1. Introduction

The constitutional foundations of European integration have been subject to far-reaching transformation. The entry into force of the Lisbon Treaty on 1 December 2009 is a milestone in this ongoing journey. However, the reform of EU treaty law is just one, albeit important stone in the game. Focusing exclusively on it does not capture the whole picture, for it is the remarkable development of national constitutional law just as well which has shaped and conditioned the reform of European constitutional law. Both activities on Union and on Member State level were closely interrelated and may literally be told as a story of 'multilevel-constitutionalism in action[1]'.

A considerable part of today's national constitutional law relating to the EU has found its current shape in recent times. Many of the Central and Eastern European countries which joined the Union in 2004 and 2007 enacted new integration clauses providing the normative basis for EU membership[2]. However, founding members such as France and Germany as well as 'old' Member States such as Ireland and Portugal also passed important EU related amendments. Here, the provisions regulating the constitutional permeability[3] for supranational law were significantly reframed in the course of the Constitutional Treaty and the Lisbon Treaty[4]. This process of adjustment is continuing. In July 2010 the Austrian legislator passed a detailed constitutional amendment with regard to parliamentary rights in EU matters[5]. In Sweden, the modernization of EU related articles is expected to come into force on 1 January 2011 in the course of a major constitutional reform package[6]. In other countries, there are calls for the introduction of explicit EU-provisions in the constitution[7].

Alongside the textual evolution, national supreme jurisdictions all over Europe have delivered an unprecedented series of landmark-decisions within a relatively short framework of time. These decisions address key questions of European constitutionalism. Just recall the declaration of the Spanish Constitutional Tribunal (CT) on the Constitutional Treaty in 2004 with its already famous distinction between primacy

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1 I Pernice, 'The Treaty of Lisbon: Multilevel constitutionalism in action' (2009) 15 CJEL 349 ff.

2 See on that AE Kellermann et al (eds), *EU-Enlargement - The Constitutional Impact at EU and National Level* (The Hague, TMC Asser Press, 2001); id et al (eds), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries* (The Hague, TMC Asser Press, 2006); A Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, Cambridge University Press, 2005) 67–121; id, '"Europe" Articles in the Constitutions of Central and Eastern European Countries' (2005) 42 CMLRev 399 ff.

3 For the concept of constitutional permeability see M Wendel, *Permeabilität im europäischen Verfassungsrecht* (Tübingen, Mohr Siebeck, 2011, forthcoming), chapter 1.

4 For a systematic analysis of integration clauses in the constitutions of the EU Member States cf M Wendel, above n 3, chapter 4–11. For an overview see C Grabenwarter, 'National Constitutional Law Relating to the European Union' in A v Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd ed, Oxford, Hart, 2009) 83 ff.

5 Federal constitutional law, Austrian federal law gazette I No 57/2010.

6 Bill No 2009/10:80. The bill includes the introduction of a general clause indicating Sweden's Membership in the EU (future Chapter 1 § 10 of the Swedish 'Form of Government') as well as the reform of the existing integration clause (currently Chapter 10 § 5, in future Chapter 10 § 6). For information about the reform I would like to thank Carl Fredrik Bergström.

7 An example is Spain, where the Spanish State Council (*Consejo de Estado*) pleaded as early as 2006 for the introduction of a new and explicit 'Europe-clause' in its opinion of 16 February 2006, No E 1/2005, available at http://www.consejo-estado.es/pdf/modificaciones%20constitucion%20esp.pdf.

(*primacía*) and supremacy (*supremacía*)[8]. Similarly, the decision of the Polish CT on the accession treaty in 2005[9], the sugar-quota-cases in Hungary, Estonia and the Czech Republic from 2004 to 2006[10] and the Arrest-Warrant-decisions in Poland, Germany, Cyprus and the Czech Republic between 2005 and 2006 are worth noting[11]. Not to forget about the French *Conseil constitutionnel* (ConC) which, in 2004, delivered not only a leading case on the Constitutional Treaty[12], but also started an entirely new generation of decisions related to the transposition of directives[13], followed by the *Conseil d'Etat* (ConE) in its landmark decisions Arcelor in 2007[14] and Perreux in 2009[15]. Another major decision was delivered recently by the German Federal Constitutional Court (FCC). By order of 6 July 2010 in the case of Honeywell the FCC has set up important procedural and substantive limits to the exercise of ultra vires review in Germany[16].

When 'Lisbon' was brought before the courts, it was thus in the context of a highly dynamic evolution of European constitutional law, both on textual and jurisprudential level. Supreme jurisdictions of several EU Member States – old and new – took Lisbon as an opportunity to add major voices to this jurisprudential choir. It is not an exaggeration to claim that the three year Lisbon-saga has become one of the most important cross-border lines of jurisprudence in the history of European constitutionalism, not only in numbers but particularly in terms of substance.

