

THE TREATY OF LISBON: EUROPEAN „PHILADELPHIA“? COMPARISON FROM THE JURISTIC POINT OF VIEW.

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Abstrakt

Tento článok sa zaoberá dopadom Lisabonskej zmluvy na Európsku úniu. Po popise a analýze zmien, ktoré táto revízia primárneho európskeho práva prinesie, článok sa snaží odpovedať na otázku, či Lisabonská zmluva môže byť vnímaná ako akási európska „Filadelfia“. Činí tak pomocou porovnania súčasného stavu európskeho „ústavného“ usporiadania s vývinom ústavného usporiadania v Spojených štátoch amerických.

Kľúčové slová

Lisabonská zmluva, Európska únia, ústavnosť, Európska ústava, Ústava Spojených štátov amerických

Abstract

This article deals with the impact of the Treaty of Lisbon on the European Union. After description and analysis of the changes brought by this revision of the primary European law, it tries to answer the question whether the Treaty of Lisbon can be perceived as a European “Philadelphia”. It does so by the means of comparison of the present state of the European “constitutional” settlement with evolution of that of the United States of America.

Keywords

Treaty of Lisbon, European Union, constitutionalism, European constitution, US constitution

Introduction

The Treaty of Lisbon has been adopted after a failure of the Treaty Establishing Constitution for Europe (“the Constitution”), as a kind of its successor; it preserved the key elements of the failed Constitution, while dropping constitutional, or to be more precise, statist language and terminology. However, as it will be argued in this contribution, it has also a constitutional character. In the following lines, I will shortly describe the notion of constitution and present its key elements. After this, the constitutional development of the European Communities (“the EC”) and the European Union (“the EU”) will be shortly described; the main attention being paid to the transformation of the founding treaties (“the Treaties”) from an act of international law to constitutional acts. At this point, a short comparison of this development to the constitutional development of the United States of America (“the USA”) will be made. I will inspect, if there are any similarities in constitutional development of these two entities and if any lessons can be learnt from them.

1. Constitution and constitutionalism in general

A constitution in a broad sense is the law that establishes and regulates organs of government. In a thin sense, it is this kind of document, which is also stable, written, superior to other laws and justifiable, i. e. that there is a constitutional court, or other mechanism that can test the compatibility of other laws and acts with the constitution and possibly, if there is a conflict, declare them to be invalid. Also a constitution has to express a common ideology.¹

The notion of constitution can be perceived in three different ways, having regard to the “contents” of the constitution: material, formal and ideal.² In its material meaning, a constitution is formed by all of the legal norms regulating power structures in the state, its organization, functioning and relations to the individuals. It regulates these types of relations:

- Relationship between state and constitution, by denomination of the highest state organs, defining the mode of their creation, their mutual relations and area of their competences, as well as the relation to the individual citizens;

¹ Craig, P. *Constitutions, Constitutionalism and the European Union*. In: *European Law Journal*, 2001, Vol. 7, No. 2, p. 127.

² See Filip, J., Svatoň, J., Zimek, J. *Státověda*. Brno: Masarykova univerzita, 2004, p. 58.

- Relationship between constitution and law, by regulating of the process of adoption of legal norms, particularly the creation of laws;
- Relationship between constitution and polity and politics, by defining the basic features of political system of a country.

In this sense, no attention is paid to the substantial form of the constitution; the norms mentioned above can be found in any type of legal regulations, judicial decisions or constitutional practices.³

In the formal sense, a constitution is a document which regulates matters mentioned above and has a special, more rigid form, combined with a higher legal force. A constitution in this sense is a document different from “ordinary” laws.

In ideal point of view, the attention is paid to the substance of a constitution; to norms which should be entailed in such a document. Of course, there is no internationally agreed list of the features; however, we can identify these key elements that shall be included in an ideal constitution:

1. Norms regulating organization and functioning of a state⁴
 - a. Norms of creation and dissolution of a state as such,
 - b. Norms defining the territory and population of a state,
 - c. Norms regulating questions of exercise of state power, i. e. identifying the holder(s) of power, division of powers, statute of state organs and specification of their competences,
 - d. Norms defining basic characteristics of a legal order,
 - e. Norms on inner administrative structure of a state,
 - f. Constitutional norms symbolizing a state, i. e. definition of state symbols, capital town and preamble.

