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### CONSTITUTIONALISM AS THE INSTRUMENT OF SECURITY AND SUSTAINABILITY IN EUROPEAN UNION LAW

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**Abstract.** The objective of the research is to define the development of constitutionalism and socio-cultural challenges related to the formation process of the European Union's legal identity. To achieve this goal, the concept of constitutionalism and its changes during the period of the European Union's development are examined. Tendencies of the European Union Member States' constitutionalism process are analysed and socio-cultural tensions of the formation of the contemporary European Union's legal identity, which arise between security and freedom, order and justice and government and society are identified. The article states that the sustainability of public democratic processes and the functioning of the European Union is possible only if the constitutional values are protected. The research also reveals that the further evolution of European constitutionalism and legal identity still needs to enhance the development of the rules which could influence the creation and activities of the independent, self-governing EU's political community.

**Keywords:** constitutionalism, liberal democracy, the European Union, identity, security, freedom, order, justice, government, society.

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## 1. Introduction

The research of European and the European Union (hereinafter – the EU) Member States' legal identity is actualized by the specific issues, which arise with development of the EU (Vaško, Abrhám 2015; Schröder, M.; Prause, G. 2015; Šttilis, Kliškauskas 2015; Balkytė, Tvaronavičienė 2010; Mačiulis, Tvaronavičienė 2013). According to the Communication of European Commission, *2020 Europe: A strategy for smart, sustainable and inclusive growth*, Europe will succeed only by working together. However, the deep assumptions of collaborative actions which establish the European legal identity and influence the creation of a unified law and order of the European Union lack consensual explicitness and it turns into an important challenge for jurisprudence. This situation was caused by two groups of factors: the multidimensional value-based nature of European identity (Inglehart & others 2000) and the diverse strategy and practice of the EU's Member States' in realization of social justice and sustainability relationship in the upholding of liberal democracy (Rudzkiene & Kanopka 2013).

The EU was born and developed during the period of peace, which has been the longest in Europe. Permanent efforts of peaceful activities, avoidance of conflicts and inner transformative power become the innate features of the EU. But this was only possible to achieve with the help of the United States. As M. Leonard (2005,

p. 5) emphasizes, 'For fifty years, under the cover of an American security blanket, Europe has been creating a 'community of democracy' and using its market size and the promise of engagement to reshape societies from the inside'. Therefore, Europeans are not interested in classic geo-politics when they talk to other countries. They start from the other end of the spectrum: What values underpin the State? What are its constitutional and regulatory frameworks means that it can completely transform the countries it come into contact with, instead of just skimming the surface (Leonard 2005, p. 9).

Over fifty years of peace in Europe, the EU's legal identity was developing not only through policy of constitutionalism and the protection of legality within its limits, but also through the development of the concept of constitution. The previous concept of constitution was changed by the concept of substantive constitution, which aims to define the principles of fair society (or political community) by constitutional means (Jarašiūnas 2003, p. 132).

Thus, the contemporary logic of the development of European legal identity is based on the establishment and implementation of the system of constitutionalism provisions. As W. Waluchow (2012) reminds, 'constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American Republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations'. This idea is continuously reconsidered and extended in the process of the development of the EU legal identity e.g. through the concept of multilevel constitutionalism and its aspects (Pernice 2001, Jiunn-Rong & Wen-Chen 2008, Scott 2013, Walker 2009 etc.).

However, the further success of the development of the EU legal identity within newly emerging multipolar world is a serious challenge to the European identity formation as well. This proposition is based on two insights:

1. 'The modern world-system ( ... ) has entered into a terminal crisis and ( ... ) the period of transition will be a terrible time of troubles, since the stakes of the transition are so high, the outcome so uncertain, and the ability of small inputs to affects the outcome so great' (Wallerstein 1999, p. 1).
2. '( ... ) the EU's response to the crisis of the Eurozone cannot be understood ( ... ) without adding the dimension of domestic politics, previously often ignored due to the absence of public interest in the EU' (Vilpišauskas 2013).