The first decision was issued on 20 December 2007 by the French ConC[17], followed by the order of the Austrian Constitutional Court (CC) on 30 September 2008[18], the first judgment of the Czech CC on 26 November 2008[19], the judgment of the Latvian CC on 7 April 2009[20], the judgment of the German FCC on 30 June 2009[21], the second judgment of the Czech CC on 3 November 2009[22], the judgment of the Hungarian CC on 12 June 2010[23]

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8 Spanish CT, case 1/2004 *Constitutional Treaty*, declaration of 13 December 2004, with case notes of F Castillo de la Torre, (2005) 42 CMLRev 1169 ff, CB Schutte, (2005) 1 EuConst 281 ff and AC Becker (2005) EuR 353 ff.

9 Polish CT, case K 18/04 *Accession Treaty*, judgment of 11 May 2005. An English summary is available at: http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf. For comments see M Bainczyk and U Ernst EuR (2006) 247 ff; A Łazowski (2007) 3 EuConst 148 ff; S Biernat, 'Offene Staatlichkeit', in A v Bogdandy and PM Huber (eds), *Ius Publicum Europaeum* (vol 2, Heidelberg, CF Müller, 2008) § 21 Polen, para 45.

10 For a comparative analysis see A Albi, 'Ironies in human rights protection in the EU: pre-accession conditionality and post-accession conundrums' (2009) 15 ELJ 46, 52 ff; id, 'Supremacy of EC Law in the New Member States' (2007) 3 EuConst 25, 48 ff; W Sadurski, '"Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union' (2008) 14 ELJ 1, 6 ff.

11 See on that J Komárek, 'European constitutionalism and the European Arrest Warrant – in Search of the Limits of "Contrapunctual Principles"' (2007) 44 CMLRev 9, 16 ff; Z Kühn, 'The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance/Acceptance' (2007) 3 CYELP 99 ff.

12 French ConC, case 2004-505 DC *Constitutional Treaty*, decision of 19 November 2004. Cf the comments of G Carcassonne (2005) 1 EuConst 293 ff; F Chaltiel (2005) 484 RMC 5 ff; X Magnon (2005) 62 RFDC 329 ff; J Roux (2005) RDP 59 ff.

French ConC, case 2004-496 DC *E-Commerce*, decision of 10 June 2004. See the case notes of FC Mayer (2004) EuR 925 ff (also relating to the decision on the Constitutional Treaty); J Dutheil de la Rochère (2005) 42 CMLRev 859 ff; J-H Reestman (2005) 1 EuConst 302 ff.

13 French ConC, case 2006-540 DC *Information Society*, decision of 27 July 2006. For comments see F Chaltiel (2006) RFDC 837 ff and C Charpy (2007) 3 EuConst 436, 445 ff.

14 French CE, case 287110 Ass. *Arcelor*, decision of 8 February 2007, para 11. Cf the case notes of P Cassia (2007) RTDE 406 ff; F Chaltiel (2007) RMC 335 ff; X Magnon (2007) RFDA 578; A Levade (2007) RFDA 564, 577; C Charpy (2007) 3 EuConst 436, 440 f and 452 ff; FC Mayer and E Lenski and M Wendel (2008) EuR 63 ff.

15 French CE, case 298348 *Mme P*, decision of 30 October 2009, para 9; cf C Charpy (2010) 6 EuConst 123 ff and C Classen (2010) EuR 557 ff.

16 German FCC, case 2 BvR 2661/06 *Honeywell*, order of 6 July 2010, paras 58 ff. The decision was published not until 26 August 2010. An English translation is available at http://www.bundesverfassungsgericht.de/en/decisions/rs20100706_2bvr266106en.html.

17 French ConC, case 2007-560 DC *Treaty of Lisbon*, decision of 20 December 2007.

18 Austrian CC, case SV 2/08-3 et al *Treaty of Lisbon I,* order of 30 September 2008.

19 Czech CC, case Pl ÚS 19/08 *Treaty of Lisbon I*, judgment of 26 November 2008. An English translation is available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php. See the case note of P Bříza (2009) 5 EuConst 143 ff.

20 Latvian CC, case 2008-35-01 *Treaty of Lisbon*, judgment of 7 April 2009. An English translation is available at http://www.satv.tiesa.gov.lv/upload/judg_2008_35.htm.

21 German FCC, Case 2 BvE 2/08 et al Treaty of Lisbon, judgment of 30 June 2009, BVerfGE 123, 267 ff. An English translation by the FCC (final version) is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html. For the multitude of comments compare the 9 pages (sic) of bibliography in the first special issue of (2010) EuR 325–333. For mainly critical assessments see in particular the comments of D Thym in I Pernice and JM Beneyto Pérez (eds), *Europe's Constitutional Challenges in the Light of the Recent Case Law - Lisbon and Beyond* (Baden-Baden, Nomos, 2011); id, (2009) 46 CMLRev 1795 ff; R Bieber (2009) 5 EuConst 391 ff; C Schönberger (2009) 10 GLJ 1201 ff; D Halberstam and C Möllers (2009) 10 GLJ 1241 ff; C D Classen (2009) 64 JZ 881 ff; M Jestaedt (2009) 48 Der Staat 496 ff; U Everling (2010) EuR 91 ff; J Schwarze (2010) EuR 108 ff; C Tomuschat (2010) 70 ZaöRV 251 ff; T Eijsbouts (2010) 6 EuConst 199 ff. For more affirmative appraisals cf F Schorkopf (2009) 10 GLJ 1219 ff; D Grimm (2009) 5 EuConst 353 ff; KF Gärditz and C Hillgruber (2009) 64 JZ 872 ff.

