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Europe Closer to its Citizens: Making Sense of the Lisbon Treaty's Legal Mechanisms¹

Introduction

European integration has been marked by unpredictable events and sometimes disappointments, but on the whole it has been a great achievement. The last decade, however, has been full of problems and failures for the European Union. The Enlargement towards the East has generated an institutional incapacity and a conflict of interests that led to a political deadlock. Economic crisis pointed out at the Institutional vulnerability. Unsuccessful referenda on the Constitutional Project revealed “European apathy” to the rest of the world but also had a negative effect on the citizens of the Union. Then the Lisbon Treaty Itself: The Irish rejection of the Treaty of Lisbon added more than consternation to the general negative feelings. Another signal, another sign of a death knell was perceived by some as the Constitutional Treaty Mark II.² After

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² “The Guardian” reported that ‘Less than 1% of the EU’s 490 million citizens appear to have scuppered the deal mapped out in Lisbon that was meant to shape Europe in the 21st century.’ *Irish voters reject EU Treaty*, “The Guardian” [13.06.2008].

a period of consultation, the Member States agreed to incorporate some concessions to Ireland in the text, which was finally accepted in the second referendum in 2009. Why should they believe in the “United Europe” if “Europe” does not believe in itself? How can they relate to Europe, and be proud of being Europeans, defend common values, and progressively develop the European identity and a sense of European patriotism? The coming into force of the Lisbon Treaty in December 2009 seems to mark a new start for the Union, but ‘is it really? The problems do not stop with adoption of the Lisbon Treaty. The recent economic crisis demonstrated that the EU has severe difficulties to deal with it and lacks efficient tools to collect “the broken glass.” The UK stamped its scepticism towards Europe in the EU Act 2011 and Cameron’s speech of 23 January 2013 on the EU membership confirmed the political fissure.

The question arises: Is the Lisbon Treaty sufficiently robust to dilute the anxiety reigning for ten years? Can it provide a skeleton to embrace diversity of interests and at the same time appear united to the outside world? Is it sufficiently assertive to make believe in “Europe” again? Can it bring Europe closer to its Citizens and instil in them a meaningful sense of European Citizenship?

What we would like to argue here is that, there is no coming back to the idealistic vision of Europe. However, the new settings and apparently modest Lisbon Treaty could eventually bring people together. It will be a different Europe. But a Europe of multiple layers and of multiple speeds is not necessarily contradictory to the idea of European Unity and European identity.

History can be made in various ways. It can be made through grand sweeping revolutions, fundamentally changing a political reality. But it can also be achieved through discreet, but continuous incremental development. These two methods reflect a different political and legal culture; cultures that have been in conflict over Europe’s effort to shape its constitutional contours. Nevertheless, the failure to agree on a Constitutional Treaty should be considered neither as a real problem, nor a surprise. On the contrary, it is an opportunity to develop a constitutional order that is more suited to the European Union, more flexible and adaptable, choosing the methods that are already familiar and match all interests. This should not be an obstacle to build a Europe closer to its citizens that would eventually foster a better understanding of European citizenship and the significance of belonging. The Constitutional Order has been building up from the early days, and in our view, the process has not been interrupted by the difficulties of the post -2000 era. Just observes that “the outer boundaries of Europe have been constituted not as frontiers

but as indeterminate boundary-regions, and that for peoples inhabiting those regions the claim of belonging to Europe [...] came increasingly to serve as a source of collective identity. Being a 'border-state', an exemplar and guardian of the core values of European civilization, was a source of vulnerability but also pride... [...] Europe, then, is not so much about absolute geography – where a country or a people actually are- as relative geography: where they sit in relation to others.”³

Our claim goes against a new wave of Euroscepticism related to eurodeficit and a general economic crisis, and also against the UK detachment from everything that is 'European. The idea that we want to defend here is that being European has become a part of our culture and we progress, wittingly or not in developing a sense of European identity.

This article will consider how the sense of belonging to Europe has been in a constant progression despite prolonged periods of inertia. The argument is that European identity is being slowly acquired despite the negative debate and inconsistency in the integration process. Have the vicissitudes of the last 14 years in the European adventure actually contributed positively to the development of the concept of European Identity?

We will look at the recent European problems, numerous remarkable initiatives, undermined by the current economic crisis and political vulnerability and examine the mechanisms, which despite the missed opportunity of the Constitutional Treaty and the symbolism it would have provided could develop sense of belonging to Europe. How could under the Lisbon Treaty with some mechanisms and novelties bring European people together? Is the present Treaty creating a favourable context for development of sense of belonging?

1. A “Constitution” without a Constitutional Treaty

It has been a long lasting debate over the themes: “Do we need a constitution” and “How to create a European Constitution.” Our argument here is that a traditional Constitution is not the only mechanism that can provide an umbrella for harmonious development of the Union and instil in people real sense of belonging. Weiler states: “Europe has charted its own brand of constitutional federalism.

³ W. Sadurski, *European Constitutional Identity?*, “EUI Working Papers Law” 2006, No. 33, p. 1; T. Judt, *Postwar: A History of Europe since 1945*, London 2005, p. 753.

It works. Why fix it?”⁴ Could there exist other ways leading to the same goal? The question ‘do we need a constitution?’ misses the pivotal point that we already have a constitution and the accoutrements of a constitutional order. It is a very European constitution, intangible, even somewhat clandestine. The European constitutional order crystallises around principles, values and achievements that are honoured and respected. Principles and achievements, that include the rule of law, democracy, human rights, social protection, ... Principles, values and achievements that are reflected in the substantive rules of the European Union and that are gradually emerging as constitutional principles. Sadurski rightly notes that the idea of identity is adjacent to the European constitutional traditions common to all Member States. This has been enshrined in Art 6.2 of the TEU and raised many times in the case law of the ECJ.⁵ The ECJ developed the general principles of Community Law “on the bases of common constitutional traditions” that now could “operate independently of the parallel development of rights based Treaty.”⁶ The development of those principles by the ECJ, independent from the Treaties provides a starting point for the development of the concept of identity. Pizzorusso maintains that the reference by the ECJ to common constitutional traditions of the Member States makes the position of EU analogical to Great Britain with its unwritten constitution.⁷ Weiler underlines that acceptance by the Member States the constitutional discipline not as a sign of subordination but as an autonomous voluntary act creates a different type of political community a unique one characterised by the willingness to accept a binding discipline originated in the traditions of the Member States.⁸

The Convention was successful in contributing to a debate that further solidified these principles and values and rejected others.⁹ A clear example is religion, where Europe decided to stand for a secular order that respects the religious and philosophical conviction of its citizens – unity in diversity.

⁴ J.H.H. Weiler, *Federalism Without Constitutionalism: Europe’s Sonderweg* in: *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, eds. K. Nicolaidis, Robert Howse, Oxford 2001.

⁵ *Ibidem*; W. Sadurski, *op.cit.*, p. 3.

⁶ J.H.H. Weiler, *op.cit.*; W. Sadurski, p. 3 quoting A. Pizzorusso, *Common Constitutional Traditions*, Bologna 2002.

