in the founding treaties and some of the decisions of the Court having a constitutionalizing effect. Though the unwritten constitution is more difficult to understand it reflects a rela-

stitutional Law of the European Union, Collected Courses of the Academy of European Law, vol. VI, Book I, 41- 155, 53; *Blondel* adds to the real and legal (written) constitution the prescriptive constitution referring to doctrines, values, goals and ideals including limited constitutional government: *Blondel*, *Comparative Government, An Introduction*, 1995, 217-218; See also *Bogdanor*, *Constitutions in Democratic Politics*, 1988, 5 - 7; *Allott*, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, CMLR, 34, 1997, 439 (468-469); *Walker*, *European Constitutionalism and European Integration*, Public Law, 1996, 266 (270).

28 *Shaw*, *Law of the European Union*, 1996, 63-66; *Curtin*, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, CMLR, 1993, 17-69; *van Gerven*, *Toward a Coherent Constitutional System within the European Union*, 2 EPL, 1996, 81 - 103; *Zuleeg*, *The European Constitution under Constitutional Constraints: The German Scenario*, *European Law Review*, 1997, 19 (20-21).

tively high level of independence of the Communities from the Member States and has a highly developed level of legally regulated power, institutional framework independently existent from the Member States and citizenship of the nationals from the country Member States. The unwritten EU constitution provisions relate to the fundamental values and principles of EC law. They are contained in the founding treaties and in the jurisprudence of the European Court of Justice and they meet most of the formal requirements of the norms of the constitutions of the nation states as higher law or law of the land.²⁹

One should not miss another of the existing approaches in the constitutional research. The perception of the constitution as a fundamental social contract between the government and the people has a constant presence in the history of constitutionalism. If we look on the constitutions as contracts between people and government we can compare them to the international treaties which reflect the consensus between the peoples and nation states, represented by their governments. From this perspective the legal nature of the founding treaties, created by the agreement reached by member states is much closer to a constitution than if a constitution is regarded as unilateral product of constituent power deriving from popular sovereignty.

The legal character of the EC and EU founding treaties bears a set of peculiarities compared to the traditional international agreements and the constitutions of the nation states. They create enforceable rights and obligations not for governments alone, but have direct, immediate, and universal effect on the citizens and legal persons belonging to the Member States. Understanding European integration as a dynamic process, though at the present the concept of the EU as un-sovereign entity (not having still its own legal personality), as an international organization *sui generis* is predominant, one can bring the proposition that the primary EU law evolves in a direction from international agreement to an emerging constitution. Indicative of this evolution are certain phenomena such as the creation of European citizenship (which although different from traditional status of a physical person within a state and existing as far as a nationality of a Member State is a prerequisite, has been common feature of statehood alone, and not to any international organization), evolution of a judicial review exercised by the European Court of Justice as a guardian of the founding treaties, and secondary law of EU institutions, having supranational, direct, immediate and universal effect, enforceable by the institutions and the judiciary of the Member States without any requirement for ratification after the countries have been notified that EC legislation has entered into force. The approximation of legislation and *acquis communautaire* are also to be mentioned as unique legal instruments in differentiating EU law from the international agree-

29 For higher law concept evolution in the antiquity and after the drafting of the written constitutions see *Cappelletti/Cohen*, *Comparative Constitutional Law*, 1979, 5-11; *Friedrich*, *The Philosophy of Law in Historical Perspective*, Chicago, 1963, 12-26.

ments. An evolving civil society in the European Union and the reform of the procedures for taking decisions - where the unanimity principle is gradually but constantly replaced by majority rule in new fields - are also paths in this direction of transformation. Besides, objections to the international institutions on the grounds of democratic deficit and lack of legitimacy have not been common in the international law, since the international agreements have resulted from intergovernmental negotiations representing the will of sovereign states and under the presumption that national governments are legitimately elected by their own peoples and represented by their agents. Though the governments of the Member States are the masters of the Treaties, and the procedure for the amendment resembles the procedures in the international agreements, the negotiating of diplomatic consensus has been predetermined by the constitutional values achieved in the parliaments and the courts.³⁰

To a great extent in a formal sense some provisions of the founding treaties have performed functions of constitutional norms. If compared according to their contents one can see that provisions of the founding treaties share some of the features of constitutional norms. In material sense constitutional norms traditionally proclaim basic values, principles and liberties³¹, regulate the structure and functioning and powers of the institutions.

