declaration of European identity in December 1973. She argues that this adoption undoubtedly marked the emergence of Europe as a distinctive political entity in the international arena. It is the result of both internal factors (the reflection on European identity initiated in the 1960s) and contextual factors (European reactions to Henry Kissinger's speech on the "Year of Europe", European success with the CSCE process, European concerns vis-à-vis the American-Soviet entente). The declaration entails two dimensions: the affirmation of an independent attitude with regard to different regions in the world and the distinct position of the Nine, with regard to those of the United States and the Soviet Union. Thus, though only momentarily, the Nine make the choice of the "European Europe" and pave the way for progressively "[defining] their identity in relation to other countries or groups of countries".

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This volume is dedicated to our colleague and friend Heinz Paetzold, Professor of Philosophy at the University of Kassel and course director of the Dubrovnik seminar, prematurely deceased in 2012.

The Constitution in the European Union

The State of Affairs

Violeta Beširević

1. Introduction

Today, most Europeans believe that the European Union does not have a constitution and that the idea about having one was buried after the *Constitution for Europe* got double "No" from the French and the Dutch. This view is shared by some academics whose common position is often reduced to a single argument: "no state – no constitution".[1] The German Federal Constitutional Court could not agree more: in its *Maastricht* and *Lisbon* decisions it concluded that the European Union did not have a constitution since it did not have *demos*.[2]

To explain and defend the opposite stance is the main purpose of this article. I intend to show that EU has un-codified, evolutive and antirevolutionary constitution, which helps connecting the Politics of Messianism with democracy and positions EU in the global world.

As to prove this idea, I will not claim that the European constitution mirrors a national constitution in the sense that it is attributable to

[1] Some German scholars share this view. See e.g. Grimm D., "Does Europe Need a Constitution?" *European Law Journal*, Vol. 1, No. 3, 1995, pp. 282-302. For a discussion on "no state – no constitution" thesis, see e.g. Möllers, C., "Pouvoir Constituant – Constitution – Constitutionalisation", in Bogdandy, A. von and Bast, J. (eds.), *Principles of European Constitutional Law*, Oxford, Oxford University Press, 2011, pp. 169-204; Dominik Hanf, "State and Future of the European Constitution – Improvement or Radical Reform?", in *German Law Journal*, Vol. 2, No. 15, 2001, http://www.germanlawjournal.com/index.php?pageID=11&artID=89.

[2] *Manfred Brunner and Others v. The European Union Treaty*, [1994] 1 C.M.L.R. 57, par. 44; the "Lisbon" decision of the German Constitutional Court, BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, June 30, 2009, par. 277, 279 and 280. For a discussion on *no-demos* thesis see e.g. Weiler J. H. H., 1995, "The State "überalles", Demos, Telos and the German Maastricht Decision", *Jean Monnet Working Papers*, No. 6/95, http://centers.law.nyu.edu/jeanmonnet/archive/papers/95/9506ind.html.

the people, nor that it is a revolutionary product. The reason is simple – European Union is a product of Political Messianism and not of democracy. As Joseph Weiler explains: "in 'political messianism', the justification for action and its mobilizing force, derive not from 'process', as in classical democracy, or from 'result and success', but from the ideal pursued, […]"[3] In the case of Europe, the 'ideal pursued' was that of integration in order to establish long-term peace and reconciliation among former enemies.

Yet, besides pursuing messianic goals, Europe's political elite has for a long time been streaming to root Political Messianism into constitutional democracy, as well. The main vehicle to transform the Community/Union from an international to a constitutional legal order has been constitutionalism.[4] True is, constitutional constraints are by themselves inherently antidemocratic, but constitution is not merely a disabling device but also an enabling one. Constitutions not only limit power and prevent tyranny but also construct power – they establish the rules that help put democracy into effect.[5] In the EU, the efforts to connect Political Messianism and democracy resulted in a rule of law-oriented type of constitution, born in the process of constitutionalization and aimed at submitting public power to law.

The scope of my discussion is limited to identification of the elements of – I am going to call it – EU Constitution, and then to examination to what extent it satisfies the requests of modern constitutionalism. I will start by offering some history to show that a concept of constitution has evolved in response to the constitutional visions of the European integrations. Since a constitution is usually connected with a state, what follows is a brief summary of different views on legal conceptualization of EU. On this point, I will join those who argue that the Union is not a state. However, the next sections will first demonstrate that a constitution can be attributable to the entities different from a state, and second, that democracy is not always the source of the constitutional authority. My next step will be to identify the core elements of the EU constitution. The rest of the discussion will shed light on some features of internal and external EU constitutionalism which justify my claim that Political Messianism in the EU integrations has been predominantly directed at

3 Weiler, J.H.H., "Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'", in *Singapore Journal of Legal Studies*, 2012, pp. 248-268.

4 For more on this process see Craig P., "Constitutions, Constitutionalism and the European Union", in *European Law Journal*, Vol. 7, No. 2, 2001, pp. 125-150.

5 Holmes, S., *Passions and Constraint: On the Theory of Liberal Democracy*, Chicago and London, The University of Chicago Press, 1995, p. 6.

making democracy the only legitimate form of governance in the EU public order, without parallel in transnational or international law.

Now, I turn to history.