⁷ *Ibidem*.

⁸ J.H.H. Weiler, *op.cit.*

⁹ *Ibidem*; W. Sadurski, p. 3 quoting A. Pizzorusso, *Common Constitutional Traditions*, Bologna 2002.

1.1. Nation-State Concepts and the European Integration

Weiler points out that when acceptance of rules is voluntary we talk about a principle of constitutional tolerance which sets up an interplay between Member States, Member States and the EU and the EU itself.¹⁰ We argue that applying conventional (nation-)state concepts to the European project is a misguided exercise. The process of European integration is a *sui generis* process that finds inspiration in state-procedures, but cannot be based on them as Europe has very specific characteristics as a nascent state(-like) supranational entity.

Europe does not have a population that identifies itself as having a citizenship in the same way as a homogeneous nation does. Such a concept is only slowly being developed in the EU and its absorption as a meaningful concept will strengthen over generations. Creating a constitution that reflects the will of the people as to its future and as to the limits on the power of the institutions that rule them – always an artificial exercise – is wholly fictional in Europe's case. The attempt that was made through the European Convention was a valuable exercise in itself, despite later rejection of the Constitutional Treaty. But failure in the European experience has seldom been a bar on progress. Arguably, the ambitious objectives of the drafters of the Treaty of Rome have been fulfilled more through failure than through grand successes. It has been a slow incremental movement forward that has been an undeniable success. European successes are the greatest when they are understated. The ambitious project to build an Economic and Monetary Union failed in its first attempt. The Common Agricultural Policy has defied rationality and reform for decades. The failures of the European policy of the EU are numerous. The Amsterdam Treaty was described as “not a complete failure.”¹¹ Reviewing these failures and setbacks might fill a casual observer with doom and gloom and yet, taking abstraction from these recurring obstacles, the European Union is revered as a shining example of successful regional integration breaking through the age-old boundaries of mythical state sovereignty. Therefore, the further evolution of the Union of Citizens and the more meaningful concept of citizenship of the Union is not precluded by the lack of the conventional schema existing in the homogeneous states. Contrary, it will find its own way which will be only proper to the Union.

¹⁰ Ibidem.

¹¹ I.-C. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, “Common Market Law Review” 1999, No. 36, p. 703.

1.2. Unwritten Constitution and the Lisbon Treaty

The text that entered into force in December 2009 resembles the well-known path many times repeated of the amending Treaty. Nevertheless, this does not necessarily mean that all constitutional ideas have been bowdlerized. We would like to argue that they progress without the formal written statement. The idea of the Constitution in the form of a rigid document failed, but the unwritten and flexible one is well present. Moreover, the symbolism of the Constitutional Treaty made its inroad even if was not stamped and “constitutionalised” on paper. Thus, as a matter of political will we are back to the Treaty, but is it not more about “wording” than anything else we are quarrelling?

Our argument is that the Reform Treaty being an amending Treaty, denuded of constitutional attributes does not necessarily bury the idea of Constitutional Order.¹² Menéndez calls the evolution of the European legal order “the narrative of constitutional synthesis.” Accordingly, the founding Treaties of Paris and Rome opened up “a new constitutional tradition” which differs dramatically from revolutionary constitutional traditions but eventually would forge a way to European constitutional legal order.¹³ This argument is perfectly defensible. In these circumstances, the integration process and the constitutionalisation process are proceeding independently even if the text of constitutional treaty was rejected. Thus, constitutional tradition proper to the EU is a source and the umbrella under which European Identity is growing almost undisturbed. The wording of constitutional synthesis is quite attractive.

Menéndez defines constitutional synthesis as “a democratically legitimate process of establishing a supranational constitution by seconding the collective national constitutions as the common fundamental law of the new polity.” He believes that constitutional synthesis makes it possible to go ahead with constitutional Union without engaging into the demanding process of traditional constitution-making.¹⁴ Further he makes it clear that “constitutional synthesis leads to the establishment of a new set institutions and decision-making processes characterised by

¹² See I.-C. Pernice, *The Constitution for Europe: A Legal Analysis*, Cambridge 2006, p. 5.

¹³ See A.-J. Menéndez, *European Constitutional Law, Between Constitution-making and Governance* (Paper delivered at the IEPL Conference, 25–26.06.2009, Hull), p. 1; see also A.-J. Menéndez, *Governance and Constitutionalism in the European Order*, in: *The European Union Order after Lisbon*, eds. P. Birkinshaw, M. Varney, Boston 2010, p. 65; S. Griller, J. Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*, Heidelberg 2009, p. 21–56.

¹⁴ *Ibidem*.

a strong resemblance to national equivalents with the projection of national constitutional principles to the supranational level of government.”¹⁵

From one hand, adhering to this argument the Lisbon Treaty then could be considered as departing from the traditional understanding of how we make a constitution, but still result in a progress. From the other hand however, the deliberate removal of symbols weakened the EU image to the outside world, as well as demonstrated lack of internal cohesion among the people of Europe. At the same time there is another possible interpretation of the voice of the Europeans. Menéndez points out that “where an issue is explicitly cast as a European concern, the instantiation of a referendum, even if it is held nationally, represents a plea to citizens to act in their capacity as European citizens, not merely as nationals.”¹⁶ Thus, the failure to agree on the Constitutional Treaty might also be viewed as a sign of unity among the people of Europe. United in disagreement that develops a sense of belonging, a sense of being together, and a desire to speak up for the common interest. Would it not be an element forging the concept of European Identity? Indeed, the voice of the people of Europe has become quite powerful and was able to deviate the European project. They all gathered together to express their anxiety and incertitude about the future reform. Mac Amlaigh believes that an “integration through obfuscation” approach to Europe’s integration and the acquiescence of a passive public is definitively gone and cannot be relied upon for the further reform.¹⁷ Nonetheless, independently of the motif and reason that pushed European people to disagree, they engaged in the process and perform the duty of the citizens of Europe.

2. Another Amending Treaty: A Failure, or a Challenge?

The Treaty of Lisbon reveals mixed feelings. From one point of view, it represents a new avenue and a new start for the European Union, a light at the end of a long tunnel. It provides an exit way from the state of limbo and a solution to at least most urgent problems.

The Reform Treaty came into force in December 2009, after the second Irish Referendum and the positive outcome of some other political complications mainly from the new Members like Czech Republic or

¹⁵ Ibidem, p. 3–4.

¹⁶ Ibidem, p. 33.

¹⁷ See C. Mac Amhlaigh C, *Revolt by Referendum? In Search of a European Constitutional Narrative*, “European Law Journal” 2009, No. 15, p. 553.

Poland. Since, it is not a Constitutional Treaty, the ratification was possible in the case of a majority of the Member States on the basis of parliamentary procedures. Nevertheless, those who saw in the Reform Treaty a disguised Constitution, strongly defended the position that referenda should take place since according to them, only the wording had changed.

