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Polish Plumbers, the EU Constitutional Treaty, and the Principle of the Welfare State

It is most intriguing to write on the principle of the welfare state in the Draft Treaty Establishing a Constitution for Europe (Constitutional Treaty) at a time when the French and Dutch people have rejected this treaty mostly because of lack of satisfactory social standards therein.^{*1}

In France, the central metaphor used in the ‘no’ campaign was the Polish plumber, a symbol of the cheap workforce coming from Eastern Europe and taking all of the French jobs away from the French people.^{*2} Thus, the French have feared that the Constitutional Treaty would further neo-liberal ends and allow a *laissez-faire* approach in the Central and Eastern European labour markets^{*3}, resulting in social dumping in competition with the so-called old member states.^{*4}

My aim is to demonstrate that the French and the Dutch were right in fearing changes in their welfare model but were mistaken to believe that the Constitutional Treaty would not foresee the principle of the welfare state.^{*5} Thus, my thesis is that the Treaty Establishing a Constitution for Europe contains a principle of the

¹ See J.-M. Dehousse, O. Lafontaine, P. Larrouturou, C. Salvi. Renégocier le traité, sinon l’Europe va dans le mur. – *Le Monde*, 13 May 2005. Available at: <http://www.lemonde.fr/web/article/0,1-0@2-3232,36-649409@51-641597,0.html>; C. Marsden. The Netherlands: decisive ‘no’ vote on European constitution. Available at: <http://www.wsws.org/articles/2005/jun2005/neth-j02.shtml> (01.08.2005).

² See T. Fuller. The Workplace: For French, cheap labor is a threat. – *International Herald Tribune*, 25 May 2005. Available at: <http://www.iht.com/articles/2005/05/24/business/workcol25.php> (01.08.2005).

³ See J.-M. Dehousse (Note 1).

⁴ See T. Fuller. In the East, many EU work rules don’t apply. – *International Herald Tribune*, 15 June 2005. Available at: <http://www.iht.com/articles/2005/06/14/news/europe.php> (01.08.2005).

⁵ Due to the vibrant discussion of the appropriateness of using tools and terms of constitutional law in analysing either the treaties establishing the European Union or, more specifically, the Constitutional Treaty, I will briefly disclose my position in this regard. I agree with the approach proposed by Ingolf Pernice, that the EU establishing treaties and/or Constitutional Treaty together with the national constitutions of the Member States form part of a multilevel constitutionalism, a sort of European constitutional order (*Verfassungsverbund*). See I. Pernice. Die neue Verfassung der Europäischen Union – ein historischer Fortschritt zu einem Europäischen Bundesstaat? – *Forum Constitutionis Europae* Spezial 1/03, p. 2. Available at: <http://www.whi-berlin.de/pernice.htm> (01.06.2005). The use of terms of constitutional law is thus justified. However, taking into account the terminology of the debate so far, I will also refer to the reformed European social model as an equivalent of the principle of the welfare state at the supranational level.

reformed welfare state, also known as the reformed European social model⁶, which is meant to influence and change the domestic welfare state models of the member states gradually. The most drastic changes are to be seen in countries that have adopted the corporatist welfare state model⁷ — including France and the Netherlands — as this model differs the most from the model advocated by the European Union.⁸

In exploring the text of the Constitutional Treaty with regard to the principle of the welfare state I will proceed from the premise that the principle can be textually expressed by making reference to its constitutive elements — the principles of equality, solidarity and non-discrimination; protection of economic, social, and cultural rights; as well as declarations of improvement of living conditions and the well-being of individuals — or references to the social market economy.

After having completed the general textual analysis, I will also take a brief look at the possible implications of the inclusion of the reformed European social model in the Constitutional Treaty for Estonian welfare state arrangements.

1. Textual references to the underlying social model

The text of the Constitutional Treaty provides us with an excellent opportunity to understand what the European Union has really become like. As a result of the simplification and clarification process administered by the European Convention, references to the European social model have also become much more visible, in contrast to the earlier confusing and blurred picture.