One should not be misled to base the difference between EU primary law from a constitution in its naming as founding treaties. However, it is worth remembering that some of the old constitutions including the "Articles of the Perpetual Union", which was the confederal fundamental law were not formally named constitutions, for the states retained their sovereignty and the Continental Congress was not an institution expounding sovereignty of the Union between the states.³²

The formal and substantial features of the constitutionalized primary community law meet to a great extent the unwritten constitution characteristics. Moreover, due to the predominance of the economic factors in the integration process, the founding

30 *de Witte*, The Constitutional Impact of the Enlargement, TMC Asser Instituut, Colloquium on European Law Millennium Session XXX, The Hague, 2000, 34-38.

31 The system of the fundamental values on which the unwritten, functional EU constitution is based includes striving for peace and avoiding military conflicts; unity as a precondition to peace, democracy, rule of law, political stability, economic prosperity; freedom, equality, solidarity and security, protection of human rights, recognizing national identity and cultural heritage; creating an ever closer Union of the people of Europe; principles of subsidiarity, flexibility and proportionality in the functioning of the institutions and in decision taking and in their relationship to the Member States; building a united institutional framework as a guarantee to the reaching of the goals of the European Union and preserving *acquis communautaire*, see *W. van Gerven*, Toward a Coherent Constitutional System within the European Union, *European Public Law*, Vol. 2, Issue 1, March 1996, 81-102, 87

32 *Madison/Hamilton/Jay*, *The Federalist*, 1961; *The Anti-Federalist Papers*, *Ketcham* (ed), New York, 1986, 357.

treaties coincide with the term economic constitution³³ even more than the fourth generation constitutions of the nation states, drafted after World War II.

The unwritten EU constitution interacts with the national constitutions predetermining the structure of the community institutional framework and the legal system, on one hand, and influencing the internal legal order and functioning of political institutions of the Member States, on the other. Contrasted to a federal system, where all the states constitutions are to be in subordination to the federal constitution, the constitutions of the countries EU Member States are adapted to the founding treaties with a limited transfer of sovereignty and other requirements, in this way preserving national identity and historical peculiarities in the constitutionalism of the Member States. When related to the adapting of constitutions to the EU primary law at present stage of the integration process *acquis communautaire* does not require extensive amendments to the national constitutions, neither it concerns problems of the form of government or the models of the different political institutions of the legislative, executive and judicial branches of government. Substantial amendments of the unwritten constitution or drafting of EU constitution in the future will require further adapting of the constitutions of the Member States.

Within the constitutional orthodoxy we should accept the constitutional development along the Neurath of building the ship at open sea metaphor and different formulae of sedimentary constitutionalism, low intensity constitutionalism, nominal constitutionalism, step by step constitutionalism etc.³⁴

III. The Lisbon Treaty without Constitutional Orthodoxy

Things might look different if we do not stick to the nowadays constitutional orthodoxy which is heresy to the prior development of constitutional theory in the antiquity and pre-modern stages of the history of mankind and which is doomed to be outdated artefact compared to the future constitutionalism in the coming ages. Is it right to treat Lisbon treaty from the perspective of nowadays constitutional theory and a future EU constitution from the standpoint of nowadays constitutional theory or are the achievements of constitutional theory of present time an everlasting monument of human thought.

A step aside from the constitutional orthodoxy path provides different answers to the Founding treaties as amended by the Lisbon Treaty and the future EU constitu-

33 On the term economic constitution, which has been introduced since the Weimar Constitution in German theory see *Constantinesco*, *La constitution de la C.E.E.*, 1977, 13 *Revue trimestrielle de droit europeen*, 244-273; see also *Streit* and *Mussler*, *The Economic Constitution of the European Community: From Rome to Maastricht*, *European Law Journal*, 1995, 5.

