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

**IGOR BLAHUŠIAK**

Právnická fakulta Masarykovy univerzity, Brno, Katedra mezinárodního a evropského práva

**DAVID SEHNÁLEK**

**Keywords**

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

**Resumé**

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 terminology. However, as it will be argued in this contribution, it has also a constitutional character.

A constitution in a broad sense is the law that establishes and regulates organs of government. The notion of constitution can be perceived in three different ways, having regard to the “contents” of the constitution: material, formal and ideal. 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, while no attention is paid to the substantial form of the constitution. 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.

The constitutionalism, the term in one of its meanings describing the extent, to which a particular legal system possesses the features 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 Communities and Union. There has been a significant shift of the ECJ's attitude to the constitutional character of the Treaties. In *Van Gend en Loos,* the Court spoke on a new legal order of international law for the benefit of which the member states have limited their sovereign rights. 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,* 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 and consequently, the EEC Treaty forms automatically after ratification a part of national law.

The last shift occurred in *Les Verts.* The Court has addressed the question of the role of founding Treaties in this legal order. The Court stated 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. This line of reasoning was further strengthened by establishing the principles of indirect effect in *Von Colson* and governmental liability in *Francovich.* 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.

However, although the EU possesses characteristics of constitutionalism, it does not possess a constitutional document. This kind of document was almost accidentally produced as an outcome of the deliberations of the Convention on Future of Europe, in the form of the Draft Treaty Establishing the Constitution for Europe.

The constitutional experience of the USA and the EU has in common more than is usually accepted. The Philadelphia convention, besides laying foundation of the republican federalist order of the USA, founded a congressional, not a presidential system. 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, which is not dissimilar to the separation of powers introduced, or perhaps better put, clarified, by the Treaty of Lisbon. The American system favors smaller states, like the European constitutional settlement does.

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. However, 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 and 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 constitution Nevertheless, it was judiciary in both cases, that promoted suprastate, or supranational, legal order aimed at guaranteeing the development of the common markets.

We can conclude that there are some significant similarities in the constitutional settlement of both entities. 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.

**Contacts - email:**

*igor.blahusiak@gmail.com*

*blahusiak@law.muni.cz*