2. The preamble

As Andras Sajó has rightly pointed out, textual references to the social agenda of the European Union begin with the values and objectives of the European Union.⁹ To name just a few, reference is made to social justice and protection, solidarity between generations, protection of children's rights, and the combating of social exclusion and discrimination.¹⁰

I would, however, begin my analysis with the Preamble of the Constitutional Treaty, as not infrequently the most creative judicial constructions have been inspired by preambles of constitutional texts. The second and third recitals of the Preamble stipulate that the European venture is 'based on the universal value of equality and 'continues along the path of [...] progress and prosperity for the good of all its inhabitants, including the weakest and most deprived, [...] open to culture, learning and social progress, [...] it] wishes to strive for [...] solidarity.'

Although most of the principles and values referred to in the Preamble can be found in Title One of Part One of the Constitutional Treaty, the Preamble serves as a connecting point between the European integration thus far and the developments to be based on this treaty in the event it enters into force. Even if it might come as a surprise to some audiences that there is a distinct European social model enshrined in the European architecture, it is the result of decades of slow but firm progress in creating Social Europe. The reformed European social model, based on a delicate balance between the social end and competitiveness concerns, is the expression of the so-called Lisbon conclusions.¹¹ According to the conclusions, the main

⁶ See, for example, K. Aiginger. *Towards a New European Model of a Reformed Welfare State: An Alternative to the United States Model*. — *Economic Survey of Europe 2005* (1), pp. 105–115; M. Kleinman. *A European Welfare State? European Union Social Policy in Context*. Houndmills, Basingstoke, Hampshire, New York: Palgrave 2002, pp. 57–58.

⁷ See the landmark study of welfare state models by Gosta Esping-Andersen, where he differentiates between the corporatist, liberal, and social democratic model (as applied in the Nordic countries). See G. Esping-Andersen. *The Three Worlds of Welfare Capitalism*. Cambridge: Polity Press 1998, pp. 26–28; According to Ian Gough, France and the Netherlands both fall under the corporatist welfare model. See I. Gough. *Social Aspects of the European Model and Its Economic Consequences*. — W. Beck, L. van der Maesen, A. Walker (eds.). *The Social Quality of Europe*. The Hague, London, Boston: Kluwer Law International 1997, p. 80.

⁸ C. de la Porte. *Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?* — *European Law Journal*, March 2002 (8) 1, p. 49.

⁹ A. Sajó. *Social Rights: A Wide Agenda*. — *European Constitutional Law Review* 2005/1, p. 39.

¹⁰ Art. I-3 of the Constitutional Treaty.

¹¹ Presidency conclusions of the Lisbon European Council, 23–34 March 2000. Available at http://www.bologna-berlin2003.de/pdf/PRESIDENCY_CONCLUSIONS_Lissabon.pdf (28.08.2005).

aim of ‘becoming the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’ was to be achieved by ‘modernising the European social model, investing in people and combating social exclusion.’¹² Elsewhere in the Lisbon conclusions, the modernised European social model is also called an active and dynamic welfare state.¹³ It must be noted, however, that nothing new was invented at the Lisbon European Council — a modernised European social model supportive of economic growth and competitiveness was suggested as early as in 1996 by the Comité des Sages.¹⁴

What is behind the rhetoric of ‘progress and prosperity for the good of all its inhabitants, including the weakest and most deprived’? If the social and economic objectives collide, which set shall prevail? Is it a matter of case-by-case balancing, or does the principle of the active welfare state refer to the privileged status of social concerns in the European Union?