34 See for brilliant elaboration on forms of constitutionalism S. Griller, *The Reform's Typology: Treaty or a Constitution*, a report to ECLN Conference 2008 in Sofia; *Curtin*, *The Future of Constitutionalization without a Constitution*, a report to ECLN Conference 2008 in Sofia.

tion especially taking into account technology accelerating pace and the lagging behind developments in constitutional theory. On the funny side the Lisbon Treaty meets almost completely some of the criteria for a written constitution established by the democratic and autocratic politicians and legal scholars.

In general the outcome of the constitutional ratification limbo has been positively approached by the top politicians who differed on the subject of the similarities and differences range between the TCE and the Lisbon Treaty. The undisputed common denominators of agreement between them were that now referendum procedure was necessary to ratify the treaty and that it has become more unclear and unreadable.³⁵ If this was the case then a conclusion comes that if the text of the Lisbon Treaty was more unclear than the TCE it has acquired much more the character of a constitution for Napoleon's and de Maistre's top criteria for a constitution was to be unclear and short.³⁶ So according to the autocratic and conservative way of thinking the mystical requirements of a constitution were better covered by the Lisbon Treaty than by the TCE. Not only in conservative but in the democratic political current as well there are thinkers that have proposed some formal criteria for a written constitution. With the little help of technological progress they could be met by the Lisbon Treaty and the TCE. The evolution of humanitarian knowledge and social traditions can hardly cope with the pace of technological development. Thomas Paine once wrote that a country does not have a constitution if one cannot carry it in his pocket.³⁷ TCE and the EU primary law – the founding treaties have been criticized for their volume making the citizens wish to get acquainted with their content extremely difficult or next to impossible. However not only EU primary law but also secondary legislation and ECJ jurisprudence can be saved in a flash memory or a matchbox sized hard disk and be carried in ones pocket or accessed via a mobile internet connection.

35 See What Top EU politicians say about the Lisbon Treaty, <http://www.free-europe.org>.

36 "... there are always some things in every constitution that cannot be written and that must be allowed to remain in dark and reverent obscurity on pain of upsetting the state." *De Maistre*, note 4 supra, 92; In his discourses on the Code Civil *Napoleon* has insisted that a constitution should be obscure and brief, *Великата френска буржоазна революция, Избрани документи*, София, 1989, 365.

37 *Paine* soundly restated basic premises of democratic constitutional theory which has become axiomatic till nowadays in the nation state constitution making: "A constitution is the property of a nation, and not of those who exercise the government. All the constitutions of America are declared to be established on the authority of the people. In France, the word nation is used instead of the people; but in both cases, a constitution is a thing antecedent to the government, and always distinct there from. ... Here we see a regular process - a government issuing out of a constitution, formed by the people in their original character; and that constitution serving, not only as an authority, but as a law of control to the government. It was the political bible of the state. Scarcely a family was without it. Every member of the government had a copy; and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket, and read the chapter with which such matter in debate was connected" (*Rights of Man, Part II, Chapter at www.constitution.org/tp/rightsman2.htm*).

The amazing effect of technological progress on powers of political institution is a fact. There was a time when sovereignty and omnipotence of the English parliament was characterized by the famous De Lolme words that there is nothing impossible to British parliament except transforming man into woman and vv.³⁸ No doubt while losing some of absolute state sovereignty in the context of EU integration and contemporary globalization the impossible phenomena have become reality with the Charter of Human Rights in the EU legally defending and recognizing the right of sexual self orientation and prohibition of discrimination on that ground included.

However if we want to tackle the issue of present and future constitutional developments within the EU without constitutional orthodoxy we will have to address at least 3 questions:

1. Written constitutions should not be considered as an attribute of the nation state and nation state should not be regarded as constitution's monopolist

Though the debate still goes on we have to admit that today the thesis of constitutional pluralism, multilevel constitutional governance and constitutionalism beyond the nation state are not any more a heresy among the academia and politicians. In contemporary global age constitutional pluralism poses challenges to traditional legal theory failure to explain emerging new issues including coexistence and interaction between multiple constitutional orders referring to the national constitutions, European constitutional construction (having still the form of an unwritten constitution) and emerging beginnings of the world constitutionalism.