Indeed, the changes introduced in the Treaty of Lisbon could be interpreted both ways. Some argue that the changes introduced were purely cosmetic. Others believe that those “cosmetic changes” will have great implications in practice. This is also what we would like to argue here. In reality, the Treaty is not as disappointing as it appears at first glance. It has a certain vision and continuity that will take European Integration forward. To an extent it is less prescriptive than the Constitutional Treaty, handling better the national interests, while at the same time making more space for evolution of a concept of identity in the shape that the EU citizens want.

What could be disappointing to a certain extent is the loss of the symbolic value of the Constitution. First, the switch from the Constitutional project to the Treaty may be seen as a retreat, in particular by the rest of the World. Secondly, symbols and constitutional attributes would elevate the progress and strengthen the citizens’ sense of belonging to Europe. However, this is debatable.

Supremacy could be an example. Previously, it did not appear in any Treaties and was purely of jurisprudential origin. The power of the ECJ decisions is not questionable here, precisely because it was outside the States agreements. Supremacy as a creature of the ECJ paved the way to the biggest achievements in the EU’s history. The Constitutional Treaty inserted it for the first time in Articles I-6 in the form of primacy. The Lisbon Treaty removed it again from the text enclosing only in the Final Declaration annexed to the Treaty. The move was discussed in terms of getting rid of any federal [?] symbolism and constitutional attributes. Does it really matter? Opinions could be divided here. Certainly, nothing has changed in practice. Supremacy of EC/EU law remains a constitutional principle, the foundation of the system. The landmark decisions of the ECJ in *Van Gend en Loos* and *Costa/ENEL* establishing this principle, have never been questioned. Therefore, from one point of view, keeping the *status quo* from the previous Treaties is not an obstacle; on the contrary, in the past Europe made perfect use of it. On the other hand, however, the absence of this principle in the Treaty, especially after the unsuccessful attempt to insert it there, at first glance contrasts with the idea of engaging in a deeper Integration, or the development of a European identity. Should not its insertion in the Treaty be considered as a natural progression and

imprinted in the binding document as the will of the people of Europe? Supremacy is generally recognised, EC/EU laws prevail, so why did its confirmation in the Treaty seem controversial and why eventually was it removed? Shouldn't it be at the heart of any further progress of the European Integration? Should it not be a binding element? Nonetheless, despite the failure to make it Treaty based, the game is not lost.

Similarly, some other changes in the Reform Treaty testify to its detachment from the idea of Europe based on *acquis communautaires*, core unquestionable achievements, in the sense of a solid common input constituting a binding element: Europe speaking with one voice and sharing common values. The Lisbon Treaty is quite the opposite. The attempt to clarify the extent of competences of the EU as well as the reference to national sovereignty in Article 3a, strengthening the latter, clearly demonstrates the inclination to separate, to draw the line between what is national and what is European. The Lisbon Treaty refers more than any other Treaty to "national" power or authority.¹⁸ Thus, Article 3a emphasises respect for the Member States' essential State functions though without specifying what the essential State functions are. In addition, the Lisbon Treaty added a sentence on national security stressing the exclusivity of the Member State's power in this matter: "national security remains the sole responsibility of each Member State."¹⁹ Thus national sovereignty in this matter becomes even more explicit.

Other developments also insinuate detachment from the idea of Europe following a single, common path. For example, the acceptance of the "opt out" from certain provisions, the existence of protocols and declarations protecting divergent national interests, the option to go ahead with the initiative in the smaller group (enhanced cooperation) and a voluntary withdrawal from the Union (already in the Constitutional Treaty) suggest that Europe is no longer unanimously embarking in the same boat where common values prevail. In addition, there is an attempt to catalogue the competencies providing a more comprehensive list, which is a good thing but on the other hand, the clearer the division is, the less flexibility remains for the Union's expansion. But precisely this stronger consideration for the national interests will bring the Union closer to its citizens. They will become more involved in the European politics.

At first glance, the clearer division between national and Union's competence with some other guarantees given to the Member States

¹⁸ See S. Kurpas, *The Treaty of Lisbon – How much 'Constitution is Left? An Overview of the Main Changes*, CEPS Policy Brief" 2007, No. 147, p. 4.

¹⁹ Art 3a of the Lisbon Treaty. See also S. Kurpas, *op.cit.*, p. 4.

would indicate a sort of regression in the integration process. However, this can also support an opposite argument because it also constitutes a new basis for the healthier relationship between Member States and the Union, since better delimitation will certainly avoid many unnecessary tensions. Also, leaving certain aspects in a purely national domain does not preclude progress towards a deeper integration.

Importantly for the citizens, a Protocol on General Interest is added to the final text giving a wide discretion of national, regional and local authorities in providing services of general interest, diversity of services; high quality, safety affordability, equal treatment and promotion of universal access, and of users rights. The Protocol is a vehicle through which citizens might enjoy in full being a part of the EU.

2.1. Identity and Symbolism. Would Symbols Make a Difference?

The most striking and immediately noticeable change in the text of the Lisbon Treaty is in its symbolism, or rather the lack of it. The Reform Treaty was stripped of all the obvious state-like constitutional features: the name, the motto, the flag, and the anthem. The words “constitutional” and “constitution” have been removed from the text. Kurpas argued that this made the Lisbon Treaty look as technical and unemotional as it possibly could, in order to avoid a repeat of the divisive debate that had occurred over the Constitution, and to avoid the need for referenda.²⁰ Nevertheless, he doubted if European citizens could be bought so cheaply and was right what the first Irish referendum demonstrated.²¹ The Lisbon Treaty impoverished the text of the constitutional symbols and constitutional rhetoric. How meaningful is this?

Has this made a difference? Are we no longer going to be citizens of the European Union? Will we no longer strive for “Unity in Diversity”? Is the European flag no longer the one designed by Arsène Heitz figuring on “an azure field a circle of twelve golden mullets, their points not touching?”²² Has this flag ceased to represent “the union of the peoples of Europe?”²³ Still sadly stripped from Schiller’s aspirations, will Beethoven’s Ninth Symphony die away as Europe’s anthem? These symbols may not be enshrined in an official document but they have become – or are at least becoming – customary constitutional *acquis*.

²⁰ Ibidem, p. 3.

²¹ Ibidem.

²² http://europa.eu/abc/symbols/emblem/index_en.htm [last visited 20.05.2014].

²³ Ibidem.