If the answer to this question has not been clear at all in the political process up to now¹⁵, the European Court of Justice seems to have made up its mind long ago. In the case of *Deutsche Telekom AG v. Lilli Schröder*¹⁶, the Court was faced with the need to interpret Art. 119 of the EC Treaty, a typically twofold Community law provision. The Court retained its earlier view and acknowledged that the principle of equal pay for men and women advances both economic and social objectives.¹⁷ The Court went on to state that ‘the Community [...] is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasised in the Preamble to the Treaty’.¹⁸ Referring to earlier case law and relying on the status of the equal treatment principle as a fundamental human right, the Court then stipulated that the economic aim is secondary to the social aim pursued by the same provision.¹⁹

While reference was not made to the Preamble of the Constitutional Treaty in this case, the way the Court has used it in striking a balance between the social and economic objectives reinforces once again the role of a preamble in the interpretation of the establishing treaties. I would like to stress, however, that it depends greatly on the interpreting court whether and, if at all, to which extent the directive principles stated in the Preamble are relied upon or considered proper for this purpose. A good example is the Preamble of the Constitution of the United States, which, albeit containing an express reference to promotion of ‘the general Welfare’, has been used neither alone nor in combination with the later added Fourteenth Amendment’s Equal Protection Clause to this effect.²⁰

It must be kept in mind, however, that the Constitutional Treaty differs from its predecessors in that it has a considerably longer introductory part including, besides the Preamble, values and objectives of the European Union.

Besides showing the value judgements of the ECJ Justices, the same case is also illustrative as to the status and rank of social rights in the European Union. I will analyse this aspect of the Schröder case later on, when I come to dealing with economic, social and cultural rights in the Constitutional Treaty.

3. The values of the Union

Besides the underlying value of human dignity, Art. I-2 of the Constitutional Treaty mentions the weighty values of equality and respect for human rights. These values are supposed to be common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

What is the role of the values of the EU as compared to the objectives of the same entity? There needs to be a reason behind mentioning more or less overlapping aims twice in a rational constitutional document.

¹² *Ibid.*, point 5 of the ‘Conclusions’.

¹³ *Ibid.*, point 24 of the ‘Conclusions’.

¹⁴ For a Europe of civic and social rights: report by the Comité des Sages, Brussels, October 1995 – February 1996 / rapporteur Jean-Baptiste de Foucauld; European Commission, Luxembourg: Office for Official Publications of the EC 1996, pp. 30–33.

¹⁵ If the Constitutional Treaty enters into force, the European Union will be bound by Art. III-117, which requires it to take into account the requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health in the definition and implementation of policies.

¹⁶ C-50/96 Judgement of the ECJ in the case *Deutsche Telekom AG v. Lilli Schröder*. – European Court Reports (2000), I-743.

¹⁷ Para. 53 of the Schröder Judgement.

¹⁸ Para. 55 of the Schröder Judgement.

¹⁹ Para. 57 of the Schröder Judgement.

²⁰ This does not mean that the litigants have not tried to achieve it. See E. Bussiere. *Disentitling the Poor: Constitutional Welfare Rights in the Supreme Court, 1965–1975*. Pennsylvania State University Press 1997.

Besides the solemn declaration of the common values dear to all Europeans, Article I-2 has a very pragmatic role to play — it serves as a filter for selection of prospective candidate countries^{*21} and as a tool for disciplining the member states from too great deviations from the European traditions with a threat of suspension of the membership rights of the member state concerned.^{*22}

Thus in this context the subtle reference to a welfare state or a welfare society in Article I-2 attains great importance. While necessitating that the candidate countries indeed move towards an active welfare state/welfare society model, if there has been no such commitment before, the effect of Articles I-2 and I-59 on the member states of the European Union is not so clear. The latter provision becomes applicable only in respect of a member state in danger of deviating considerably from the values enshrined in Art. I-2 of the Constitutional Treaty.

Is suspension of membership rights applicable with regard to a member state that is in disagreement with the chosen social model and pursues a classical *laissez-faire* approach instead, but does fulfil all the other requirements — democracy, rule of law, respect for civil and political human rights, etc.? For now, it can only be a matter of speculation what, if anything, the other member states and the European Union would do in such a situation, but it is clear that the solutions chosen would definitely reveal whether and how the listed values are ranked at a particular point of time.