The formation of a multipolar world also changes the political rhetoric of some EU Member States, which has already expressed their focus on the development of illiberal democracy and separatist sentiments towards NATO (Lucasas 2014).

Therefore the goal of our research is to define the development of constitutionalism and socio-cultural challenges related to the formation process of the EU's legal identity. To achieve this goal, we have examined the concept of constitutionalism and its changes during the period of the EU's development. We also have analysed tendencies of the EU Member States' constitutionalism process and identified socio-cultural tensions of the formation of the contemporary EU's legal identity, which arise between security and freedom, order and justice and government and society. The research is based on the philosophical, comparative and systemic analysis of constitutionalism, politics and politics of law.

## **2. The concept of constitutionalism and its changes during the period of the EU's development**

According to G. Sartori (1962, p. 856), if in the 19th century the term 'constitution' as an over-all basic agreement was definite and clear, in the 20th century, few decades following the first World War, this term acquired two senses: a constitution as any 'state order' and constitutionalism as a specific 'content of guarantees'. According to the latter sense, it becomes improper to say that every state, which has a constitution, is a constitutional state.

The concept of constitutionalism is based on the perception of constitution as specific guarantees and on the idea that the political order is subject to a stable and independent of various (first of all political) changes

'higher law'. The constitutional system which relies on this idea is characterized by three essential features: (1) limited and accountable government, (2) adherence to the rule of law, and (3) protection of fundamental rights (O'Donohue 2013, Yeh & Chang 2008). However, as the analysis of international treaties and agreements indicates, these features may be found on broader than national level. Therefore, J. Rubinfeld (2002, p. 394-395) talks about international constitutionalism that has emerged over the last several decades: 'On this view, it is not particularly important that a constitution be itself the product of a national participatory political process, expressing that nation's fundamental values or commitments. What is important is that a constitution must recognize human rights, protect minorities, establish rule of law, and set up democratic institutions that will remain stable for the indefinite future. If national ratification of some kind is important in this story, it is important almost instrumentally'.

The trend of constitutionalism to transcend nation-state boundaries provides the basis for analysis of the EU (supranational) model of constitutionalism. In 1951 six European countries - Belgium, Luxembourg, the Netherlands, Italy, France, and West Germany - signed the *Treaty establishing European Coal and Steel Community* and in 1957 the *Treaties establishing the European Economic Community and the European Atomic Energy Community*. Since then, the new supranational entity – the EU – which emergence is based on the mentioned treaties, is still moving towards two interrelated directions: enlargement and integration. Currently the EU unites 28 Member States and has signed a number of association agreements with a few countries. Some of those countries aim to become the Member States of this supranational entity in the future.

However, the EU enlargement does not guarantee a successful integration process, which along with new memberships becomes more complicated not only because of the specifics of new Member States' national regimes, but also because of the ambiguous attitude of citizens (and their representatives) of the old Member States towards the EU's enlargement and the impact on the well-being of their own and of the whole society (Eurobarometer 2006). It might be assumed that this was one of the main reasons that led to the collapse of the European constitution draft.

On the other hand, according to I. Pernice (2001, p. 2), these days no state is able to guarantee the protection of freedom, peace, security and welfare of its citizens on its own: 'International crime and terrorism, global trade and financial markets, climate change and unlimited communication worldwide etc. need new structures of government'. Thus, despite the fact that the *Treaty establishing the Constitution for Europe* was rejected, the EU still remains an important guarantee of political and economic security and stability of its Member States. However, there is a reasonable question, is it still possible to speak about the EU constitutionalism? If so, what is typical to the EU constitutionalism model?