³ Filip, J., Svatoň, J., Zimek, J. *Státověda*, p. 64.

⁴ A statist terminology will be used in this section. This is not in any case to indicate that the EU is to be considered as a state. The reasons are rather pragmatic, since the theory of constitution is framed in a statist framework. Thus, the terminology is left unchanged.

2. Norms that embody the relationship of a state to the individuals and other states; defining relationships of a state to its environment, by creation of citizenship and stating the basic rights of freedoms of individuals. As for the other states, there are provisions on entering into international legal obligations, most prominently on conclusion of international treaties.
3. Norms defining state aspirations and values; for example respect to human rights, principles such as rule of law or (parliamentary) democracy.

After this short identification of elements of ideal constitution and defining the meaning of the notion as such, we will inspect the constitutional process of the EU in detail, in the light of trying to answer the question, whether there is a European constitution.⁵

2. European constitution

Does the EU have a constitution, even though the Constitution failed? This core question will be addressed to in this section.

The constitutionalism, the term in one of its meanings describing the extent, to which a particular legal system possesses the features described above in a thin sense of the notion of constitution, in the EC developed gradually over time. The EC has developed from an international organization to a supranational entity that confers rights and duties directly to its individual citizens and in which the controls on the exercise of public power are similar in nature to those found in nation states.

The existing Treaties do meet the criteria enlisted above. The decision-making in the Council, by the qualified majority, rather than unanimity, the existence of the European Parliament and the Court of Justice, as well as institute of Union citizenship, principles of direct effect and primacy of communitarian law are the most prominent features of line of thought leading to this conclusion.

Also, the interpretation of the Court of Justice (“ECJ”), according to the Article 234 Treaty Establishing the European Community and corresponding relationship between national courts and the ECJ has had a profound effect on constitutional development of the

⁵ Please not the small “c” at the beginning of the word, indicating, that this is not a reference to the Treaty Establishing a Constitution for Europe that is being referenced to as “the Constitution”.

Communities and Union.⁶ The jurisprudence of the Court of Justice developed the basic doctrines that included fundamental rights to the remit of European integration.

There has been a significant shift of the ECJ's attitude to the constitutional character of the Treaties. In *Van Gend en Loos*⁷ the Court spoke on "a new legal order of international law for the benefit of which the member states have limited their sovereign rights". In this case, the Netherlands, supported by Belgium and Germany, argued that Treaty establishing European Economic Community does not differ from a standard international treaty and consequently, there is no direct effect of disputed Article 12 of this treaty. However, the Court did not follow this line of reasoning and held that the Treaty had created a new legal order, different from international law. The question of relationship of new established European law to the national law was not addressed at that time.

It was precisely this question that created momentum for the Court to change the view mentioned above. In *Costa v. ENEL*⁸, the Court held that "in contrast with the international treaties, the EC Treaty has created its own legal system...which had become an integral part of the legal system of the Member States and which their courts are bound to apply." Thus, in the accord of Van Gend en Loos reasoning, the Treaties have established a new legal order, that is different from international law. Thus, and this was a new development, unlike international treaties, the EEC Treaty forms automatically after ratification a part of national law. That means application of monistic concept.

This contrast with the international law has important consequences, both in substantive and procedural terms. Procedurally, the lower (Italian) courts can address the Court of Justice with preliminary questions without prior having to address higher, or even constitutional national court. Substantially, this has meant that the communitarian European law is supreme to national legal order of a member states. This argument has been derived from the phrase "bound to apply." This position clarified the relationship between national and communitarian law.

⁶ Craig, P. *Constitutions, Constitutionalism and the European Union*, p. 137.

⁷ See *Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Available at [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:HTML>, cit. May, 13th, 2008.

⁸ See *Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64*. Available at [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61964J0006:EN:HTML>, cit. May, 13th, 2008.