This was also confirmed by the post Lisbon developments. The discussion around symbols revived again. One year after the agreement on the Lisbon Treaty, the European Parliament took some steps to legalise symbols by the backdoor.²⁴ “Ode to Joy” will be performed at all formal sittings of the Parliament, the European flag displayed in all Parliament meeting rooms and the newest creation: the motto “United in Diversity” will appear on all official Parliamentary documents. The intention of the European Parliament was to provide an impetus to “the authorities of the Member States to join it in promoting the use of European symbols within the scope of their powers.”²⁵ The declaration annexed to the Lisbon Treaty states that “16 Member States recognised that the EU symbols express the sense of community of the people in the European Union and their allegiance to it.”²⁶ European Parliament, thus sends a message to European citizens that symbols have crucial importance and should be used as widely as possible “because they represent the values that inspire the Union’s existence, they unite all those who live and work within its borders, and they identify it in the world as a benchmark for freedom, development and solidarity.”²⁷ A German Chairman, Leiden, said that “the symbols would give Europe “a soul” and would help citizens to better identify with the Union.”²⁸

2.2. A Deeper Democratisation and the Citizenship Chapter

There is a generally shared opinion that the Lisbon Treaty clearly enhanced citizens’ rights and engaged in a deeper democratisation. The citizens’ package was identified by J.-M. Barroso as one of the four biggest achievements of this Treaty.²⁹ Those achievements could be questioned since arguably the Lisbon Treaty merely refurbishes some existing parts of the previous Treaties. The new chapter, now entitled Citizenship and Non-discrimination, is a result of the absorption by the Citizenship Chapter: Part II of existing provisions on non-discrimination moved from Part I of the Treaty. This apparently cosmetic revamp brings, however,

²⁴ MEPs legalise EU symbols through the backdoor, at <http://www.euractiv.com.com> [last visited 12.09.2008].

²⁵ European Parliament Draft Report on the use by Parliament of the Symbols of the Union, 20072240(Reg), PR\70357EN.doc, 30.01.2008, p. 8.

²⁶ *Ibidem*.

²⁷ *Ibidem*.

²⁸ *Ibidem*; MEPs legalise EU symbols through the backdoor, at <http://www.euractiv.com.com> [last visited 12.09.2008].

²⁹ See http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/2009/10/index_en.htm#top [last visited 12.04.2014].

further consequences. First, the non-discrimination provisions in the previous Treaty applied already under certain conditions to third country nationals.³⁰ Merging the non-discrimination provision with citizenship implies that its scope cannot be narrowed and therefore, will result in the applicability *ratione personae* of the entire chapter also to non-citizens.³¹ *Vice-versa*, the Citizens' initiative, a precious *acquis* of the Lisbon Treaty, will presumably be formulated in relation to non-discrimination on the six prohibited grounds since again those issues now form one chapter and are not specifically excluded from the scope of application of an old Article 21 (now 24 TFEU) (Citizens' initiative).³² Nonetheless, the recent Regulation 211/2011 putting in place modalities for the Citizens' Initiative is deceptive in this respect, excluding third-countries nationals. Further refurbishment concerns the controversial provision on passports and ID cards being shifted from Part Two to Part I, linking it with the similar issues of JHA. The latter amendment had important political consequences since the UK, Ireland and Denmark have opted out of this provision. The new settings seem to bring more clarity and ends up the previous artificial division. The major asset of this refurbishment is to make the Citizen's dimension more explicit. The clearer and better organised content offers according to Barroso, a meaningful definition of the European citizenship. This is enhanced by a truly new provision on the Citizens' initiative inserted in Part II. This is a form of mass petition to request the Commission to propose legislation.

The question is whether the changes introduced by the Lisbon Treaty will make a difference for the EU Citizens? It has been argued that the EU's weak legitimacy or lack of legitimacy arising from the EU democratic deficit made EU citizens indifferent about EU matters.³³ We can quote here the absence of direct European elections for the EU Commission and Council of Ministers, but also a lack of public debate on the EU issues that the Citizens initiative could change.³⁴

³⁰ See S. Peers, *EU Reform Treaty: Analysis*, Statewatch Analysis 2007, p. 5 <http://www.statewatch.org/news/2007/oct/analysis-5-reform-treaty-oct-2007.pdf> [last visited 13.03.2012].

³¹ *Ibidem*.

³² See S. Peers, *EU Reform Treaty: Analysis. 3.1 and 3.2*, Statewatch Analysis 2007 <http://www.statewatch.org/news/2007/aug/eu-reform-treaty-tec-part-one-3-1.pdf> [13.03.2012].

³³ See M. Wind, *Post-National Citizenship in Europe: The EU as a Welfare Rights Generator*, "Columbia Journal of European Law" 2009, No. 15, p. 239–263.

³⁴ See B.M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, "Columbia Journal of European Law" 2011, No. 17, p. 151.

In addition, the revamping of the citizens' chapter, which at the first glance seems superficial, could have some significant implications. But again a lot depends on how the Court of Justice of the EU will interpret certain provisions.

The new chapter on Citizenship and non-discrimination brings some amendments to existing articles leading to some substantive changes. For example, old Article 19.1 (now 22 TFEU) has been changed, giving the Parliament greater power over non-discrimination legislation, since it has now consent powers and not as previously consultation powers. In addition old Article 20. 2. (now 23 TFEU) highlights that citizens of the Union enjoy the rights but are also subject to the duties imposed by the Treaty. This stipulation reminds us strongly of the texts of domestic constitutions. Could we then argue that the citizens' dimension has been constitutionalised without the Constitution? The answer probably depends on how much importance we attach to this symbolic formulation.

Furthermore, the Lisbon Treaty provides for a new legal base to adopt legislation regarding social benefits arising from the free movement of citizens old art 21 (3) (now 24 TFEU). The new legal base regarding the protection offered by diplomatic and consular authorities turns out to be controversial since it is concerned with the limitation rather than extension of rights. Article 23 (old art 20): "The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection."

Two points need to be made about this passage: the special legislative procedure (qualified majority), rarely present in the new Treaty, is used; and the Parliament's role is very limited here since it is only consulted. On one hand, this is still a step forward since this provision replaces the existing Article leaving the regulation of this matter to the Member States. On the other hand however, the text differs from the Constitutional Treaty limiting the EU powers. First, it mentions only coordination and cooperation measures necessary to facilitate such protection, the Constitutional Treaty encompassed any 'measures necessary to facilitate such a protection'. Secondly, the Lisbon Treaty uses Directives to establish coordination and cooperation measures whereas the Constitutional Treaty provided for 'European Laws (regulations) as measures to facilitate the consular protection' which would be much stronger tools. Therefore, the removal from the Lisbon Treaty of the constitutional innovation regarding legal acts and the maintenance of the old denomination of legal acts inserted in old Article 249 (now 289 TFEU) considerably weakened the scope of

Article 20 (now 23 TFEU).³⁵ Nonetheless, the chapter on Citizenship is not deprived of its own logic. The changes have potential to reinforce the EU legitimacy. Szewczyk argues that the chapter on citizenship together with a greater role assigned to national parliaments gave rise to a new source of political legitimacy in the form of transnational citizenship.³⁶ The process is in progress and it requires constant justification based on the Charter but the EU power of persuasion should overcome the open-ended frictions. He believes that the umbrella of fundamental rights could provide a safer, more coherent consolidating element and a better way forward than previously arbitrary expressions of national interests.³⁷

2.3. EU Citizenship: A Hybrid Concept

The 'common components of citizenship' were traditionally related to the nation state and embedded in the constitutions.³⁸ From this perspective the evolution of the concept of citizenship within the European Union would have gained considerable momentum from the framework of the Constitutional Treaty; although some constitutional formulations together with unequivocal symbols would direct its conceptualisation into a traditional State framework. With the failure of the Constitutional Treaty it is important to find an alternative path to fill it with substance.