Given the danger of social dumping of such a member state and the impact on the monetary and fiscal stability of the EU^{*23}, deviations from the principle of the welfare state or the European social model would definitely not go unnoticed.

4. The objectives and competences of the Union within the social sphere

With a view to their being a potential justification for extension of the European Union's competence by the Council^{*24}, the objectives of the European Union should be read carefully. In addition to confirming once again the commitment of the European Union to the reformed European social model^{*25}, the objectives of the EU reveal most clearly the nature of the chosen social model. Thus, Art. I-3 of the Constitutional Treaty makes references to 'a highly competitive social market economy, aiming at full employment and social progress' as well as 'combat [of] social exclusion and discrimination, and [promotion of] social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child' as well as 'social cohesion and solidarity between member states'.

Viewed through the prism of traditional European welfare regimes as identified by G. Esping-Andersen^{*26}, these objectives present a mix of characteristics of the liberal and the social democratic (i.e., the Nordic) model. Thus, full employment and equality between women and men have long been desirable ends of the Nordic welfare state model. Whereas the concept of social market economy seems to refer to the German corporatist welfare model, as German scholarship deems a social market economy an expression of the welfare clause of the Basic Law^{*27}, this does not constitute a sufficient ground for arguing that the corporatist male breadwinner model has been taken aboard in the great European venture. In fact, the objectives of fighting against social exclusion and combating gender inequalities seem to refer to a diametrically different approach. A commitment to 'free and undistorted competition' and 'a highly competitive economy' shows that the European Union is not aiming to interfere with free markets more than absolutely necessary for pursuing the social ends — this tilts the overall balance towards the Anglo-Saxon liberal model. This is obviously one of the reasons why the French and Dutch voters, traditionally accustomed to the corporatist welfare, felt uncomfortable with the Constitutional Treaty and decided to reject it on their respective referenda.

Although quantitative analysis does not seem to be proper at this point, it must be pointed out that social sphere commitments form two thirds of the enumerated objectives of the European Union. This corre-

²¹ See Art. I-58 of the Constitutional Treaty.

²² See Art. I-59 of the Constitutional Treaty.

²³ S. Regent. The open method of co-ordination: A New Supranational Form of Governance? – European Law Journal, April 2003 (9) 2, p. 192.

²⁴ See Art. I-18 of the Constitutional Treaty.

²⁵ See, *inter alia*, the reference to 'promotion of well-being of its peoples' in Art. I-3, para. 1 of the Constitutional Treaty.

²⁶ G. Esping-Andersen (Note 7), pp. 26–28.

²⁷ E. Benda, W. Maihofer, H.-J. Vogel (Hrsg.). Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, 2. Aufl. Berlin, New York: Walter de Gruyter Verlag 1995, p. 793.

sponds to the thesis of Goran Therborn that a state — in this case a polity — can be regarded as a welfare state or welfare society if the majority of its activities are dedicated to improvement of the social conditions therein.^{*28}

As it has been stipulated above, there is a direct link between the objectives and the sphere of competence of the EU. Thus, the flexibility clause enshrined in Art. I-18 of the Constitutional Treaty empowers the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, to adopt measures that are deemed necessary for achievement of any of the European Union objectives beyond the competencies of the EU. Even if taking such measures promises to be exceptional, it is still a means for interfering with the sovereignty of the member states. As could have been expected in this context, the objectives of the European Union have been formulated in broader and vaguer terms as the competencies — I restrict myself here to analysing the social objectives and the powers of the European Union in the social sphere only.