2. Some History

There is no doubt that federal Europe has long been a subject of debates about ultimate aims of the European integrations. In 1946, Prime Minister Churchill openly announced: "Our constant aim must be to build and fortify the strength of the United Nations organization. Under and within that world concept we must recreate the European family in a regional structure called – it may be – the United States of Europe and the first practical step will be to form a Council of Europe".[6] Although reference to federation and constitution did not appear in the Schuman Declaration, its architect, Jean Monnet, later explained that establishment of the European federation was a main goal behind the Declaration.[7] At that time, some German politicians and scholars also shared the view. For example, Carlo Schmid, one of the drafters of the German Basic Law, logically argued: "If you want an effective Europe, you have to want a federal state of Europe".[8]

Additionally, the first President of the European Commission, Walter Hallstein, authored the book *The Unfinished Federal State*, in which he advocated federal Europe and clarified that all of the founding fathers of the Community were practically "federalists", who, in 1955, because of a much more ambitious project of a European Defense Community was defeated, turned to the establishment of a surrogate project of European Economic Community, which arguably should have served as the basis for the establishment of the federal community.[9]

In 1966, the dream about federal Europe was interrupted by De Gaulle when he used the "empty chair policy" to protest against the politics of more integration. The result of this conflict is well known: the vision of functional integration, with a primarily economic rationale won, and not the vision of the federal Europe.[10]

6 http://www.coe.int/t/dgal/dit/ilcd/archives/selection/churchill/ZurichSpeech_en.asp.

7 See in Ziller, J., "The Constitutionalization of the European Union: Comparative Perspectives", 55 *Loyola Law Review* 413, 2009, pp. 416-417.

8 Schmid, C., "Deutschland und der Europäische Rat", in *Schriftenreihe des deutschen Rates der europäischen Bewegung*, Vol. 1, cited in Kokott, J., "The Basic Law at 60 – from 1949 to 2009: The Basic Law and Supranational Integration", *German Law Journal*, Vol. 11, p. 104, 2010, fn. 10.

9 Oeter S., "Federalism and Democracy", in Bogdandy, A. von and Bast , J., (eds.), op. cit., p. 57; for more see Hallstein W., *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse*, Düsseldorf, Econ, 1969.

10 Oeter, S., *op.cit.*, pp.57 -58.

УНИВЕРЗИТЕТ УНИОН
У БЕОГРАДУ
ПРАВНИ ФАКУЛТЕТ
БИБЛИОТЕКА

During the last decades of the twentieth century, the vision of a federal Europe was set aside. In contrast, an idea of Europe based on common constitution survived in different forms, despite the fact that it was defeated several times. First, in 1984, a draft of the European Constitution made by *Altiero Spinelli* failed, as well as the following effort to make the Maastricht Treaty – a real constitutional instrument.[11] The Amsterdam Treaty was adopted after an attempt to constitutionalize all founding treaties in a common constitution (based on the *Herman Report*) had also failed.[12] The substantial issues which were not resolved in the Amsterdam treaty, like division of competence, democratic legitimacy of the Union, transparency, efficient legislative procedure, including qualified majority voting system, was not resolved either in the Treaty of Nice, adopted in 2001.

At the very beginning of the twenty-first century, German Foreign Minister Joschka Fischer revitalized the debate over the European federation and European Constitution, advocating creation of a loose but sovereign and functional European Federation.[13] Prompted primarily by a then-coming enlargement, in 2001 the European Council adopted Declaration from Laeken, in which it formulated the most important questions of constitutional nature to be resolved at the Convention on the Future of Europe. The decision to rethink the EU legal order in a form of a Constitutional Convention (scheduled for 2002-2003) meant to be a momentous, as was the American Philadelphia Convention of 1787, when the federal American Republic was created.

Yet, although for the first time in history of the European integration the term "constitution" was included in the final document, the European Convention did not produce the same result as the American one. The Treaty Establishing a Constitution for Europe did not envisage federal Europe. Instead, the Constitutional Treaty aimed to legitimize the existed constitutional practices in a non-hierarchical way, meaning that it did not imply strong supremacy of the EU in relation to the member states. Nonetheless, it included the provisions on fundamental rights, chapter on division of powers, as well as the provisions on the EU symbols. Moreover, the fundamental treaties of the EU were named the "Constitution", its regulations – "framework laws" and "laws", the ministers were introduced, and the EU Parliament was designated as an institution of the EU citizens. On one side, the Constitutional Treaty envisaged a number of areas in

11 For more see Pernice, I., "The Treaty of Lisbon: Multilevel Constitutionalism in Action", 15 *Columbia Journal of European Law* 349, 2009, pp. 354-356.

12 *Ibid.*, p. 356.

13 His speech is available http://centers.law.nyu.edu/jeanmonnet/search.html?q=Joschka%20Fisher.

which qualified majority was supposed to become a major voting system in the Council. On the other side, it also created a bigger role for the national parliaments in the legislative proceedings of the Union.[14]

In 2004, all EU Member States signed the Constitutional Treaty. The history is yet to determine whether the true reasons for its rejection on referenda in France and the Netherlands were internal economic and political conditions in these countries, a lack of enough information about the constitutional reform, a fear from a super-state or something else. Whichever was the reason, unlike in previous cases, when referendum was reintroduced in some other countries, the force of the double "no" was so convincing, that organizing a new referendum in France and the Netherlands was out of consideration.[15]

Instead, the European political elite focused on drafting a new Reform Treaty (later known as the Lisbon Treaty), and openly promised that "the constitutional concept" is abandoned, and that the parts of the future Treaty – "the *TEU* and the *Treaty on Functioning of the Union* will not have a constitutional character."[16] However, behind the scene, they had something different in mind: the Lisbon Treaty should have preserved constitutional practices as defined in the abandoned Constitutional Treaty in a way which would allow referendum in the Member States to be avoided. German Chancellor, Angela Merkel, has openly admitted this fact: "My friend Sarkozy and I have suggested to call it not a Constitution but a Reform Treaty because only then another French referendum could be avoided".[17]

The result of the political manoeuver is the following: The Lisbon Treaty comprises of two treaties amending the previously existing EU fundamental treaties. Constitutional terminology as "constitution", "law", "framework law", "the Minister of Foreign affairs", were removed from the text, as well as the Union symbols. The provision regarding the supremacy of the EU law was moved from the main text into the declaration included in the Final Act.[18] The EU Charter of Fundamental Rights was also removed from the main text. However, Article 6 of the present EU

14 For a discussion see Pernice, I., *op. cit.*, pp. 370-371.

15 For more see Búrca G. de, "If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change", 33 *Fordham International Law Journal* 1472, 2010, pp. 1472-1489.