Hartnell notices that customarily citizenship has been rooted in domestic law and not international law.³⁹ As such it is not well suited to a multinational and multicultural environment. It is also an interdisciplinary concept since clearly "it lies at the intersection of law, social science and political theory."⁴⁰ It is also a complex concept that can "denote a relationship to a polity, a social status, an activity, a package of rights or package of responsibilities."⁴¹ As such it needs clear guidance and well established limits. In contrast, EU citizenship has been made of bits and pieces from the very beginning. It is

³⁵ B.M.J. Szewczyk, *op.cit.*; S. Peers, *op.cit.*

³⁶ B.M.J. Szewczyk, *op.cit.*, p. 229; S. Peers, *op.cit.*

³⁷ *Ibidem*, p. 230. See also R. Bellamy, D. Castiglione, J. Shaw, *Making European Citizens: Civic Inclusion in the Transnational Context*, Basingstoke 2006.

³⁸ See M. La Torre, *Citizenship and the European Democracy: European Constitution and the Treaty of Lisbon*, in: *The European Union Legal Order after Lisbon*, eds. P. Birkinshaw, M. Varney, Boston 2010, p. 197. See also M. La Torre, *Citizenship: A European Wagner*, "Ratio Juris" 1995, No. 8, p. 113.

³⁹ *Ibidem*. See also H. Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, "Berkeley Journal of International Law" 2006, No. 8, p. 344.

⁴⁰ See M. La Torre, *Citizenship and the European Democracy...*, *op.cit.*; M. La Torre, *Citizenship: A European Wagner...*, *op.cit.*; H. Hartnell, *op.cit.*, p. 343.

⁴¹ See G.L. Neuman, *Book Review*, "American Journal of International Law" 2002, No. 96, p. 514; H. Hartnell, *op.cit.*, footnote 70.

not surprising then that it appears today to be unconvincing and seemed to be lost once the constitutional frame was abandoned. In the ambit of the Lisbon Treaty, it is crucial to reposition the concept of citizenship and let it develop within the new realm. One possible way forward is to focus more on citizens themselves and to make them decide what sort of citizenship they want. So far, the content of citizenship was imposed by the Treaty and therefore elaborated at the Union level. In the current frame provided by the Lisbon Treaty the substance for the meaningful concept of citizenship could be filled by citizens themselves, at the national level or even a regional level. Lansbergen and Shaw point out that the evolving constitutional framework is placed at the EU and national levels in what constitutes today a “composite Euro-polity” and that the national experience and practices have been so far undervalued.⁴² They rightly argue that not enough attention has been paid to the constitutional implications for the Member States that such a concept involves. They also emphasise the need to re-evaluate the role of citizenship within the national discourse so as to be able to bring forward more consistent model of membership which would evolve into interplay between national and EU level citizens’ rights.⁴³ There is also a challenge to look at the third level of Multi-Level Governance, sub-national bodies such as directly elected regional parliaments in bringing substance to the concept of citizenship. This potential has never been explored. The question is “To what extent can they provide a conduit for citizen interest and eventually also an identity of participation in the European Union from the lowest most direct level?”⁴⁴ “To what extent are regional parliaments engaging in European debate and communicating this to their citizens?” Could they fulfil the notion of citizenship in a more pragmatic way? Shifting the debate to national and regional level fits perfectly with the Lisbon Treaty’s objectives and the space was given to national parliaments.

2.4. Expansion of the Concept of Citizenship

Our argument about the progressive, sometimes, subconscious acquisition of a sense of belonging to Europe goes against the general trend towards scepticism about European Identity. “The European Union has been [...] described as opaque, technocratic and distant from its

⁴² See A. Lansbergen, J. Shaw, *National Membership Models in a Multi-level Europe* (Paper delivered at the IEPL Conference, 25–26.06.2009, Hull), p. 2.

⁴³ *Ibidem*.

⁴⁴ See A. Woodward, *Who’s fit for Europe? The European Fitness of Belgian Regional Parliaments and the Implications for Democratic Participation* (paper delivered at the 8th Biennial International Conference, 27–29.03.2003, Nashville Tennessee), p. 1.

citizens.”⁴⁵ This is not surprising given that, in the early stages of European Integration, European legislator did not foster a citizen-centred approach. European Citizenship was included in the Treaty as “a complementary notion”, although the recent judgment, in *Rottmann* expanded its limits. The lack of clarity about its content triggered a vibrant debate mainly concentrated on rights. Weiler believes that “The never-ending rhetoric is all too often a mask for a veritable political deficit of individual empowerment in European democracy. “*Rights and Circus* may be the apposite motto for the Turn-of-Millennium Europe; smother them with rights- which they don’t exactly need- and keep them quiet.”⁴⁶

This background is not very encouraging but in the words of Habermas “«More Europe» is the correct answer to the current economic crisis”, and though his argument is mainly concerned with economic governance, it can be extended to the problem of identity.⁴⁷ How can the current Treaty favour the development of a European identity? The changes with respect to Citizenship of the Union in the Lisbon Treaty have been insignificant in appearance; nevertheless, the entire context of the Lisbon text shifts it from complementary to a more independent concept of citizenship.⁴⁸ This is particularly visible in the Lisbon Treaty’s manifesto to make the Union more democratic, more transparent and more efficient: in brief to make the Union closer to its citizens. There is a clear vision to create ‘a direct link between EU citizens and their political representation at Union level’ that Schrauwen considers as an attempt of constitutional conceptualisation of EU citizenship.⁴⁹

At first glance, some alterations of the Constitutional Treaty impoverished the notion of citizenship. The connection between citizenship and fundamental rights was broken since Title II part 1 of the Constitutional Treaty was dropped from the Lisbon Treaty. Similarly, the removal of the Charter of Fundamental Rights from the main body of Treaty itself emphasises the severance of their connection with citizenship.⁵⁰

On the positive side, the merging of the pillars removed the existing anomaly that the European citizenship was a matter of the first, EC Pillar

⁴⁵ See J. Snell, *European Constitution Settlement: An Ever Closer Union*, “European Law Review” No 33/2008, p. 619.

⁴⁶ See J.H.H. Weiler, (Editorial) *Individuals and Rights: The Sour Grapes*, “European Journal of International Law” No 21/2010, p. 277.

⁴⁷ See J. Habermas, *Bringing the Integration of Citizens into Line with Integration of the State*, “European Law Journal” No 18/2012, p. 486.

⁴⁸ See A. Schrauwen, *European Union Citizenship in the Treaty of Lisbon: Any Change at All*, “Maastricht Journal of European and Comparative Law” 2008, No. 15, p. 55.

⁴⁹ Ibidem.