I. Pernice (2001, p. 4) believes, that European Constitution consists from (1) the primary EU law, laid down in the *Treaties on the European Union, The European Community and Euratom*, (2) the precedents or the law made by European judges in Luxembourg and (3) the national constitutions and the related jurisprudence of the national constitutional courts. This approach enables the scientist to talk about the multilevel European constitutionalism model where: 'The European constitution, thus, is, one legal system, composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent (...)' (Pernice 2001, p. 4). In addition, as the analysis of *Treaty on European Union (Lisbon Treaty)* and *Treaty on the Functioning of the EU* reveals, these treaties establish *inter alia* the essential ideas of constitutionalism: the central position of its citizens, transparency and democratic legitimacy of its actions, the role of national parliaments, the rule of law, voluntary membership, etc (Pernice 2009, p. 40).

These facts suggest that even if European constitutionalism as a political process confronts the issues of public acceptance, it remains a significant element of EU integration and identity on the legal level as far as by the legal means it protects and consolidates the EU's common values, and thus it leads to a better self-understanding of the EU's political community (Nolte 2005, p. 4) and coordination of common actions in order to achieve the political and economic security and stability of the EU as a supranational structure and its Member States.

### 3. Tendencies of the EU Member States' constitutionalism process

After the collapse of the Soviet Union the fourth wave<sup>1</sup> of the development of constitutions has risen and constitutionalism has been established in Central and Eastern European countries. Constitutions that were adopted during this period have such integral features of the constitutional regulation as attention to human values, democratic regulation of public affairs, constitutional control and new priorities of modern life. According to E. Jarašiūnas (2005, p. 28-29), although the constitutional regulation in each country differs, new constitutions also have common features: a detailed description of fundamental human rights and freedoms, constitutionally regulated political pluralism, activity of political parties, media, protection of ethnic minorities, market economy, and ownership, the idea of legal social secular state, principle of powers' separation, a European model of constitutional control, etc. During this period the trend of constitutional establishment of state's functions in international area has emerged. Thus, the text of constitution usually includes provisions concerning principles of state's foreign policy, solutions of international conflicts, war and peace issues, the relationship between national and international law, state powers to sign, ratify and denounce international treaties, etc. In addition, the state often participates in various international organizations and regional integration processes. Thus, new provisions, which enable national authorities to dispose some powers to supranational organizations, appear in the constitutions of the EU Member states (Jarašiūnas 2006, p. 22-23). However, constitutions of this period are also characterized by the emphasis of the continuity of statehood since almost all countries of the region suffered heavy losses of their sovereignty in their history (Jarašiūnas 2002, p. 52).

It is necessary to mention that the fourth wave of constitutionalism raised the role of a constitution in a political life, which had so long been dominated solely by political interests. From a philosophical point of view this means that the exclusivity (absoluteness) of postmodern interest groups is essentially limited to the system of constitutionalism provisions that is public (Mesonis 2003, p. 83-121).

More than a decade after the collapse of Soviet-totalitarian system thirteen new countries joined the EU<sup>2</sup>. The EU membership raises important constitutional issues of state's sovereignty. In other words, the question is whether the state retains the essential attributes of statehood after becoming the member of the EU. Moreover, taking into consideration the fact that a constitution is a fundamental law that reflects the core values of state's political community, it is necessary to investigate whether the EU membership is acceptable from the value-based point of view, whether it complies with the interests of the state and its citizens, and whether it is compatible with established norms and principles.

Basically all constitutions of the EU Member States' postulate the principles of state sovereignty, independence, and democracy. However, these principles did not prevent the states from becoming the EU members because the sovereignty and independence cannot be understood in an absolute sense and they cannot be linked to any *de facto* possible public powers possession. This perception, according to I. Jarukaitis (2011, p. 264), is denied by the concept of constitutionalism, which limits absolute powers of the government as well as by increasing international cooperation and states' inter-dependence. However, after becoming the member of the EU, the state retains the control over the most important national issues solution which ensures both its statehood and the solution of the issues concerning its membership in the union. Although the EU's powers are broad, they are defined by the EU functions and the EU remains based on the principle of its given powers. The membership in the EU does not limit national identity and common European identity, which is based on common values, it emerges next to it (Vadapalas 2012, p. 272).