A fairly good example in this regard is the objective of promoting social justice and protection as well as solidarity between generations. While the objective sounds highly promising and raises the expectations of most vulnerable groups of society, the European Union does not have any remarkable competencies in the sphere of subsistence benefits or pensions besides the soft law tool of the open method of co-ordination.^{*29} The emphasis is rather on attaining a higher rate of employment.^{*30}

The open method of co-ordination plays an important role in the involvement of the European Union in matters of social policy and employment. It is far more than a mere soft law instrument. The EU institutions use this method to reach and influence areas where they have either no or not enough competencies, particularly in the social field.^{*31} As a result of the non-willingness of the member states to delegate more powers to the EU in the field of social policy and pressed by the necessities of balancing EU monetary and fiscal policy^{*32}, the European institutions intend to redesign national social models gradually through a non-binding multi-layer system^{*33} that is based on political authority.^{*34} The increasing usage of this new governance^{*35} approach in the social sphere raises a number of important issues, however.

Firstly, adding one more variable to the division of powers scheme alongside the principles of subsidiarity and flexibility blurs further the vertical division of competencies between the European Union and its member states^{*36} — member states can never be sure upon which question the European Union is taking action. Thus, there certainly is a problem with transparency and legal certainty at stake. This concern is supported by the fact that there have been examples of use of the open method of co-ordination without any basis in the establishing treaties already in the pre-Constitutional-Treaty time.^{*37}

Secondly, it has been pointed out that the supranational non-binding standard-setting in the social sphere in the form of the open method of co-ordination might curtail the meaning of social rights enshrined in the EU Charter of Fundamental Rights and Freedoms (Part II of the Constitutional Treaty), because if a social right would be violated by the use of the open method of co-ordination, there would be no means of redress available.^{*38}

Another link between the social objectives of the European Union and its policy competencies can be found in Art. III-117 of the Constitutional Treaty. By obliging the EU to take into account the social objectives in

²⁸ G. Esping-Andersen (Note 7), p. 20.

²⁹ See Art. III-210 of the Constitutional Treaty; N. Bernard. A 'New Governance' Approach to Economic Social and Cultural Rights in the EU. – T. Harvey, J. Kenner (eds.). *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*. Oxford, Portland, Oregon: Hart Publishing 2003, p. 248.

³⁰ Presidency Conclusions of the Stockholm European Council, 23–24 March 2001, point 9. Available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html (28.08.2005); Art. I-3 and Art. III-205 of the Constitutional Treaty.

³¹ See, generally, C. de la Porte (Note 8), pp. 38–58; D.M. Trubek, L.G. Trubek. *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*. – *European Law Journal*, May 2005 (11) 3, pp. 343–364.

³² S. Regent (Note 23).

³³ The EU Commission elaborates guidelines or targets for member states, then the member states report on a regular basis as to whether and how their policies comply with the EU-set goals in the field in question and receive non-binding feedback from the EU institutions, including suggestions on how to meet the targets better. At the same time, best practices of member states are being identified and promoted; member states are encouraged to give advice to each other. See C. de la Porte (Note 8), pp. 39–45.

³⁴ D.M. Trubek, L.G. Trubek (Note 31), p. 343.

³⁵ J. Scott, D.M. Trubek. *Mind the Gap: Law and New Approaches to Governance in the European Union*. – *European Law Journal* 2002 (8) 1, pp. 5–6.

³⁶ F.C. Mayer. *Competences — reloaded? The vertical division of powers in the EU and the new European Constitution*. – *International Journal of Constitutional Law*, May 2005 (3) 2–3: Special Issue, p. 507.

³⁷ C. de la Porte (Note 8), p. 52.

³⁸ N. Bernard (Note 29), p. 256.

defining and implementing any EU policies, the Constitutional Treaty establishes the principle of the welfare state in EU law similarly to domestic constitutions as a directive principle to the legislative and executive powers.^{*39}

5. The core of the principle of the welfare state: fundamental social rights and social citizenship

According to T. H. Marshall, social citizenship forms the core idea of a welfare state.^{*40} Thus, rights ranging from ‘the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society’^{*41}, which have found their way to the EU Charter of Fundamental Rights and Freedoms enshrined in Part II of the Constitutional Treaty, serve as a further piece of proof that the European Union is meant to adhere to the principle of the welfare state. However, given their limited legal effect and restrained wording, and a very slight chance of having standing before the ECJ in a social rights case, there is no reason to regard this catalogue of social rights as the triumph of a social Europe.