⁵⁰ Ibidem.

only.⁵¹ This extends the EU Citizenship to the whole Area of Freedom, Security and Justice including former Third Pillar.⁵² Arguably, “Security as a matter of Union citizens gets a more solid Treaty basis.”⁵³ The Lisbon Treaty also brings a fusion of the citizenship and non-discrimination provisions. Part II of TFEU is named “Non-discrimination and Citizenship” uniting different grounds on the basis of Article 13 and on the basis of nationality.

The Constitutional Treaty, Article I.1, declared that it “reflect(ed) the will of the citizens and the states of Europe to build a common future’ The Lisbon Treaty drops the reference to a Citizens” Union, using instead the Maastricht formulation, “an ever closer Union among the people of Europe.” Again, putting together citizens and the states on the equal footing in the Constitutional text had a highly symbolic significance that underlined the centrality of the citizen in the Union’s future.

However, the centrality of the citizens transpires implicitly from the different parts of the Lisbon Treaty. The very new mechanism is the citizens’ initiative, allowing them to participate directly in the political debate. For example, Article 9 of the TEU pinpoints the participation of citizens in the political debate, Article 10 refers to citizens being directly represented at the Union level and in the European Parliament, Article 14 states that European Parliament “shall be composed of the of representatives of the Union’s citizens.”⁵⁴ Those tools should appeal to the EU citizens if they could get over the general mistrust in the European Construction. In addition, in order to enhance transparency within the Union, access to documents has been broadened and offered to other EU entities, for example, the European Central Bank or European Investment Bank and other ‘bodies, offices and agencies.

As a final remark, we can sum up the Schrauwen’s point that although the changes on citizenship in the Lisbon Treaty are merely cosmetic, overall however the Lisbon Treaty manifests the signs of re-conceptualisation of citizenship towards more citizens’ centred approach. She also makes a valid point that merging the pillars extended citizenship to the Area of Freedom Security and Justice made it more duty oriented as opposed to taking the rights-based approach so far adopted.⁵⁵ Let’s hope that this new angle would make European Citizens aware about the significance that European Citizenship brings.

⁵¹ X (Editorial Comments), *Two-speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?*, “Common Market Law Review” 2008, No. 45, p. 1–11.

⁵² Ibidem.

⁵³ Ibidem; A. Schrauwen, op.cit., p. 55.

⁵⁴ Ibidem.

⁵⁵ See A. Schrauwen, op.cit., p. 58.

Unfortunately, the hopes to expand the citizenship of the Union to cover all people living and working within the EU, have not been brought to fruition although some Articles related to discrimination could arguably apply to them. In addition, discrimination could also create a bridge for further development that would eventually expand Citizenship to cover all Europe's people.

And, as the history of European Integration shows, it is up to the Court of Justice to take forward, to expand or to interpret those articles, in order to make them meaningful. As mentioned, the CJEU's logic is not conditioned by what the Member States agreed and its judgments could give a real impulse and a direction for the further development of the concept of Citizenship.

In fact, Shaw observed that "Citizenship of the Union is a "dynamic patchwork", an evolutionary concept open to change."⁵⁶ Also, Article 25 TFEU leaves the door open for the future review of the citizenship provisions.⁵⁷

As predicted, the CJEU has manifested its judicial activism in the recent decisions in *Zambrano*, *Rottmann*, *McCarthy* and most recently in *Dereci*.⁵⁸ Part of the significance of those cases lies in the fact that they have once again opened up the debate on Citizenship at the European forum. The CJEU, in *Rottmann*, marks a departure from what was well established principle of EC/EU law that EU law does not apply to "purely internal situations."⁵⁹

The recent decisions bring a new approach. The Court of Justice of EU decided two cases on EU Citizenship, *Rottmann* and *Zambrano* without any acknowledgment of the supposed necessity for a "cross-border element."⁶⁰ The Court declared that in the application of Article 20 TFEU there is

⁵⁶ See J. Shaw, *The Interpretation of European Union Citizenship*, "Modern Law Review" 1998, No. 61, p. 293.

⁵⁷ See K. Rostek, G. Davis, *The Impact of Union Citizenship on national Citizenship Policies*, "European Integration on line papers" 2006, p. 10 at <http://eiop.orat/eiop/article/index.php> [last visited 21.05.2012]. See also R. Morris, *European Citizenship: Cross-Border Relevance, Deliberate Fraud and Proportionate Responses to Potential Statelessness*, "European Public Law" 2011, No. 17, p. 417–435.

⁵⁸ See C-135/08 *Rottmann v. Freistaat Bayern* [2010] ECR I-1449; C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011]; C-434/09 *McCarthy v. Secretary of State* [2011]; C-256/11 *Dereci v Bundesministerium für Inneres* [2011].

⁵⁹ 'Purely internal situations', C-33/74 *Johannes Maria van Binsbergen v. Bestuur van Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 or alter in C-115/78J. *Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399.

⁶⁰ See D. Kochenov, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, "Columbia Journal of European Law" 2011, nr 18(1), p. 56–109.

no need for a cross-border element, it is enough that the national measure has an effect of “depriving citizens of the Union of the genuine enjoyment of the substance” of their rights. The implications of this proposition are very interesting, putting in perspective the status of European Citizenship and its well-delimited complementary nature.

Apart from extending the scope of application of EC Law both *ratione personae* and *ratione materiae*, *Rottmann* opens up the prospect of a wider spectrum of European Citizenship, citizenship standing alone, without the preconditions for the nationality of the Member State or active participation in the labour market. Would this development open the gates for third country nationals who live and work in the EU to rely on it in future? The *McCarthy* decision seems to reconcile the old approach with the new. But, referring to the finding in *Schempp*, the Court states that even if a citizen of the Union has not made use of their right to freedom of movement that does not mean that their situation should be considered purely internal.⁶¹ However, it also points out that EU Citizens cannot rely on Article 21 TFEU for a right to reside in their own country. The Court reaffirmed a similar position in its *Dereci* decision.⁶² At least for the time being, the Court has narrowed down its findings in *Zambrano* and continues to hide behind a cautious approach towards widening a scope of the EU Citizenship. Nonetheless, a seed has been planted, as Hinarejos rightly observes, and we cannot predict what the future holds.⁶³

Undoubtedly, the recent debate on citizenship in light of these four judgments supports our thesis that the notion becomes more and more relevant to the people of Europe. Since 2000 we could observe the gradual detachment in the Court's decisions from the market rules in favour of the citizens' rights-centred approach. Rights resuscitate the interest of the European audience. Rights make them want to belong to Europe.

We distinguish three steps, up to now, in the development of the concept of citizenship, corresponding to the objectives of successive Treaties and the different visions of Europe prevailing at the time of each Treaty. All three show the progressive evolution of the concept. First, the

⁶¹ C-404/03 *Schempp*, [2005] ECR I-6421, also on that point Tryfonidou A., *Redefining the Outer Boundaries of EC Law, The Zambrano and McCarthy Rulings*, 18(3) *European Public Law* 493–526 (2012).

⁶² D. Kochenov, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, “European Law Journal” 2013, No. 19, p. 502–516.