16 See Council of the European Union, *IGC 2007 Mandate*, 11218/07, Brussels, 26 June 2007 http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf.

17 See in Brunkhorst, H., "The Future of the European Constitution", in Closa, C. (ed.), *The Lisbon Treaty and National Constitutions. Europeanization and Democratic Implications*, ARENA Report No. 3/09, RECON Report No. 9, Oslo, 2009, p. 168.

18 See 17. Declaration concerning primacy, annexed to the Final Act (2007/C 306/02).

Treaty referrers to the Charter and declares that it has the same binding force as the treaties composing the Lisbon Treaty.[19]

This short journey through the history of EU integrations cannot be ended without referring to the Court of Justice of the EU, and its major court – the Court of Justice, initially known as the European Court of Justice (ECJ). Among the members of EU academia, there is a common narrative that the ECJ began to build, through its case law, a constitutionalized, pro-federal-legal order back in 1960s, in order to save the integration process, jammed due to De Gaulle's politics of empty chair.[20] As I will show later, the ECJ is a principal actor in introducing and supporting the migration of constitutional ideas into the EU.

In sum, from the very beginning, aspirations and conversations among different actors involved in the European integrations, resulted in constitutional rather than international law practices. This begs the question of the EU conceptualization.

3. State or Non-State Polity?

The conceptualization of the Union has been for quite some time a highly topical subject of academic debates. Generally, a different characterization of the legal nature of the EU can be broken under three main categories.

First, some authors claim that the EU is a treaty based intergovernmental organization, whose member states are still primarily interested and obliged to achieve national interests. Andrew Moravcsik, the well-known follower of this approach, argues that the best confirmation of this theory is a failure of the Constitutional Treaty, which supposed to launch a European super-state.[21]

Second, many argue that the EU is a state-like entity. There is a long-time tendency to discuss relations among the Community/Union, national governments and EU citizens in terms of federation, despite the fact that the European polity possesses more confederative than federative characteristics. Among those who support state-like approach, some claim that the EU has already acquired characteristics of a federal state.[22] Such

19 For more on the Lisbon Treaty see e.g. Craig, P., *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, Oxford University Press, 2010.

20 For a discussion, see Laurence, H. and Karen, A., "Legitimacy and Lawmaking: A Tale of Three International Courts", 14 Theoretical Inquiries in Law 479, 2013, pp. 487-493.

21 Moravcsik, A., "What Can We Learn from the Collapse of the European Constitutional Project?" *Politische Vierteljahresschrift*, 2006, Vol. 47, No. 2, pp. 219-241.

22 See e.g. Denis J., "Fearing Federalism's Failure: Subsidiarity in the European Union", 44 *American Journal of Comparative Law* 537, 1996.

arguments first appeared in the aftermath the Maastricht Treaty, and were drawn from institutional designs of a common foreign and security policy, protection of human rights, common currency, the EU citizenship, the EU Parliament, the EU Central Bank, as well as from the ECJ influential jurisprudence.[23] Similar arguments were offered after the Lisbon Treaty was adopted. European federalists assert that the European integrations will end up in the creation of the Union of the European States when Member States accept completely to delegate its sovereign jurisdiction in the area of foreign and security affairs to the Union and when the Council gives up the central role it now plays in the EU.[24]

Third, many authors support "something else" approach and commonly refer to the Union's *sui generis* nature. For example, starting from the EU common legal order, territory and citizenship, Armin von Bogdandy claimed that the Maastricht Treaty created a new form of political governance, whose legal nature was best described as "supranational federation", distinguishable from a classic federation, but which existed parallel to it.[25] Weiler understands the present Union in terms of polity based on "constitutional tolerance".[26] Ignolf Pernice explains that the Lisbon Treaty has consolidated multilevel constitutional structure of a new kind, based upon functioning democratic Member States, complementary to them, and binding them together in a supranational unit without itself being a state or aiming at statehood.[27]

Finally, some authors claim that the EU is the best understood in a way distinct from both national and supranational versions of single *demos*. Kalypso Nikolaidis speaks about *demoicracy* and defines the European Union as "a Union of peoples, understood both as states and as citizens, who govern together but not as one".[28] The EU *demoicracy* is not a state nor supranational entity. It is legitimized by pluralism of *demoi*.

23 *Ibid.*, p. 539.

24 Mancini, G.F., "Europe: The Case for Statehood", *European Law Journal*, Vol. 4, No. 1, 1998, pp. 29-42.

25 Bogdandy, A. von, "The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty", 6 *Columbia Journal of European Law* 27, 2000, pp. 27-54.

26 Weiler, J.H.H., "Federalism Without Constitutionalism: Europe's Sonderweg", in Nicolaïdis, K. and Howse, R. (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford, Oxford University Press, 2001, pp. 54-70.

27 Pernice, I., *op. cit.*, pp. 350-351, 406-407.

28 Nicolaïdis, K., "The Idea of European Demoicracy", in Dickson, J., and Eleftheriadis, P. (eds.), *Philosophical Foundations of European Union Law*, Oxford, Oxford University Press, 2012, pp. 247-274.

Now, suppose that Union is not a state. Does this mean that it does not have a constitution? I turn now to this issue.