The provisions regulating application of the Charter rights^{*42}, including the fundamental social rights, clearly reflect the fears of the member states.

This is why the EU Charter of Fundamental Rights and Freedoms is legally binding for the European institutions, whereas member states have to follow the Charter only when they are implementing EU law.^{*43} The fear that the fundamental rights shall be a justification for extension of the EU’s competencies has been eliminated using double protection — both a very restrictive wording of the rights that concern a sphere where the EU has limited competencies and an express statement to this effect in Art. II-111. This is obviously why the wording of social welfare rights hardly promises anything besides the respect and recognition of the right as it has been defined by the laws of the Union and member states. On the other hand, it must be taken into account that careful wording and reference to the legislature is characteristic for these rights in general. At the same time, the employment rights are concisely stated and seem to produce a direct effect. In addition to confirming the thesis that the EU protects social rights only insofar as it has competencies, this indicates once again that the European Union’s social model is employment-market-centred.

Accordingly, it can be concluded that the European Union is protecting social rights instrumentally — those rights that serve the needs of the labour market directly are protected to a greater extent than those only relating to it. Another explanation could be that the European Union is respecting the *status quo* of division of powers in the social sphere. But keeping in mind the existence of the open method of co-ordination as such, it is hard to believe that the second explanation is correct.

The labour-market-centred rights’ protection seems to be a relic of the initial approach taken in European Union (then Community) social policy. If the free movement Chapter of the Constitutional Treaty seems to indicate that social privileges are limited to workers, the European Court of Justice has changed this in recent years using the concept of EU citizenship.^{*44} More specifically, the Court has used in the cases of *Martinez Sala* and *Grzelczyk* the ban of discrimination based on citizenship as a vehicle for complementing the modest set of EU social rights with full entitlement to the same social benefits as enjoyed by nationals of the member state where the EU citizen resides.^{*45} This move has definitely made EU social citizenship more meaningful.

While it can be learned from these cases that an entitlement for a social benefit prevails for persons who have exercised their right to free movement and hold EU citizenship, it is not so clear what would happen if a market freedom conflicts with a fundamental social right.

Whereas the Schröder case referred to above seems to suggest that a fundamental social right would prevail in such a case^{*46}, no generalisations can be made. First of all, it must be taken into account that the funda-

³⁹ In the case of the German Basic Law, the principle of the welfare state is justiciable only in exceptional cases. In routine case law it has been defined as a guiding principle for the legislative and executive branch. See E. Benda, W. Maihofer, H.-J. Vogel (Note 27), p. 760.

⁴⁰ G. Esping-Andersen (Note 7), p. 21.

⁴¹ T.H. Marshall’s definition of social rights as reproduced in M. Kleinman (Note 6), p. 192.

⁴² Art. II-111 through II-114.

⁴³ Art. II-111 of the Constitutional Treaty.

⁴⁴ Consider in this regard the judgements of the European Court of Justice in cases C-85/96 *Martinez Sala*. – European Court Reports (1998), I-2691 and C-184/99 *Grzelczyk*. – European Court Reports (2001), I-6193.

⁴⁵ While in the case of *Martinez Sala* there was a child-care benefit at stake, the *Grzelczyk* case concerned a subsistence benefit.

⁴⁶ Para. 57 of the Schröder Judgement, see Note 16, *supra*.

mental human right at stake in this case was equal treatment with regard to remuneration for men and women, a right at the core of the labour-market-related rights. Secondly, there was a provision with a dual aim at stake. So the measure was suitable for furthering both economic and social ends at the same time, and there was not necessarily a conflict at stake.