The evolution of legal pluralism has taken centuries during the last millenniums of human civilization. For long time the legal pluralism appeared to follow the dualistic type of division depicted by Ulpian in the Digest of the Roman Law.³⁹ *Ius civile* within many statal legal systems existed simultaneously with the single *ius gentium* or law of the peoples. International and municipal law developed in separate realms of legal continuum that never collided for the implementation of international provisions in the national legal system was virtually nonexistent. Mutual influence between the plural legal systems was experienced rather as reception of legal patterns and solutions through legal transplants by a scenario where various national legal systems played the roles of donor and recipient. Except for the last couple of centuries when the international law expanded through multilateral treaties during the whole previous time period legal pluralism followed the dualistic separation between multiple monistic municipal legal orders and common but limited by its regulatory ability international law. Emergence of global society bolstered diversification, structured the international law normative institutes to facilitate harmonization

38 *I.D.Levine*, *Sovereignty*, Saint Petersburg, 2003,21

39 *Юстиниана*, Москва 1984, кн.1, титул I, 23.

of different fields and universal or regional levels of international cooperation. Although being an interesting object of research legal pluralism has been a field much more explored by legal theory and comparative legal science.

In comparison to legal pluralism constitutional pluralism is of a more recent origin for it emerged at a much later civilization stage.

For less than 3 centuries written constitutions have been monopoly of the nation state which was perceived to be the sole legal entity in possession of constitutional capability to draft and adopt the supreme law of the land. Of course, national constitutional law coexisted with the international law which though the *pacta sunt servanda* principle was irreversibly established in the legal and political reality after WW II, was considered to be within the scope of national constitutional supremacy. With the foundation of the European Communities a new transnational legal order emerged having the supranational, direct, immediate and horizontal effect within the legal systems of the EC member states. At a first glance supremacy of the community law might be considered to undermine position of the nation state constitutions as the supreme law of the land. In fact for the first time a supranational legal order has been gradually acquiring the formal characteristics of a constitutional system though founded on typical unwritten constitutional arrangements. In this way European integration transformed the legal pluralism built on the coexistence of national and international law into interaction between various levels of constitutional arrangements. Initially it took the shape of interrelationship between the unwritten EC constitution which encompassed some primary EC law provisions from the founding treaties, seminal decisions of the ECJ and few important rules created by the EC institutions, and written nation state constitutions of the EC member states. Since 1960ies constitutional pluralism was enriched with EC law - a new legal system reaching beyond the legal dualism of international and municipal law.

The term global constitutionalism has received wide range of connotations in legal theory. It has been approached from comparative prospective referring to the national models of constitutional government in the world and not within the symbiosis of constitutionalization of power relationships in contemporary globalization process.⁴⁰ Globalization of constitutionalism and adopting a constitution for a non state entity has been treated in the context of unwritten constitution within the founding treaties.

During the last decade scholars tackled a new phenomenon or a new stage in the development of constitutionalism emerging on a global level.⁴¹ They have treated the

40 See for the best papers in this field with analysis of post World War II trends *Fleiner*, *Five Decades of Constitutionalism*, Publications de l' Institute de Federalisme Fribourg, 1999, 315; also his *Ageing Constitution*, paper to the Conference "The Australian Constitution in Retrospect and Prospect", Perth, 21-23 September 2001; *Ackerman*, *The Rise of World Constitutionalism*, *Virginia Law Review*, 1977, 771-798.