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<sup>1</sup> There are four milestones ('waves') of the development of constitutional regulation distinguished in legal literature. The first wave covers the period from the XVIIIth century until the end of the 1st World War, the second wave covers the period between the two world wars, the third - the period from the 2nd World War until the end of XXth century and the fourth one covers the period from the end of XXth century until the present day.

<sup>2</sup> Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia in 2004, Bulgaria, Romania in 2007, Croatia in 2013.

Before entering the EU most states had to face the question of the constitutional basis of the EU membership<sup>3</sup>. For instance, in the case of the Republic of Lithuania it was necessary to answer the question whether the basics of membership in international organizations enshrined in the Article 136 of the Constitution are sufficient. The constitutional amendments, formulated according to this article, provided the basis for the Lithuania's membership in the EU. Thus, on 13th July, 2004 the *Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union* was adopted. The first part of this Act establishes the contractual referral of powers of the Lithuanian state to the EU in order to fulfil its responsibilities. The second part of this act states that the norms of European Union law are a constituent part of the legal system of the Republic of Lithuania and they are applied directly, while in the event of collision of legal norms, they have supremacy over the laws and other legal acts of the Republic of Lithuania. According to the Constitutional Court of the Republic of Lithuania, this Constitutional Act constitutionally approves Lithuania's membership in the European Union (Constitutional Court of the Republic of Lithuania, 2011).

Another important trend of constitutionalism development during the analysed period is an increasing role of constitutional control institutions in state's political life. Many European countries have chosen a European model of constitutional justice, which is characterized by the functioning of a specific monitoring body - the Constitutional Court. Constitutional justice institutions on the national and the EU levels occur in accordance with the following principle: although the EU's legal norms are integrated into legal systems of the EU Member States, the EU legal system remains independent. According to V. Vadapalas, this means that the national legislative bodies cannot abolish the EU law and the national courts cannot declare the EU law null and void. This is the prerogative of the European Court of Justice. This Court is empowered to supervise the legality of the EU legislature, to ensure that the Member States comply with the obligations arising from treaties and to interpret the EU law on the request of national courts (Vadapalas 2012, p. 271).

Thus, according to E. Jarašiūnas, the development of constitutionalism of each EU Member State is characterized by two trends: national constitutionalisation and harmonization of national legislation with EU law. At the same time, given these two national development trends, the future of a special constitutional protection authority - constitutional courts - is planned. Constitutional courts as the most important instruments of constitutionalisation of law should become the guardians of borders between national and the EU law (Jarašiūnas 2002, p. 58).

#### **4. Socio-cultural tensions of the formation of the contemporary EU's legal identity**

Constitutionalism is about the fundamental rules and the identity, or better the self-understanding, of any particular political community. In different ways, the self-understanding has become somewhat insecure over the past few years (Nolte 2005, p. 4). More than half a century (from 1950 Schuman Declaration) the EU's identity has been developed in the period of peace guaranteed by the East-West power symmetry, called the *Cold War*. However, now we have to admit there is no longer a bipolar world and 2014s may be regarded as the beginning of the functioning of the real multipolar world. Therefore, the retention policy and countries' security systems based on the symmetry of the bipolar world power are not working anymore. The leaders of non-democratic and illiberal states clearly understand that geopolitical situation has changed radically, that local wars become potentially possible again, and that it is possible to apply military methods, which have already been tried elsewhere, in Europe (Deutsche Welle 2014). This means that at any extent real hybrid nature local war in Europe and any inter-state political blackmail on this ground not only undermine the confidence in international law but also change the tensions between security and freedom, order and justice, government and society which were stabilized during long-term peace (especially after the fall of *Berlin wall*).