The Omega^{*47} case, a recent case involving a conflict between the principle of human dignity and free movement of services, explains quite adequately my doubts as to the success of social rights cases. In that case, the Court did not balance the principle of human dignity, the basis of all fundamental rights, with the freedom to provide services freely. Instead, it used human dignity as a mere public interest to substantiate the standard exception, public order. Although the public order concerns were declared legitimate this time, it must be kept in mind that, in that kind of scheme, all exceptions to the freedom to provide services, or any other basic European Union freedom, must be interpreted restrictively. Therefore, it is not clear at all whether a public interest of social inclusion would be weighty enough to prevail over a market freedom.

However, these questions shall be answered if and when the ECJ comes across a suitable case involving a genuine conflict between a market freedom and a fundamental social right. Then it shall also be clear whether the Court would let the social aims prevail and which kinds of techniques and justifications it would use for that purpose.

6. A brief glance at the Constitutional Treaty from the perspective of a member state

Based on the premise that the constitutional structures of member states and the European Union are interconnected^{*48}, it is only fair to bring in the other side of the coin — the member state perspective. I will do this from the perspective of Estonia.

From the point of view of Estonia, the most important question seems to be whether and how the welfare state model chosen by the European Union influences interpretation of the welfare state clause (e.g., the welfare state regime adopted) and the social rights anchored in the Constitution.

In a situation where the powers of the state are shared with the European Union in the fields of employment and social policy, the legislative and executive branch would be faced with the European social model in the form of directives or the open method of co-ordination in any case and would have to try to reconcile the domestic and the European dimension of the social policy. The role of courts would be different, however. The courts would be required to follow the Constitutional Treaty charter of social rights while applying EU law.^{*49} Application of EU law could range from application of acts of Parliament based on EU directives to guaranteeing equal rights to EU citizens.

Article 10 of the Constitution of the Republic of Estonia stipulates the principle of the welfare state as a basic principle of the Constitution. This is complemented by a fairly generous set of social rights. The domestic case law suggests that the requirements of the welfare state clause have been fulfilled if the state guarantees its inhabitants a possibility of meeting their basic needs.^{*50} It must be kept in mind that the state shall be liable to intervene only in cases where the family of the needy person is not able to support him.^{*51} These features seem to be characteristic of the liberal and corporatist model of Esping-Andersen respectively.

As the Constitutional Treaty has not entered into force yet and there are, understandably, no cases to analyse, I will construct a hypothetical situation based on the available initial information, however scarce. Thus, the European Union might consider the corporatist principle of subsidiarity of state involvement to be in direct conflict with its aim of combating social exclusion. In case this would be found in the open method of co-ordination process, the EU could only exert political pressure on Estonia to change its Constitution. If there were to be a conflicting provision of EU law, it would prevail over the Constitution under the principle of supremacy of EU law and the courts should apply European Union law, not the provision or principle of the Constitution conflicting with it.

⁴⁷ Judgement of the European Court of Justice in the case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*. – European Court Reports (2004), p. I-9609

⁴⁸ Consider the theory advocated by I. Pernice (Note 5).

⁴⁹ Art. II-111 of the Constitutional Treaty.

⁵⁰ Judgement of the Constitutional Review Chamber of the Supreme Court of Estonia of 21 January 2004 in case 3-4-1-7-03. – RT III 2004, 5, 45 (in Estonian).

⁵¹ *Ibid.*

Due to the limited duration of the nation's European Union membership, there have been no cases where the Supreme Court would have applied EU law instead of domestic laws so far. The only prospective case before the Supreme Court, where there was a chance to reinterpret a provision of the Constitution concerning freedom of association with political parties in accordance with provisions of the Treaty Establishing the European Community, was declared inadmissible on formal grounds.^{*52}

Section 1 of the Constitution of the Republic of Estonia Amendment Act^{*53}, which allows Estonia to belong to the European Union in accordance with the basic principles of the Constitution, provides another interesting insight into the matter. This provision seems to be the Estonian version of the *so lange* judgements of the German Constitutional Court.^{*54} It is not clear however, what the government would do if it were to find out that the European Union is violating the principle of the welfare state enshrined in the Constitution.