4. A Short Reminder on Different Constitutional Traditions

Usually, existence of the constitution is linked to the existence of the state. However, this is not a rule. Some international organizations, including the ILO, UNESCO and the UN FAO, have constitutions although they are not the states. Be that as it may, this argument bears no importance in this discussion, because the international organizations are not empowered to exercise legislative and executive powers, producing direct consequences for the individuals, which is exactly what Union does. Today, EU performs important political, economic and social functions, among which those in the field of freedom, security and justice deserve to be particularly emphasized.[29] Accordingly, what has to be limited at the Union level is not a state but public power.[30]

The issue whether the Union has a constitution became the subject of the academic interest after the German Constitutional Court in its *Maastricht* decision concluded that Union did not have *demos* and therefore it lacked a constitutional document (*no-demos* thesis).[31] According to the Court, the EU fundamental treaties composing the Maastricht Treaty were not constitutional instruments but international treaties, whose masters were the Member States.[32] In the discussion that followed, some have defended the Court's arguments,[33] while others endorsed the post-state and post-national perspective, emphasizing that constitutions could exist on transnational level, including the Union itself.[34]

Those who claim that a constitution can only be attached to the existence of democratic, homogeneous *pouvoir constituant* pursue an argument that there is no constitution without a state. Their claim is based on the so-called power-limiting or order-founding constitutional tradition, characterized by the existence of revolutionary constitution, aimed at founding an entirely new order and limiting government for the purpose

29 Craig, P., and Búrca G. de, *EU Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2011, p. 155.

30 Grimm, D., "Types of Constitutions", in Rosenfeld, M., and Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 130.

31 *Manfred Brunner and Others v. The European Union Treaty*, par. 44.

32 *Ibid*., par. 55, 77.

33 See e.g. Grimm, D., "Does Europe Need a Constitution?", *op. cit.*

34 Habermas, J., "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'", *European Law Journal*, Vol. 1, No. 3, 1995, pp. 303-307.

of preserving individual freedom. The American and the French constitutional traditions are cases at point.[35]

Remarkably, this approach overlooks the existence of, what Möllers calls, "power-shaping" constitutional tradition, which is not aimed at creating a new political order, but at legalization or juridification of already existing one.[36] In this tradition, a constitution does not constitute a new polity but rather aims at limiting a pre-democratic or already existing sovereign power through legal rules. Although they differ in details, the power-shaping constitutional tradition is typically connected with England and Germany.[37]

Now, the EU constitutional tradition shares with German and Britain constitutional tradition a lack of revolutionary moment and an idea of evolutional constitutionalism. Although even today it is without a written constitutional instrument, Great Britain does not lack a constitution – its Constitution has been constantly developed and apprehended as an evolutionary process of political practices. The German example also testifies that democracy has not always been a starting point in building a new polity. Constitutional norms have its historical source in constitutional treaties of the ninetieth century that served as constitutions of the first German nation-state.[38] They were concluded by sovereign states and did not create a new order, but rather, the sovereign states transferred a part of their sovereign powers to the common institutions.[39] Historically, the Union emerged in a similar manner.

There is further wrinkle here. A nation-state oriented constitutionalism is usually associated with France, but the truth is, as Hannah Arendt convincingly argued, that a notion of democratic homogeneity was not a part of the French Revolution.[40] As mentioned earlier, neither the German constitutional history is familiar with *le pouvoir constituant*, nor is the British constitutional tradition familiar with a strong concept of the state.[41] Moreover, accepting the argument of the German Constitutional Court, advanced in its *Lisbon* decision, that existence of homogenous *demos*, who forms *le pouvoir constituant* and who exercise its power on free and democratic elections based on equal rights for all voters, provide

35 Möllers, C., *op. cit.*, pp. 171-173, 179.

36 *Ibid.*, p. 172.

37 *Ibid.*, pp. 172-176.

38 *Ibid.*, p. 176.

39 *Ibid.*

40 Arendt H., *On Revolution*, London, Penguin Books, 1990.

41 Möllers C., *op. cit.*, p. 179.

necessary legitimization for a state,[42] means denying constitutional character of many states, including, for example, the Second German Empire.[43] Not to mention that even today's Germany, as a federal state, does not function on the principle of equal rights for all voters. All in all, the idea of ultimate connection between constitution and a nation-state can hardly be found in the history of the European states.

In short, the fact that the current funding document of the EU is termed the Lisbon Treaty, as well as the fact that it lacks democratic legitimization, does not necessarily imply a conclusion that the EU does not have constitution. Democracy is not a necessary precondition for a constitution to emerge: constitutional norms can be shaped in the context of the "rule of law constitutionalism" (Brunkhorst), in which constitutional standards steam from the process of juridification of the public power.

This brings me to the final and the most basic problem: namely, what remains to be proven is that the exercise of public power at the Union level has been organized and limited in a way usually crafted by a constitution.

5. The Sources of EU Constitutional Authority

A test to explore whether the EU has a constitution is the French revolutionary Declaration, which declared civil rights and in Article 16 proclaimed "a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." Under this test, the existence of the EU un-codified constitution receives its confirmation. A short explanation is the following.

It is worth repeating that the Lisbon Treaty and its relevant protocols guarantee the rule of law and organize exercise of the public power by providing institutional balance among Union institutions, division of powers between the Union and the Member States, as well as hierarchy of legal norms. Second, the EU Charter on Fundamental Rights, attached to the Lisbon Treaty, has become legally binding for all Member States and does not represent any more only a set of empty rights. The Lisbon Treaty also recognizes the Union as an autonomous legal personality. Based on these facts, I will join Habermas who argues that the treaties forming the Lisbon Treaty have become a foundation of a political community with a constitution of its own.[44]

42 The *Lisbon* decision, par. 277, 279 and 280.

43 Brunkhorst H., "Demokratija shvaćena ozbiljno: Evropa posle propasti ustava", *Anali Pravnog fakulteta u Beogradu*, No. 2, 2005, pp. 5-19.