The last shift occurred in *Les Verts*.⁹ After declaring the communitarian law to be a new legal order, which is different from both national and international law, the Court has addressed the question of the role of founding Treaties in this legal order. The Court stated, on the background of a challenge of legality of the act of the European Parliament, that “the Treaty is a basic constitutional charter for the Communities”. This view enabled it to hold that the Communities are based on a rule of law and to establish a system of remedies that ensured legality to be observed. The Court held that if action taken by the European Parliament had not been a subject to the (judicial) review, this situation would have been in contrary to the spirit of the Treaties. Thus, the constitutional character of the Treaties was used to ensure that review of legality is always applicable. This line of reasoning was further strengthened by establishing the principles of indirect effect in *Von Colson*¹⁰ and governmental liability in *Francovich*¹¹. Constitutionalism in the European Union thus might seem to some observers to be a sort of by-product. As I will argue later in this article, this is certainly not the case.

We can consider the Treaties to be the European constitution also for the other reasons¹²:

1. They are a higher-level, reflexive law that is used to produce legal norms;
2. They guarantee the normative primacy of the European law over national law;
3. They constitute independent organs;
4. They constitute a single, unitary EU (since Maastricht);
5. They produce new rights of the European citizenship;
6. ECJ regularly uses constitutional discourse.

To be even more precise, Shaw¹³ identifies as key constitutional elements these provisions of the Treaties:

⁹ See *Judgment of the Court of 23 April 1986. - Parti écologiste "Les Verts" v European Parliament. - Action for annulment - Information campaign for the elections to the European Parliament. - Case 294/83.* Available at [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0294:EN:HTML>, cit. May, 13th, 2008.

¹⁰ See *Judgment of the Court of 10 April 1984. - Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen. - Reference for a preliminary ruling: Arbeitsgericht Hamm - Germany. - Equal treatment for men and women - Access to employment. - Case 14/83.* Available at [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61983J0014:EN:HTML>, cit. May, 13th, 2008.

¹¹ See *Judgment of the Court of 19 November 1991. - Andrea Francovich and Danila Bonifaci and others v Italian Republic. - References for a preliminary ruling: Pretura di Vicenza and Pretura di Bassano del Grappa - Italy. - Failure to implement a directive - Liability of the Member State. - Joined cases C-6/90 and C-9/90.* Available at [online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0006:EN:HTML>, cit. May, 13th, 2008.

¹² Brunkhorst, H. *The Legitimation Crisis of the European Union*. In: *Constellations*, 2006, Vol. 13, No. 2, p. 166.

- Provisions on nature of a system - Art. 1, 312 Treaty establishing the European Communities (“TEC”) and 48, 49, 51 Treaty on European Union (“TEU”)¹⁴
- Provisions on rule of law, including the role of ECJ - Art. 6, 10, 220, 226, 228, 230-35 TEC
- Provisions on values, principles and norms of a system - Art. 1, 5, 6, 12, 13, 17-22 TEC
- Provisions on exercise of power within the EU - Art. 5, 7, 308 TEC

Thus, although the EU possesses characteristics of constitutionalism, it does not possess a constitutional document. This kind of document was almost accidentally produced¹⁵ as an outcome of the deliberations of the Convention on Future of Europe, which took place in 2002 and 2003 in Brussels. Its proceedings are described in detail elsewhere,¹⁶ for our purposes its outcome is important - the Draft Treaty Establishing the Constitution for Europe.

In the light of aforementioned premises, we can argue, that the EU has a constitution, even though the ratification process of the Constitution has failed. The founding Treaties are to be considered as a European constitution, although not based upon revolutionary action. This is an important difference from the US constitution. The other differences, as well as similarities of constitutional experience both of the EU and the US will be described in a further detail in the following section.

3. A sketch of comparison of the European constitution to the constitutional settlement of the United States of America

¹³ Shaw, J. *Process and Constitutional Discourse in the European Union*. In: *Journal of Law and Society*, 2000, Vol. 27, No. 1, p. 11.

¹⁴ Both treaties are cited in the version after the reform by the Treaty of Nice.

¹⁵ The constitutional process of the EU was unexpectedly launched in 2001. Until this time, the notion of “constitution” had not entered a mainstream European political discourse. As a breakthrough, the speech of Joschka Fischer, that time German foreign minister, at Humboldt University in 2000 can be seen. See de Burca, G. *The European Constitution Project after the Referenda*. In: *Constellations*, 2006, Vol. 13, No. 2, pp. 207-217.