22 Czech CC, case Pl ÚS 29/09 *Treaty of Lisbon II,* judgment of 3 November 2009. An English translation of the most important sections by J Komárek is contained in (2009) 6 EuConst 345 ff. For the perspective of a German legal scholar see I Ley (2010) 65 JZ 165 ff.

23 Hungarian CC, case 143/2010 (VII. 14.) *Treaty of Lisbon*, judgment of 12 July 2010. An English translation has not been rendered yet, except for a short press

and the second order of the Austrian CC the very same day[24]. The most recent Lisbon-decision so far was delivered by the Polish CT on 24 November 2010[25]. Another case is still pending before the Danish Supreme Court[26]. Alongside the decisions of national supreme jurisdictions, there were a number of important advisory opinions and reports, such as the opinion of the Dutch State Council of 12 September 2007 on the pre-Lisbon IGC mandate[27], the opinion of the Danish Ministry of Justice of 4 December 2007[28] and the report of the British House of Lords of 13 March 2008[29].

Although all of these decisions and opinions paved (or confirmed) the way for ratification in one way or another, they reveal significant differences in procedural as well as in substantial terms. This article will assess the Lisbon-jurisprudence from a comparative perspective[30]. After a brief preliminary reflection about how to compare (below II), the analysis addresses the procedural background and gives a general overview of the decisions (below III). It then tackles the substantial key issues for the future development of EU law which were raised by the decisions, particularly the demands of the supreme jurisdictions regarding democratic legitimacy of EU-authority (below IV) and the courts' claims of constitutional limits and judicial reservations (below V). A concluding remark aims at a question of judicial methodology as the Lisbon-decisions reveal a remarkable quality of comparative dialectics between the supreme jurisdictions of the Member States (below VI).

2. A preliminary word about comparison

Comparing must not be cherry picking. This is why the attempt of a comparative analysis is a challenge if not a difficult affair in the present context. Some of the judgments under review extend to almost epic sizes. The judgment of the German FCC alone consists of 421 paragraphs which add up to more than 140 pages in the original print version. These circumstances make it inevitable to focus on the essential lines of argument in order to compare. But how to separate the essential from the nonessential? The particular difficulty here lies not so much in length, but first and foremost in diversity and (deliberate) ambiguity.

Taking the Lisbon-judgment of the German FCC as an example, it soon becomes clear that this decision can hardly be described as a monolithic product of judicial reasoning made up all of a piece. It is, rather, an expression and reconciliation of a variety of dissonant voices within the FCC's Second Senate[31]. The above-mentioned Honeywell-decision is a prime example in this respect. While the majority of the FCC's Second

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review. For translation and important information I would like to thank Adél Holdampf and Attila Vincze.

24 Austrian CC, case SV 1/10-9 *Treaty of Lisbon II*, order of 12 June 2010.

25 Polish CT, case K 32/09 *Treaty of Lisbon*, judgment of 24 November 2010.

26 See on that JH Danielsen, 'One of Many National Constraints on European Integration: Section 20 of the Danish Constitution' (2010) 16 EPL 181, 190 f.

27 Dutch State Council, case W02.07.0254/II/E *Lisbon-Mandate*, opinion of 12 September 2007. An English translation is available at http://www.raadvanstate.nl/adviezen. For a comment see J Ziller, 'The Law and Politics of the Ratification of the Lisbon Treaty', in S Griller and J Ziller (eds), *The Lisbon Treaty* (Wien, Springer, 2008) 309, 319 ff.

28 Contrary to what it had said in respect to the Constitutional Treaty, the Danish Ministry of Justice qualified the Lisbon Treaty as a treaty which did not transfer competences in the sense of the constitutional integration clause (Article 20) and thus could be ratified like an ordinary treaty of public international law under Article 19 of the Danish constitution.

29 'The Treaty of Lisbon: an impact assessment', report of 13 March 2008, available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.

30 Apart from the almost uncountable number of comments on the decision of the German FCC, there are apparently only three contributions dealing with some of the Lisbon-decisions in a comparative perspective, cf J-H Reestman, 'The Franco-German Constitutional Divide' (2009) 5 EuConst 374 ff specifically concerning the aspect of constitutional identity; A Weber, 'Die Europäische Union unter Richtervorbehalt' (2010) 65 JZ 157 ff with a comment on the German Lisbon-decision in a broader comparative perspective and RU Krämer, 'Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court' in A Fischer-Lescano et al (eds) *The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives* (Bremen 2010) 11 ff. comparing the first decision of the Czech CC with the Lisbon-judgment of the German FCC.

31 An author has aptly compared the resulting multitude of interpretations with the Japanese film Rashomon. All characters have experienced or suffered the same incident, but recount it completely different. See FC Mayer, 'Rashomon in Karlsruhe – A Reflection on Democracy and Identity in the European Union', Jean Monnet Working Paper 5/10.