44 Habermas, J., "The Crisis of the European Union in the Light of a Constitutionalization of International Law", *European Journal of International Law*, Vol. 23, No. 2, 2013, p. 342. Even before the adoption of the Lisbon Treaty, some claimed that the EU

Yet, there is more to add. The EU constitutional standards steam also from the jurisprudence of the ECJ. As Habermas notes, its principal role to interpret the founding treaties in absence of the published preparatory documents, made the ECJ deal constantly with the question which Madison faced in 1787, during foundation of the US: "can a federation of member states with democratic constitutions satisfy the conditions of democratic legitimation, without the national level being clearly subordinated to the federal level, as it is in the federal state?"[45] In the foundational Van *Gend en Loos* case, decided over forty years ago, the ECJ declared the autonomy of the Community legal order, underlining its *sui generis* character.[46] In the subsequent cases, it ruled that the Community treaties constituted the constitutional charter of the Community, based on the rule of law.[47] In the presence of a legislative gap, the ECJ has also secured direct effect and supremacy of EU law in the Member States.[48] This Court was also very influential in developing human rights standards within the EU legal order, although they were completely omitted in the foundational Communities treaties concluded in 1950s. Lastly, but not less importantly, the ECJ has asserted its sweeping power of judicial review several times, last time in the first *Kadi* judgment, delivered in 2008, when it asserted that: "Community is based on the rule of law, inasmuch as neither its Member States non its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Community Treaty [...]."[49]

Finally, EU constitutional standards also originate from the Member States' constitutional orders. The Community/Union's human rights policy has derived from this source. Despite their divergence, von Bogdandy claims that dependence of the Union's constitution on the Member States' constitutions is greater in law and in fact than that of a federal state on its constituent states.[50]

already had a *de facto* constitution (Treaty of Rome), which had served it well. See Moravcsik, A., *op. cit.*, p. 220.

45 Habermas, J., "The Crisis of the European Union in the Light of a Constitutionalization of International Law", *op. cit.*, p. 342.

46 ECJ: European Court of Justice, case – EUECJ R-26/62, *NV Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, CMLR 105, [1963] ECR 1.

47 ECJ: European Court of Justice, case – 294/83 *Partiécologiste "Les Verts" v. European Parliament*, [1986] ECR 1339.

48 *Van Gend en Loos*, *op. cit.*; ECJ: European Court of Justice, case-6/64, *Costa v. ENEL*, [1964] ECR 585.

49 ECJ: European Court of Justice, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6351. Further in the text: *Kadi I*.

50 Bogdandy, A. von, "Founding Principles", in Bogdandy, A. von and Bast, J. (eds.), *op. cit.*, p. 39.

He also warns that Member States' constitutions can hardly be adequately grasped without resource to the Union's constitution any more, since they no longer constitutionalize all public power in their scope of application.[51]

The foundations of this EU un-codified, complicated and pretty non-transparent constitutional structure have been explained by several constitutional theories, including theories on constitutional pluralism, constitutional synthesis, multilevel-constitutionalism and constitutional tolerance.[52]

The quality of EU constitutionalism has been target of a broad criticism. In the rest of my discussion, I will revisit some aspects of EU constitutionalism that help sustain the EU constitutional authority.

6. Internal Aspects of EU Constitutionalism: Moving Beyond Generalization

In principle, modern constitutionalism requires imposing limits on the powers of the government, loyalty to the rule of law and protection of fundamental rights.[53] In pursuing these ideas, the actors participating in constitutionalization of the Community/Union have not succeeded in generating coherent constitutional standards that would well fit in a contemporary understanding of constitutional democracy. Put simply, while the Community/Union was mostly responsive to the ideas of promoting the rule of law and securing the recognition of fundamental rights, it did not manage to consolidate its authority through the lens of democratic-decision making. Before tackling the key problem of the democratic deficit, I will briefly mention the Union's most important achievements in the human rights field.

The EU may not originate as a human rights organization, yet it nonetheless has managed to achieve an impressive record in developing human rights protection – from silence in the treaties establishing the Communities in 1950s, to the legally binding EU Charter of Fundamental Rights, attached to the 2009 Lisbon Treaty. Beside the Charter, the general principles of EU law, drawing from national constitutional traditions, and international treaties signed by the Member States, the most important being the European Convention for the Protection of Human Rights

[51] *Ibid.*

[52] For a discussion see e.g. Fossum, J. E. and Menéndez, J. A., "The Theory of Constitutional Synthesis: A Constitutional Theory for a Democratic European Union", *RECON On Line Working Paper*, 2010/25, http://www.reconproject.eu/main.php/RECON_wp_1025.pdf?fileitem=3653824.

[53] For more see e.g. Rosenfeld, M., "The Rule of Law and the Legitimacy of Constitutional Democracy", 74 *Southern California Law Review* 1307, 2001.

and Fundamental Freedoms (ECHR), are also sources of the rights protection in the Union. Moreover, the EU is soon to access to the ECHR itself.[54] Finally, to this list of achievements, a clear inclination of the ECJ to engage substantially in human rights adjudication, particularly in the area of discrimination, data protection, privacy and "war against terrorism", should be added. However, one should not forget that despite settled case law, for a long time some were sceptical towards the quality of the rights protection within the EU legal order, asserting that the ECJ did not distinguish human rights from fundamental market freedoms.[55] Nevertheless, the ECJ has managed to mitigate this scepticism when, in a series of its antiterrorism decisions delivered in the post 9/11 period, it struck down a number of EU measures for violating a variety of fundamental rights, including due process rights and the right to property.[56]

Although it is reasonable to wonder whether EU commitments to human rights amounts to something more than self-legitimizing politics, which is also, undeniably, still subject of many flows, EU institutional and policy developments in the field of human rights are less contested than constitutional practices aimed at limiting the powers of its institutions. Therefore, I turn now to this issue.

A major argument in favour of EU reduced constitutionalism steams from a lack of democratic legitimacy. However, the history of the European integrations indicates that many efforts have been undertaken to mitigate this state of affairs. The latest, included in the Lisbon Treaty, are aimed at improving quality of representative and participatory democracy in the Union, as well as at increasing the role of the national parliaments in the Union's decision-making proceedings. Consider the following.