41 See *Pernice*, *The Global Dimension of Multilevel Constitutionalism: A legal Response to the Challenges of Globalisation*, *Common Values in International Law*, Essays in Honor of

global constitutionalism as but another form of governance where the power in order to meet benchmarks of democracy has to be framed with constitutional restraints.⁴² Primacy of international law, the increasing role of many international organizations like the WTO, development of human rights legal instruments at a supranational level have been considered as different streams forming the fabric of global constitutional beginnings posing limitations on the actors of the emerging global governance. Although these phenomena resemble the guarantist function of the constitutions it would be an exaggeration and a simplification to look for supremacy of the global rule of law moreover for an emerging unwritten constitution. At present, proposing a draft world constitution is utopian illusion bordering science fiction like the Constitution of Mars.⁴³ Within the context of global democratic governance international legal standards have been instrumental to the bridging national and global constitutionalism. Nowadays the intensity of legally binding and hierarchical structures are strongest within national constitutionalism, they are present in federalism and are in the process of affirming in the relationship between EU constitution and the constitutions of the member states. In the current global constitutionalism there is some compatibility of democratic standards but not a fully fledged hierarchy of constitutional orders. Globalization is still looking for its own constitutional order and the rule of law and global standards interaction with national constitutional orders has still to rely on *pacta sunt servanda* principle. Significance of international legal standards increases since they compensate the weaker legal binding force of the emerging supranational global constitutionalism.⁴⁴ National constitutions are affected by the emerging global constitutionalism for it is a challenge to the role of nation state constitutions as utmost expression of sovereignty. Global constitutional-

Christian Tomuschat, 2006, 973; *Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitutionmaking Revisited, CMLR 36, 703 –750; *Waker*, The Idea of Constitutional Pluralism, EUI WP, Law N 2002/1; *Ферайоли*, Отвъд суверенитета и гражданството. За един световен конституционализъм, Съвременно право, 1995,70-78.

42 One of the best liberal definitions of constitutionalism emphasizing the constitution's role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton "The constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy."; *Finn*, Constitutions in Crisis, 1991, 5.

43 See "A constitution for the Federation of earth", as amended at the World Constituent Assembly in Troia, Portugal 1991. Now being circulated worldwide for ratification by the nations and people of the earth. Distribution for ratification under the direction of the World Constitution and Parliament Association and the Global Ratification and Elections Network (wcpagren.org). World Constitution and Parliament Association 8800 West 14th Ave. Lakewood, Colorado 80215 USA; See *Robinson*, The Constitution of Mars, The Maritans, 1999.

44 In a recent article, *Maduro* offers three pillar constructs of constitutions in a national and global context: *Maduro*, From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance, Lead Paper to the Workshop Changing Patterns of Rights Politics: A Challenge to a Stateness?, Hamnse Institute for Advanced Studies, June, 2003, 9-12.

ism influences the status of the national constitutional self-determination in the idea of self-government, the form of participation, power distribution and representation. The legal standards established by the international treaties and soft law might be interpreted as a fourth pillar through which the emerging global restraints on governance are transposed to national constitutionalism as universal criteria to the constitutional governance.

Expanding constitutional governance at global level is related to the concept of societal constitutionalism relating to broadening the scope of regulation which has been one of the main trends in the fourth constitutional generation. Societal constitutionalism concerns the increasing number of actors in political decision-making process and poses limitations on their actions.⁴⁵

The EU Constitution surpasses the proposition that the constitution is an attribute reserved for the nation states and marks a new phase in the constitutional civilization. For the first time in history, a non-statal entity has adopted a written constitution.⁴⁶ With the EU Constitution mankind has entered the third stage of constitutional civilization when constitutional governance has expanded beyond the nation state.

Three distinct stages in the evolution of the governance and constitutionalism can be outlined. Mankind has lived for millenniums in a state without a constitution limiting governmental power. After the Westphalian Treaty and especially after the last decades of the 18th century when the first written constitutions were adopted – for centuries the constitutions became monopoly of the nation states. The rule of law has been entrenched in a written constitution as legal form of state legitimately structuring power built on supremacy of constitutional limitations, supporting hierarchy of the legal and political system to ensure democratic government and protect human rights at the national level.

Non-statal entities like the EU and in some foreseeable future international organizations perhaps the WTO and/or the UN founded on agreement between the participating sovereign nation states with “open statehood” will entrench the rule of law in a written constitution coexisting and interacting with the national constitutions.