⁶³ See A. Hinarejos, *Citizenship of the EU: Clarifying “Genuine Enjoyment of the Substance” of Citizenship Rights*, “Cambridge Law Journal” 2012, No. 71, p. 279–282; S. Adam, P. Van Elsuwege, *Citizenship Rights and the Federal Balance between the European Union and its Member States: Comment on Dereci*, “European Law Review” 2012, No. 37, p. 176–190.

scope of application of the Treaty was limited to those who contributed to European Integration (the cross-border element). Second, the concept of citizenship was introduced by the Maastricht Treaty but was dependent on the possession of nationality of one of Member States. The third step, developed by the Court in the above four judgments, leaves the door open for a further expansion of the concept which may come to embrace all the people of Europe and not only EU nationals.

2.5. The European Identity and a Sense of Belonging

According to Kurpas, the removal of symbols from the Lisbon Treaty is an indication that the political “fathers of Europe” have abandoned the idea of giving Europe “social legitimacy or emotional attachment.” He argues that this is a major deficiency of the Lisbon Treaty, one that will have considerable impact on the future integration process.⁶⁴

This approach is not very convincing. The omission of the “emotional attachment” in Kurpas’ view makes of the Lisbon Treaty an important step backwards, blurring the concept of European identity. Certainly, the Union has never had a strongly developed concept of European identity; the Constitutional Treaty would have invested it with some content, but the Lisbon Treaty re-established the previous *status quo*.

But again this is true only if identity is thought of in a traditional manner, as developing from constitutional values. Could European identity follow a different path? Could it develop outside of a constitutional framework? The sense of identity is closely associated with citizenship and the latter usually originates from a Constitution. Are there any other options? Normative theories usually consider citizenship as membership in a political community. Hartnell argues that one of the components of such a membership is a notion of belonging. “Most social scientists view belonging through the optic of culture and identity.”⁶⁵ “Belonging is not limited to either the nation or the state for its frame of reference, but incorporates social and psychological dimensions as well.”⁶⁶

European Identity had its chance to follow its own path and to arise from the EC achievements and the expansion of the Union. It could also develop on the basis of Article 20 TFEU which endowed the EU nationals with Union Citizenship. The ECJ held that: “Union Citizenship is

⁶⁴ See S. Kurpas, *The Treaty of Lisbon...*, op.cit.; see also S. Kurpas, J. Schönlaue, *Deadlock Avoided, But Sense of Mission Lost? The Enlarged EU and its Uncertain Constitution*, “CEPS Policy Brief” 2006, No. 92.

⁶⁵ See H. Hartnell, op.cit., p. 333.

⁶⁶ *Ibidem*, p. 336.

destined to be the fundamental status of a national of the Member States.”⁶⁷ This is a very authoritative statement, underlining the importance of the concept that goes far beyond the dryness of Articles in the Treaty. The Treaty itself clearly indicated that European Citizenship could only operate in a limited frame. Article 20 TFEU states: “Union Citizenship is complementary to national citizenship and shall not replace it.” In that way, the Treaty established the hierarchy situating European Citizenship as an additional element to national citizenship where the latter is the condition for the former. Within its limited margins, the concept of citizenship faced some obstacles to its development. First, its content, fleshed out by the ECJ and the extensive legal literature, related almost exclusively to the position of a national of the EU in another “Member State.”⁶⁸ Only very recently has the question of a citizen of the EU who is residing and working in his own country been raised before the CJEU. Secondly, “much of the scholarly work has addressed Union Citizenship in a manner which divorces it almost completely from the national context in which it is most strongly rooted.”⁶⁹ The extensive scholarship mainly considers Union Citizenship in the context of the dynamics of European integration.⁷⁰ Thus, the concept seems to refer only to the mobile citizens protecting their rights in another Member State, leaving untouched “the lives of the majority of static citizens.”⁷¹ Despite the abundant literature the Union Citizenship is still not clearly defined, but misunderstood and wrongly perceived. As a result, European Identity has had some problems in relying on this concept for its evolution.

The hard question, in light of these patchy developments, is how to instil a sense of belonging to Europe. The tie to Europe should normally progress through comprehensive citizenship from which identity should flow, building towards an embryonic sense of European patriotism. Unsurprisingly, given the underdeveloped concept of European identity, the concept of European patriotism is almost non-existent, since the latter should be a corollary of the former.

Kumm argues that if the EU wants to fulfil its new redefined tasks and to engage into deeper integration entailing taking decisions on sensitive

⁶⁷ See C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* [2001] ECR I-6193, para. 31.

⁶⁸ See F. Jacobs, *Citizenship of the European Union: A Legal Analysis*, “European Law Journal” 2007, No. 13, p. 591–610; J. Shaw, *The Transformation of Citizenship in the European Union*, Cambridge 2007, chapter 3.

⁶⁹ See A. Lansbergen and, J. Shaw, *op.cit.*, p. 2.

⁷⁰ *Ibidem*, p. 3.

⁷¹ *Ibidem*, p. 2.

issues, such as the security of its citizens, it needs to have a robust European identity and attached to it, a sense of patriotism.⁷² According to him, a deeply integrated polity necessitates a strong European Identity and a pronounced sense of patriotism. He is convinced that it is not merely an option for Europe, it is an “absolute must” a pre-condition for “ever closer Union.” Without a meaningful concept of European identity, “European Citizens will continue to oscillate between fickle support, disinterest, and national recalcitrance in their attitudes toward the European Union.”⁷³ The Constitutional Treaty could have been an opportunity to fill with substance the meaning of European Citizenship and also European identity. It embedded, to some extent, a concept of common European identity with the potential to evolve further into constitutional patriotism.⁷⁴ The Preamble of the Constitutional Treaty imposed directions for the future integration, underlining at several points the importance of “being united.” Thus, the idea of “unity” is encountered many times in the text, for example: united to pursue the common goals; “united” in sense of involving everybody, including the weakest and the most deprived; “united” through the idea of solidarity between generations. And, the concluding statement in the preamble, “united in diversity” is quintessential, highly symbolic, sending a strong message, a motto of the Union opening and ending a Constitutional Treaty.

However, the idea of “united in diversity” has not been dropped from the current Treaty and “unity” has been translated into solidarity and respect for diversity of interests. Nor have the common values, such as human rights democracy and the rule of law disappeared. The observance of human rights, democracy and the rule of law is still there and it becomes a binding element, the common ground, or common denominator for all Europeans. Nonetheless, the combination of preamble with values could have become constitutional commitments if embedded in the Constitutional Treaty, and as such have lost something of their weight under the Treaty arrangement.⁷⁵

⁷² See M. Kumm, *Why Europeans will Not Embrace Constitutional Patriotism*, “International Journal of Constitutional Law” 2008, No. 6, p. 117–136.

⁷³ *Ibidem*, p. 119.

⁷⁴ See J. Habermas, *Why Europe Needs a Constitution?* In: *Developing a Constitution for Europe*, eds. E.O. Eriksen, J.E. Posselt, A.J. Menéndez, London 2004, p. 19–35; J. Habermas, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship, The Inclusion of the Other*, Cambridge (Mass.) 1998, p. 105–127.