The Lisbon Treaty is drafted to follow the usual qualities of representative democracy. Article 10 of the TEU determines that at the Union level citizens are directly represented in the European Parliament, and indirectly represented in the European Council and in the Council through their Member States representatives (who are democratically accountable either to their national Parliaments or to their citizens).

Measured by usual democratic standards, representative democracy in the Union reflects the following tendencies. On one hand, the European

[54] The final version of the draft agreement on Accession of the EU to ECHR was adopted on April 5, 2013.

[55] Kühling J., "Fundamental Rights", in Bogdandy A. von and Bast J. (eds.), *op. cit.*, pp. 479-514; Kingreen, T., "Fundamental Freedoms", in Bogdandy A. von and Bast J. (eds.), *op. cit.*, pp. 515-549; Möllers, C., *op. cit.*, p. 182.

[56] For a discussion see Tridimas, T., "Terrorism and ECJ: Empowerment and Democracy in the EC Legal Order", *European Law Review*, Vol. 34, No. 1, 2009, pp. 103-126.

Parliament is not a sovereign legislator whose word is final; it is not a parliament that supports governing majority nor does it have majority coalition. Other political institutions are still not fully responsible to it for all acts they adopt, nor the adaption of all important decisions requests the European Parliament's approval. On the other hand, its legislative, supervisory and budgetary powers have increased over time, as has its power over the appointment of the Commission.[57]

To remind, before the adoption of the European Single Act in 1986, the Parliament was given a few powers, including consultative and supervisory, but not legislative power and therefore was labelled as "multilingual talking shop". Under the Maastricht Treaty, it got the equal role in the legislative making as the Council. The Lisbon Treaty secures its participation as an equal partner in the ordinary legislative proceedings (subject to the Commission's initiations), which covers approximately 44 areas, including agriculture, services, immigration, structural funds, etc.[58] Moreover, the European Parliament has a status of veto player over delegated acts adopted by the Commission with an aim to implement EU regulations in more details.[59] Apart from a major role in the legislative process, the budgetary function that it shares with the Council, the Parliament uses very tactically to influence a change in the institutional balance and emphasize its representative role.

At this point, it is necessary to underline that democratic legitimacy of the Union legislative acts, although of a limited nature, springs from the described institutional balance, which in the Union serves as an autonomous version of separation of powers principle.[60] The readiness of the Members States to increase legislative powers of the European Parliament, although deeply controversial, has produced two important consequences. First, the increased capacity of the European Parliament to influence EU policy-making has weakened the democratic deficit argument. Second, the Parliament now functions as mechanism to compensate for domestic de-parlamentarisation, since transfer of sectorial policy decisions to the EU level has undermined the power of domestic parliaments to control and influence their governments in EU policy-making.[61]

57 For similar view see Corbett, R., Jacobs, F. and Shackleton, M., *The European Parliament*, (7th ed.), London, John Harper Publishing, 2007, p. 245.

58 For a detail overview see Craig, P. and Búrca, G. de, *op. cit.*, pp. 51-58.

59 *Ibid.*, p. 54.

60 ECJ: European Court of Justice, case – 138/79, *Roquette Frères v. Council of the European Communities*, [1980] ECR 3333.

61 Auel K. and Rittberger B., "Fluctuant necmerguntur. The European Parliament, National Parliaments, and European Integration", in Richardson J. (ed.), *European Union: Power and Policy-Making*, 3rd ed., London, Routledge, 2006, pp. 136-137.

Besides representative democracy, the Lisbon Treaty speaks also about participatory democracy. Even before it became law, some elements of the participatory democracy were to be found in EU law.[62] The novelty brought by the Lisbon Treaty is the citizens' initiative of inviting the European Commission to submit a legislative proposal for adoption. Yet, its effects remain to be seen.

Finally, the Lisbon Treaty has improved EU democratic credentials by reserving more space for the national parliaments in the EU decision-making process. This argument calls for further explanation.

An optimal version of incorporating the national parliaments within the EU institutional system through a new parliamentary Chamber or European Senate, although frequently discussed, has never come to fruition.[63] Nonetheless, under the Lisbon Treaty, the national parliaments have acquired an opportunity to exercise a more efficient control over the adoption of some European acts, by supervising the implementation of the subsidiarity principle.[64] This, so-called "early warning mechanism", requests that the Commission sends all legislative proposals to the national parliaments at the same time as to the Union institutions, and informs them about any views and positions taken by the Union with regard to such proposals.[65] The national parliaments may within 8 weeks send to the Union institutions a reasoned opinion as to why they consider that the proposal does not comply with subsidiarity.[66] Although, in principle, it will be difficult to ensure the required number of national parliaments to present reasoned opinion in relation to the same EU measure, so as to compel the Commission to review or even to withdraw the proposal, the Commission is likely to take seriously any such opinion, particularly if it originates from a larger Member State.[67] One should not forget that,

62 See e.g. ECJ: European Court of Justice, case C-49/88, *Al-Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council of the European Communities*, [1991] ECR I-03187; case – T-410/06, *Foshan City Nanhai Golden Step Industrial Co., Ltd v. Council of the European Union*, [2010] ECR II-00879; see also Article 42 of the EU Charter on Fundamental Rights.

63 Witte, B. de, "The Lisbon Treaty and the National Constitutions. More or Less Europeanization?", in Closa, C. (ed.), 2009, *op. cit.*, p. 38.

64 The issue is regulated by the Protocol on the Application of the Principles of Subsidiarity and Proportionality (Protocol on Subsidiarity) and the Protocol on the Role of National Parliaments in the EU (Protocol on National Parliaments). Both protocols are annexed to the Lisbon Treaty.