45 See *Teubner*, Societal Constitutionalism: Alternatives to State - centered Constitutional Theory, Stores Lectures 2003/2004, <http://www.jura.uni-frankfurt.de/teubner/pdf>.

46 For a brilliant critique on the thesis of no demos as reflected in the German Maastricht decision see *Weiler*, The State “uber alles, Demos Telos and the German Maastricht Decision, EUI WP RSC N95/19; The classical *Jellinek* trinity of territory, nation and sovereignty as a prerequisite to constitution drafting has been overcome. Some definitions extended the benchmarks of the state by adding independence, effective government, recognition by other states, capacity to enter in agreements with other states, states apparatus, organized economy, fictional pars of states as official residences of foreign diplomatic envoys, see LTA Seet Uei Lim, Geopolitics: The Need to Reconceptualise State Sovereignty and Security in the Journal of Singapore Armed Forces 1999, www.mindef.gov.sg/safti/pointer/back/journals/1999/Vol25_2/7.htm.

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However, success of the EU constitutionalism rules out two primitive conclusions.

It doesn't mean that by adopting a constitution the EU is transformed into a state or a fully fledged federation. It also doesn't mean that the EU constitution and the emerging beginnings of global constitutionalism mark the process of the_withering of nation states. Instead the EU and global constitutionalism will exist hand in hand with the constitutions of the nation states, will be made possible through the national constitutional and legal systems and will not replace them. Moreover, the nation states will be the main actors in the evolving constitutional pluralism and will work together with other non-statal actors.

2. What is the relationship between the constitutions in a constitutional pluralism?

According to legal positivistic method including its most developed forms like the doctrine of law autopoiesis all legal and constitutional systems are hierarchically structured and provide institutions for conflict resolution within the law. The courts protect human rights, enforce the hierarchy of law excluding the contradictions between provisions in various sources of law and guarantee the legitimate monopoly of violence which lies at the heart of the Weberian definition of the state. Even libertarians and legal minimalists bring up catalaxy to rule out conflicts within the legal system. Without a hierarchical structuring the legal and constitutional systems are considered to be chaotic phenomena or amorphous conglomerate of inconsistent and disintegrated legal rules created by various regulatory bodies.

Methods of structuring interrelationships between the international, EU and municipal law include harmonization of values through introducing international democratic standards (reception, transplants, and mutual influence) and implementation of international law instruments in the national legal systems by the national legislation of parliaments and bylaws of the executive bodies. To avoid conflicts multilevel constitutionalism elaborates power delimitation and jurisdiction differentiation. Still another avenue to implement the international standards particularly in the field of human rights is applying decisions of the ECJ and ECtHR by the national courts opening the national constitutional order by the EC member states by amending the national constitutions. Pooling of sovereignties in order to secure division of competences. It seems that at least 3 types of relationship between the different levels of pluralism develop. Multilevel governance in constitutional pluralism should rely on toleration, legitimacy built on common values, contrapunctualism and hierarchy within the powers consigned to different levels of constitutional governance. Harmonization, unification, convergence legal transplants between different constitutional levels which have been predominant methods of relationship between different national constitutional systems and legal families are less likely to be applied than contrapunctualism, toleration, delimitation of competence and jurisdictions, hierarchy and dispute resolution between different constitutional orders.

3. How would supranational non state constitutions look like?

Should a constitution of a supranational entity be similar or even identical to the nation state constitution, for example to the constitutions of the EU Member States? Primitive rationalism armed with Okkam's razor would look for a document beyond the nation state that will fully match the nation state constitution's form and substance. Any difference would be interpreted as an argument of impossibility of a constitution beyond the nation state and a proof of the nation state monopoly over the written constitutions. A step aside of the constitutional orthodoxy will lead to other conclusions. Comparativists have described differences between the nation state constitutions. They are so numerous that no state constitution can be absolutely identical to another country's constitution. Comparative constitutionalisms within the context of constitutional monism provided evidence that there are no universal constitutional patterns to be prescribed to all countries like prescription drugs to the patients suffering from the same disease. Any attempt at devising and selling a concrete constitutional model where the politicians and lawyers have to fill only the country's name remains a distant illusion beyond the reach of any constitutional designer.⁴⁶ But it was St. Thomas Aquinas' wisdom who referring to Isidore states the maxim that "a law ought to be possible both according to nature and according to the custom of the country."⁴⁷ If then state constitutions differ between themselves why, by what logic, should we come to a conclusion that a supranational constitution should be identical to a constitution of a nation state?