For now, it seems, there is no basis for such concerns. Given the very modest welfare regime chosen by the Republic of Estonia, it is quite probable that the effect of the reformed European social model on the Estonian welfare state arrangement will be to increase the level of protection provided for the state's inhabitants.

7. Conclusions

It must be concluded that the Constitutional Treaty is fully permeated with the idea of a reformed European social model or the principle of the active welfare state. References to this can be found throughout the whole Treaty. When comparing this approach with that of the domestic constitutions, the difference is visible. By and large, the latter texts only mention the welfare state principle, stipulate the principles of equal treatment and solidarity, or enumerate social rights. But in no case is reference made to so many features of a particular social model. Moreover, in the conservative discourse on constitutional law, it is not considered advisable to mention a particular economic model, like the social market economy, in the text of a constitution.^{*55}

Reasons for drafting such a detailed and transparent net of provisions concerning the European social model could be manifold. First of all, doing so could serve the purpose of mapping the existing arrangements. Secondly, the member states would like to have the European Union and the reformed European social model distinctive of it as visible as possible, in order not to accept something elusive or hidden with the Constitutional Treaty. Thirdly, in view of the frequent amendment of the existing establishing treaties, it could have been considered a normal state of things to make the treaty so detailed, given its being subject to changes to be made in the near future. Fourthly, in a context of a decade and a half of debates as to the decay of the welfare state as such, the drafters might have wanted to make sure that there would be some sort of welfare state model anchored in the Constitutional Treaty, so as to prevent the member states from a complete race to the bottom in the globalisation-driven regulative competition.

In addition to the technical question of why the principle was formulated in the treaty in this particular way, it is far more important to understand why the principle was included in the Constitutional Treaty at all. In my opinion, the most fundamental reason was the need to legitimise the European Union further. Besides the attempt to bring the European Union closer to the people through the concept of EU citizenship in the Maastricht Treaty, adding a set of fundamental rights and bringing in reference to citizens as the source of legitimacy of the EU throughout the Constitutional Treaty^{*56} was obviously considered not enough for achieving this aim. Something more meaningful and understandable to people was needed. And the principle of the welfare state is well-suited for that.

Another consideration, of a more pragmatic nature, might have been the concern that the European Monetary Union is most vulnerable to extensive welfare spending, as it could endanger the budgetary balance of the member state concerned.^{*57} Thus, the European Union needed to have some control over the social policy activities of the member states. With a view of the diversity of social models and unwillingness of the member states to delegate powers to the EU in the social sphere, the EU has ended up circumventing the obstacles in inventive ways — using broad policy guidelines in the form of EU values and objectives and the process of the open method of co-ordination.

⁵² Decision of Supreme Court *en banc* of 19 April 2005 in case 3-4-1-1-05. – RT III 2005, 13, 128 (in Estonian). See in particular the separate opinion of Justices J. Laffranque, T. Anton, P. Jerofejev, H. Kiris, I. Koolmeister, and H. Salmann.

⁵³ Eesti Vabariigi põhiseaduse täiendamise seadus. – RT 2003, 64, 429 (in Estonian).

⁵⁴ See BVerfGE 89, 155; BVerfGE 73, 339.

⁵⁵ See, for example, E. Benda, W. Maihofer, H.-J. Vogel (Note 27), p. 800.

⁵⁶ See, for example, Art. I-1 and Part II of the Constitutional Treaty.

⁵⁷ S. Regent (Note 23).

The reformed European social model contains elements of the social democratic and liberal models of Esping-Andersen. This is why it is probably going to be hard to accept for inhabitants of traditionally corporatist-regime countries, like France and the Netherlands.

In view of the minimalist welfare state regime that Estonia has chosen, it will definitely not need to make use of the protection clause of the Constitution of the Republic of Estonia Amendment Act in order to safeguard the principle of the welfare state against negative interference by the European Union during the validity of the Constitutional Treaty. This is, of course, if the Constitutional Treaty enters into force at all.