⁷⁵ See M. Kumm, *op.cit.*, p. 123: On the other hand, Kumm identifies some valid reasons why those values could not provide a basis for the development of concept of European identity or patriotism. The universal values are not proper to Europe,

In the Constitutional Treaty, they were projected in a progressive manner connecting past with the future.⁷⁶ The continuity or the unity of times seems to be the key, the basis for development of a sense of patriotism. European citizens united through sharing the same origin, the same heritage since “they take origin from “the cultural, religious and humanist inheritance.” Therefore universal values are linked to the particular culture and having a particular history from which this community has developed. And again, an underlying “unity” is invoked, a sense of belonging inherited from the past and implicating the aspirations for the future. Sadurski notes that a legal tradition or constitutional tradition is the concept comparable with heritage, legacy or inheritance and the meaning of it is about “the hold of the past over the present.”⁷⁷ It is about “how the legal past is relevant to the legal present” and about “the power of the past-in-the-presence.”⁷⁸ The question arises whether the bumpy past and uneven progress in development of European Identity serve as a binding element for the future. Could the “past” that did not inspire people of Europe become, in Krygier’s terms “a factor of transmission of the past into the present?”⁷⁹ Certainly, there is an element of continuity that could proliferate in the future: the “common path” that makes the EU citizens involved, albeit often in disagreement.

The binding element lies with the common values and principles borrowed from the legal traditions of the Member States. Although all those articulated values and principles are not new, the combination of them has created an innovative configuration and made the Union unique and distinctive. The Constitutional Treaty laid down the emotional ground to which Union citizens could become gradually attached. Kumm suggested that the preamble offered a flexible invitation to Europeans to make their own sense of the European identity “by engaging with it, to fill with the substance and to make it real.”⁸⁰

It appears clear that the rejection of the Constitutional Treaty was certainly a lost opportunity for evolving a meaningful concept of

democracy, rights, the rule of law are shared by democratic society all over the world and since they are not unique to Europe cannot provide a cohesive factor that only Europeans could be identified with. He also points out at the diversity of interpretation throughout Europe of those core values. He believes that the core values such as rights, democracy and human rights are insufficiently ‘thick’ in order to be cohesive for supranational organisation to overcome possible conflicts with thicker national identities.

⁷⁶ Ibidem, p. 127.

⁷⁷ M. Kumm, op.cit.; W. Sadurski, *European Constitutional Identity?...*, op.cit., p. 4.

⁷⁸ M. Krygier, *Law as Tradition*, “Law & Philosophy” 1986, No. 5, p. 237–262.

⁷⁹ Ibidem, p. 242.

⁸⁰ M. Kumm, op.cit., p. 127.

citizenship, European identity and possibly European patriotism. However, it is not necessarily true that they can only evolve under the Constitutional umbrella. The history of European integration has demonstrated on many occasions that Europe had its own way to move forward, often different from the national approach. Furthermore, the sense of belonging, the spirit of being European, of having common values and common aspirations for the future, should not be compromised by the failure of the Constitutional Treaty. From a certain angle, the Lisbon Treaty brings a more direct link between the treaty and the Citizens. This could be a basis to bolster the sense of belonging since the citizens themselves would be able to shape the dimension of citizenship and European identity. A perspective of wider and deeper citizens' participation in the Union's life could naturally bring a real sense of unity. For example, the common efforts to overcome the current economic crisis could support the idea of unity.

Nonetheless, academics are divided on role and centrality of European identity in the European Construction.

Paskalev, for example, expresses the view that a common identity is not a necessary element for a transnational democracy within the EU. From this angle what Europe needs, is for citizens to be able to take advantage of, fully participate in, and influence future political decisions, rather than being united by the common identity. He argues: 'Democracy is possible not only in a community of people united by identity or solidarity but also for the group of strangers, who have nothing in common but two interests: interests in common governance and interest in subjecting it to public criticism.'⁸¹ But, the 'legal tradition' that has been developed through different phases of the European integration would go against this argument.

Conclusion

Can we convince Eurosceptics that the project of European Integration has not yet fallen apart? Can we help European citizens believe in Europe in a time of economic crisis and the Eurozone deadlock? Can they be proud of being Europeans? It is not easy to overcome the general disbelief in Europe. But, we cannot ignore that throughout all vicissitudes along the path to European Integration the EU has developed its own 'legal

⁸¹ See V. Paskalev, *Lisbon Treaty and the Possibility of a European Network Democracy*, "EUI Working Papers Law" 2009, No. 20, p. 1.

tradition'. We share common values mainly borrowed from the Members States' constitutional traditions, but also evolving in a configuration proper to the Union. As EU citizens we are confronted with problems and crises, but we also enjoy the rights and advantages of being in the EU. An ordinary citizen is becoming more aware about his rights and increasingly concerned with the duties.

The Lisbon Treaty, although at first glance an impoverished "Constitution", provides a variety of mechanisms allowing further expansion towards a "Union of Citizens." It aims to cover diversity of national interests and allows to progress with a diverse speed. The sense of belonging to Europe progressively permeates in us being intermeshed with other components of the notion of citizenship generally conceived.

In conclusion there are a few points to be raised.

First, the failure to agree on the Constitutional Treaty with clearly pronounced Constitutional symbols does not impede the progress of the Constitutional Order which is unique to Europe. It is neither against the general conception of the Constitution as such, although it is different to the conventional approach generally accepted in particular in continental Europe. Citizenship of the Union or European Identity can develop under the current Treaty setting. They will develop within what Menéndez calls 'the narrative of constitutional synthesis' establishing a new constitutional tradition robust enough to allow further progress.

Secondly, the concepts of European Identity and European patriotism are not buried. The new avenue could be found in the adopted Treaty. The Treaty of Lisbon creates a more direct link between the EU and its citizens. It re-conceptualises Citizenship not through amendments, but rather through making the citizens central to political life of the Union. For this purpose, the Treaty provides some vehicles, including the citizens' initiative, new transparency rules and the greater role of national parliaments, and these will lend substance to the Citizenship of the Union. In particular the judgments issued in *Rottmann*, *Zambrano*, *McCarthy* and *Dereci* announce the new approach to Union Citizenship, citizenship standing alone although so far considered as an exception; citizenship based on rights.

Is the current Treaty robust enough to bring us out of the crisis and meet new challenges? For many years we have been convinced about the importance of unity, uniformity, *acquis communautaire* and the uniform application. It is exactly the opposite what this Treaty is about.

The Treaty clearly abandons the idea of uniformity. As many have noticed, this Treaty is more about exceptionalism and differentiation. It is understood that there can be "unity in diversity." Thus, the Lisbon

Treaty refers to the tools of flexibility, enhanced cooperation, opt-in, and opt out, all serving as emergency brakes. At the first glance, the Treaty may seem to divide rather than unite, but in the longer term unity through diversity may be the only way that 28 nations can have “an ever closer union.” Respecting the differences, understanding national needs and cherishing the common values: this is a “golden idea” that will bring European People together.