To illustrate how we should not look at a fully fledged supranational constitution I propose several meta legal examples from everyday life.

In the Handbook of Fallacies J. Bentham restates the old no precedent argument that if something has not happened it will never happen which leads the other way round to the well known ancient saying that there is nothing new under the sun thus excluding all future developments.⁴⁸ There will never be a supranational constitution unless it does not repeat the national constitution – adapted to the supranational state.

Let us now remind a funny mistake of old professors in the universities of the past. The best expected answer from a student at an oral exam would be the shadow reflection of professors teaching on the subject in the hornbook or at the lecture. The more accurate the reflection is the higher the mark attributed to the student would be. Again following this way of thinking a supranational constitution would be an echo of a constitution of a nation state.

46 There has been an interesting experiment proposed by the late Professor Siegan, see his *Drafting a Constitution for a Nation or Republic emerging into Freedom*, George Mason Univ. Press, Fairfax, Va. 1994.

47 Aquinas Ethics, *The Moral Teaching of St Thomas*, translation of the principal portions of the second part of "Summa Theologica", London, Granville Mansions, 1892, Q XCVI.

48 *Bentham*, note 2 supra, 74-75.

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Finally if we turn to UFOlogy which is by no means a simple science we should draw a lesson in the same direction. If another civilization exists somewhere on another planet or galaxy it exactly should look like humans from the Earth. But if there are some other forms of life why should they be a replica of the human species inhabiting the earth? Ergo to admit the emergence of a supranational fully fledged constitution will not be a repetition of an existing nation state constitution.

IV. Conclusion

Within constitutional orthodoxy the Lisbon Treaty is a *sui generis* international treaty. After its lustration from the constitutional phraseology it by no means complies with the requirements of a written constitution of a nation state. Speculation might lead to the elaboration of a thesis that within the corpus of EU law – mostly norms from primary law and some of the seminal decisions of the ECJ might be considered to meet the requirements of constitutional entrenchment, have constitutional character and should be considered as a core of the unwritten EU constitution. Although matching some of the requirements of a normative constitution it fails to satisfy the merits of a political constitution.

However things look different without constitutional orthodoxy. Leaving the legal dogmatic ground aside, the Lisbon Treaty is an international instrument in its form but according to its substance has a constitutional character. It is amending the acting supranational unwritten EU constitution represented by the founding EU treaties, other norms and some of the ECJ decisions. A supranational constitution is not a clone or replica of a nation state constitution at least for the difference of the object of their regulation, the difference in the constituent power they originate from and the difference of their authors – a sovereign state or non state entities.

Why then a new term should be coined and introduced, instead of posing dilemmas constitution and/or international treaty? Wouldn't it be better to have a special word blending the qualities of a treaty and a constitution?

Terms evolve in time and place and they acquire new meanings and substance in the history of mankind. So it seems to be with the term constitution as well. Consequently instead of introducing new terms with a static content of phenomena they reflect we should turn to inventing new contents in the old terms which should be made relevant to the new dynamic processes.

Present days meaning of constitution associating the term with the nation state constitution has been used for several centuries but this certainly does not mean that this has been so in the past and it will be in the future as well. Since the Latin term was invented and used for the 4 kinds of legal acts of the roman emperors being different from the nation state written constitutions. It is obvious that instead of dying with the institutions of the Roman emperors the term survived will not stand unchanged forever in the future. We can compare the perplexity of orthodox constitutionalists sticking to the nation state constitution and refusing to apply the term

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constitution to a supranational legal order to an imaginary reaction of a citizen of Rome looking to find the meaning of the imperial constitutions in a nation state written constitution.