¹⁶ See for example Tsebelis, G. *Thinking about the Recent Past and the Future of the EU*. In: *Journal of Common Market Studies*, 2008, Vol. 46, No. 2, pp. 265-292.

The constitutional experience of the USA and the EU has in common more than is usually accepted.¹⁷

The Philadelphia convention, besides laying foundation of the republican federalist order of the USA, founded a congressional, not a presidential system. The shift towards presidency is a development started by President William McKinley, who held the office from 1897 till 1901. Thus, the most powerful actors were state parties and politician. Only after the Great Depression, the presidency fully acquired its present-day importance. This is very similar to the position of the European Parliament in the present-day constitutional setting of the EU.

Also, the American constitution regulated relations between the federal government and states, by providing that the federal institutions possess the enumerated powers and the rest lies with the states. This is not dissimilar to the separation of powers introduced, or perhaps better put, clarified, by the Treaty of Lisbon.¹⁸

Also, the American system favors smaller states - it overrepresents them in Congress and in the Senate. Smaller states have thus more representative powers as they ought to have, if an ideal mathematic model was applied. This is also a feature of the European constitutional settlement, a principle that flows directly from the founding treaties and has been only slightly modified.¹⁹

The structure of the US governmental system also lays foundation for permanent confrontation of the legislature and the president. Is this the case of the EU? There are the tensions between the Council and the European Parliament, indeed. If we take a presidency of the EU, as a part of the Council, which it indeed is, we arrive at the conclusion that this is the case of the European Union. The changes introduced to the Council composition introduced by the Treaty of Lisbon further strengthen this conclusion.²⁰

If we look at the process of framing of the two constitutions, there are would be also some similarities if we compared the Philadelphia convention to the Convention on the Future of Europe. Both entities were indirectly electorally accountable, both based on an ambiguous

¹⁷ See Fabbrini, S. *Transatlantic constitutionalism: Comparing the United States and the European Union*. In: *European Journal of Political Research*, 2004, Vol. 43, pp. 547-569.

¹⁸ See Art. 3b TEU (Lisbon version) and Art. 2A - 2F Treaty on Functioning of the EU.

¹⁹ See respective provisions on distribution of seats in the European Parliament and on voting by qualified majority in the Council.

²⁰ See Art. 1, para. 16 and Art. 2, para. 191 of the Treaty of Lisbon. At this point, it shall be noted, that the Council and the European Council are perceived of a common nature, being both formed by the officials belonging to the Member States' executives, and thus forming two layers of the same institution.

mandate, which they soon overlapped. There was also a kind of domination of the representatives of the states in both cases, but also a substantial difference in the mode of their operation; Philadelphia convention deliberated in secrecy, while this was not, at least ideally, true for the Convention on Future of Europe. However, as we have seen, the process of constitutionalization in the EU has been rather a longer term evolution, than a single act. Thus, from the procedural point of view, there are not many similarities.

Procedurally, it can be said that experience of the USA and the EU is of a totally different nature. Whereas the USA started with the written constitution and only gradually developed constitutionalism, the EU experienced the process of constitutionalization first, without having a formal written constitution²¹ Nevertheless, it was judiciary in both cases, that promoted supraprimate, or supranational, legal order aimed at guaranteeing the development of the common markets.

Conclusion

We can conclude that there are some significant similarities in the constitutional settlement of both entities. A strong position of Parliament, clear separation of powers between layers of governance, overrepresentation of smaller member states, as well as a kind of element of permanent confrontation inherent to the system form the similarities in the substantial point of view. However, from a procedural point of view, the constitutional developments of the two entities are rather different; the US started with a written constitution, followed by process of constitutionalization, the EU followed a reversed path.

Thus, the Treaty of Lisbon cannot be perceived as a unique event, a kind of European Philadelphia, even if we consider it to be a direct successor of the Treaty establishing Constitution for Europe; we'd better view it as a part of gradual constitutional development of the European integration process.

Nevertheless, the central role of the judiciary in the constitutional process, as well as substantial similarities in the constitutions of both entities allow us to pose a question whether there can be a possibility to learn some lessons from the evolution of the US constitutional settlement in respect to the EU.

²¹ Fabbrini, S. *Transatlantic constitutionalism: Comparing the United States and the European Union*, p. 561.

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