65 See Article 4 of the Protocol on Subsidiarity and Article 2 of the Protocol on National Parliaments.

66 See Article 6 of the Protocol on Subsidiarity and Article 4 of the Protocol on National Parliaments.

67 Craig, P. and Búrca, G. de, *op. cit.*, p. 97.

according to the same system and with the extended period for consideration (not 8 weeks but 6 months), national parliaments are directly involved in the procedures regarding the accession of new member states and amending the founding treaties.[68]

The "early warning mechanism" is one of the clearest examples by which the Union deviates from the classical model of international organization. It sheds additional lights on EU multilevel constitutional structure, for the mechanism requires cooperation not only between Union and national parliaments, but also between national parliaments themselves.[69] First, although, as a rule, a national parliament does not have an obligation to take the position with regard to particular legislative proposal, the non-participation of one or more parliaments would weaken the role of others, because the national parliaments' veto power depends on the number of parliaments expressing the negative opinion.[70] Accordingly, as Bruno de Witte, rightly notes, we are dealing here with the obligation of the national parliaments rather than with the model of information.[71] Second, the obligation triggers the work of many national institutions, including governments, domestic parliamentary committees, and national parliaments themselves. Third, the application of the early warning mechanism has provoked in the Member States either constitutional changes (in France) or legislative changes concerning functioning of the national parliaments.[72]

To conclude. The Lisbon Treaty represents an attempt to legitimize European Union in a way that brings Union closer to democracy. Yet, despite some improvement in democratic practices, it cannot be repeated often enough that Union still suffers from democratic deficit. The voters still cannot change the executives, nor can determine, by their vote, composition of the EU institutions – among three institutions performing legislative function – the only one directly elected is the European Parliament. Starting from the premise that the idea of democracy makes sense only to the extent to which political parties are allowed to fight over power,[73] the absence of genuine European parties makes already fragile democratic credentials more obvious. Finally, the lack of or weakness of

68 Articles 48 and 49 of the TEU.

69 Pernice, I., *op. cit.*, p. 26.

70 Witte, B. de, *op. cit.*, p. 39.

71 *Ibid.*

72 *Ibid.*, pp. 39-40.

73 Pildes, R., "Political Parties and Constitutionalism", in Ginsburg T. and Dixon R. (eds.), Comparative Constitutional Law, Edward Edgar Publishing, Cheltenham, 2011, p. 254.

a European *demos*, understood as a "political community of common attachment and engagement",[74] also explains why the Union is commonly seen as a democratic deficit setting.

However, pitting the EU democratic credentials against the democratic credentials of today's constitutional democracies may soften this conclusion. Constitutionalism and democracy are not about to triumph across the globe. Executives tend to dominate most modern domestic politics. Moreover, even in the old democracies, the classical tenets of constitutionalism – the rule of law, separation of powers and human rights protection – have been severely challenged by the "war on terrorism", the fight against illegal migrants and the financial meltdown. Examined through these lenses, usual generalization of EU constitutionalism and democracy appear less compelling. A discussion on EU judicial politics in human rights protection, further underlines this point.

7. External Aspect of EU Constitutionalism: Some Reflections on the *Kadi I* Judgment

While the discussion about internal aspects of EU constitutionalism has shown that the Union's major problem is a lack of consolidated democratic procedures, the discussion that follows will reveal that its external aspects, founded on the rule of law and human rights politics, appear to be constructed on a much more consolidated basis. A credit for that goes almost exclusively to the ECJ.

For the purpose of this discussion, the ECJ's antiterrorism jurisprudence, in particular, the decision in *Kadi I* case, delivered in 2008, bears particular importance, because it improves the quality of EU human rights protection and underlines external dimensions of the European constitutionalism.

Facts first. In the case of *Kadi I*, a Saudi Arabian national, Yassin A. Kadi, and the Al Barakaat International Foundation, both with substantial assets in the EU, brought in front of the ECJ an action for the annulment of several EU regulations, adopted to implement a series of UN Security Council resolutions concerning the fight against international terrorism.[75] Enacted under the Chapter VII of the UN Charter, the Security Council resolutions required for all states to take measures to freeze the funds and other financial assets of individuals and entities associated with Osama

74 Walker, N., "The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: the Case of the EU", in *The Migration of Constitutional Ideas*, Choudhry, S. (ed.), Cambridge, Cambridge University Press, 2006, p. 322.

75 *Kadi I*, par. 16-45.

bin Laden, Al-Qaeda network and the Taliban.[76] The Sanction Committee of the Security Council adopted and amended many times the list containing the names of the persons and entities whose funds were to be frozen. To this aim, and in accordance with the Security Council resolutions, several EU regulations were adopted, with direct legal effect in the national legal systems of all EU Members States. Subsequently, both Kadi and the Al Barakaat were listed in the annex to the regulations as suspected of ties with terrorism. Therefore, their funds and financial assets in EU were frozen.[77]

Before the Court of First Instance (now the General Court), they claimed the contested EU regulations violated their fundamental rights, in particular, the right to property, the right to a fair hearing and the right to judicial remedy, all well-established in the ECJ's jurisprudence to the effect that fundamental rights recognized and guaranteed by the constitutions of the Member States, and especially those provided in the ECHR, formed an integral part of the Union legal order.[78]

The first instance judgments, delivered by the General Court, rejected all Kadi's and the Al Barakaat's claims.[79] However, in reversing, the Grand Chamber in the second instance judgment accentuated autonomy, authority and separateness of the EU from the international legal order, making thereby an earthquake in international law.

Thus, the ECJ annulled the EU regulations in so far as they imposed sanctions on the claimants, finding that the regulations constituted unjustified restriction of their right to be heard, the right to an effective legal remedy and the right to property.[80] However, the Court did not stop here. It ruled that the obligations imposed by international treaty could not have the effect of prejudicing the constitutional principles of the European

76 See the UN Security Council resolutions No. 1267 (1999), 1333 (2000), 1390 (2002), 1452 (2002), and 1455 (2003).

77 *Kadi I*, par. 39-40.

78 At that time, the Lisbon Treaty, referring to legally binding EU Charter on Fundamental Rights, was not yet into force.

79 ECJ: European Court of Justice, case T-315/0, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, [2005] ECR II-03649; case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2005] ECR II-3533.

80 *Kadi I*, par. 333-353, 357-372. In the following cases, the ECJ continued to rule in favor of *Yassin Abdullah Kadi.* See the Judgment of the General Court, case – T-85/09, *Yassin Abdullah Kadi v. European Commission*, [2010] ECR II-05177 (*Kadi II*); ECJ: European Court of Justice, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council, United Kingdom v Yassin Abdullah Kadi*, [2013] not yet reported.

Community Treaty (specifically – allocation of powers and human rights standards), and reaffirmed its earlier finding that the EU autonomous legal system is based on the rule of law.[81] The most striking part of the judgment deals with the status of the UN Charter within the EU legal order in which the Court treated "all EU recognized 'fundamental rights' as belonging to normatively superior category". By doing so, the ECJ in *Kadi I* significantly challenged the arguments about reduced constitutionalism at the Community/Union level.[82]

Now, the issue is why the ECJ has decided in *Kadi I* not only to consolidate EU constitutional order, but also to present the vision of its superiority, to which international law – is external and subordinate? A less ambitious court would have chosen to act more flexible. For example, it would have borrowed the *Solange* doctrine from the German Constitutional Court, established in the conflict over human rights protection between that Court and the ECJ itself, at the time when the Community suffered from deficiency in human rights protection.[83] The German Constitutional Court ruled in a compromising manner, determining that the Community legal order and the German legal order stood in "mutually disciplining relation" (Weiler), meaning that the Court would examine the compatibility of EU legislation with fundamental rights standards guaranteed in Germany as long as effective protection was missing at the Community level.[84] In contrast, the ECJ in *Kadi I* has failed to use the situation of a clear inconformity of the UN Security Council antiterrorist resolutions with universally recognized human rights standards, as an opportunity to influence consolidation of universal mechanisms for the human rights protection. Instead, it decided to distance the EU from the international politics tolerant to human rights abuses.

De Búrca explains that the Court's approached in the *Kadi I* judgment has more in common with the U.S. long-standing general distrust towards international law, than with a general attitude of EU, which has been for a long time associated with respect and fidelity to international

81 *Ibid.*, par. 281, 282, 285.

82 Búrca, G. de, "The ECJ and the International Legal Order: a Re-Evaluation", in Búrca, G. de and Weiler, J.H.H. (eds.), *The Worlds of European Constitutionalism*, Cambridge, Cambridge University Press, 2012, p. 121.

83 Several authors refer to this possibility including Gráinne De Búrca. *Ibid.*, pp. 141-143.

84 *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel, (Solange I)*, BVerfGE 37, 271 [1974] CMLR 540. In the mid 1980s, the German Constitutional Court ruled that the need for such control no longer existed for human rights protection acquired meaningful status at the Community level. *Solange II*, BVerfGE 73, 339, [1987] 3 CMLR 225.

law and its institutions.[85] The real issue, therefore, is – why did in *Kadi I* the Court choose to deviate from the Union's general respect for international law? Among many speculations, one deserves particular attention: a strict primacy and sovereignty language in *Kadi I* coincides with the EU efforts to promote itself as an international actor at the global stage of international relations, not less significant than the US, Russia and China.[86] Furthermore, Weiler convincingly argues that *Kadi I* also reflects a need of Europe to distance itself from Asia/Muslim bloc in the world of global politics.[87]

It is for all these reasons reasonable to claim that the EU constitutional authority also serves to position EU in the world of global governance.

8. Conclusions

My first aim in this discussion was to show that EU lives under the constitution. To insist on its blueprint, I have followed eye-catching metaphor: "if it looks, walks, and quacks like a duck, then it is probably a duck." In other words, when placed against the background of Article 16 of the French revolutionary Declaration, the EU legal order manifests the features of a constitution, progressively developed to root Political Messianism into democracy and position EU in the global order. The EU constitution denies the premise that a constitution is always philosophical construct, and fits well into argumentation that, in modern times, constitutional framework emanates from political decision-making, and not from pre-established truth.[88]

My second aim was to assess to what extent EU constitutional standards satisfied the requests of modern constitutionalism, generally understood as a set of limits on the powers of the government and adherence to the rule of law and the protection of human rights. The discussion has revealed that EU's present constitutional achievements can be identified with the rule of law environment and human rights recognition, while a lack of connection between political power and electoral accountability is still missing constitutional feature. The fact that EU democratic defects appear less visible when pitted against the defects of national constitutional systems can only partially alleviate weaknesses of EU democratic credentials.

85 Búrca, G. de, "The ECJ and the International Legal Order: a Re-Evaluation", pp. 142-145.

86 Búrca, G. de and Weiler, J.H.H., *op. cit.*, p. 280.

87 *Ibid.*

88 Grimm, D., "Types of Constitutions", *op. cit.*, p. 104.

The existence of the EU constitution and trust in the responsiveness of the EU constitutional order are two different issues. "Democratic constitutionalism" underlines that constitutional authority is based on both its democratic responsiveness and its legitimacy as a law.[89] For the time being, European citizens do not perceive the existing un-codified EU Constitution as law nor its standards as distinct from everyday politics.

However, keeping in mind that constitutionalism is a forward-oriented process, and assuming that the EU will survive the present crisis, the issue which remains open is whether the future efforts to eliminate the defects of the EU Constitution should be tied to traditional ways of thinking about democratic accountability within nation states, or we should stop thinking in terms of a Westphalian state, and accept that transnational systems can provide a cure for democratic failings in ways that differ from traditional postulates of direct majoritarian democracy.[90] This is, however, an issue for a different discussion.

89 Post, R. and Siegel, R., "Democratic Constitutionalism", in *The Constitution in 2020*, Balkin, J. and Siegel, R. (eds.), Oxford, Oxford University Press, 2009, p. 27.

90 For some hints see Moravcsik, A., *op. cit.*