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<sup>3</sup> Some constitutions of the EU Member States include the provisions on the membership in international organizations. They are usually the states which have adopted these provisions when the supranational nature of the European Community has not been so clearly expressed and later those constitutions have not been altered for a variety of reasons. However, some EU states, whose constitutions include the basics of such formal membership in international organizations, added to their constitutions rules which directly refer to the EU membership while ratifying the Maastricht Treaty.

These tensions will inevitably get stronger in this multipolar world, where the interests of non-democratic, democratic and liberal democratic states constantly confront and this process will have a negative impact on social trust in law. It is necessary to examine the development of these eternal tensions from the viewpoint of constitutionalism since their dynamic is not only the context of the formation of the EU legal identity but also its consequences. In other words, the dynamic of tensions between security and freedom, order and justice, government and society are the shifting sources of socio-cultural challenges to the EU's legal identity as well as to constitutionalism.

#### **4.1. The tension between security and freedom**

Modern European identity is developing on the base of liberalism and democracy coalescence. Therefore, we can't imagine non-liberal democracy. However, the idea of non-liberal democracy is vital (Shvarz & Varkentin 2014), e.g. it was revitalised by the Russian Federation. The main contradiction between liberal democracy (i.e. constitutional liberalism) and democracy arises from the fact that the laws and their application do not meet the specific requirements of liberal constitutionalism (Elster & Slagstad 1997, p. 106), and the powers of the executive branch are concentrated without clear restrictions. Constitutional liberalism is based on the limitation of powers of the government while the democracy is based on their mobilization and implementation (Zakaria 2003, p. 105). Anti-liberal tendency also occurs when democracy is functioning, but its procedures are extended without tolerance strengthening and protection of legality within the requirements of liberal constitutionalism.

Thus, in terms of legal philosophy, the fundamental differences between liberal democracy and non-liberal democracy are related to ambiguous interpretations of the concept of 'freedom', which is not an object of present analysis. However, it is important to emphasize that freedom is the fundamental basis of human spiritual and material existence, interiorisation of values and creative activities. Freedom is the possibility of decision and action, which is defined by the interaction of personal qualities and external conditions. Thus, the liberal democratic decision is always difficult since it contains two essential elements: the idea of equal freedom and the requirement of appropriate social conditions for its implementation. We emphasize the idea of equal freedom most often as if it was sufficient. However, the implementation of spontaneously equal freedom is not possible especially in cases where appropriate social conditions for its implementation are not under the complete control of the individuals themselves, nor their democratically formed state authorities.

Freedom is always related to security. A human being experiences larger or smaller insecurity tension permanently. According to B. Buzan (1997, p. 71), most threats to the individual appear from the fact that people are living in a social environment that generates the inevitable social, economic and political pressure. Security is understood as the condition of safety and protection against the risk, as trust in own knowledge. This also includes objective security, a sense of security (subjective security) and trust in security (absence of doubts). While examining security we also deal with various problems of values' protection. According to Maslow's hierarchy of needs is the second most important group of needs of individuals after biological and physiological needs such as air, food, drink, shelter etc. It seems that contemporary post-modern societies do not perceive aforementioned values anymore, because the latter European generations do not lack neither food nor security. However, the cynicism (Linkevičius 2014), the growing revisionist power as well as an attempt of the Russian Federation to dictate new international rules of the game (Lucas 2014) destroys the foundations of European security system.

The relationship between freedom and security is expressed by all human rights and freedoms. We have already accustomed the European practice of the extensive legal interpretation of human rights and freedoms under the conditions to of a rising life quality. This trend occurs without coincidence since during a relatively long period of peace in Europe and growing life quality European societies have established the conception of human rights as the standard of the relationship between social security and individual freedom. At the same time we forget the dependence of the relationship between freedom and security on social changes. Society tends to place more emphasis on the importance of social security and to limit the scope of individual freedoms in periods of war, social upheaval and the recovery of the life quality. And vice versa, in periods of growth of life quality society emphasizes tolerance and expands the scope of individual freedoms.

Governments and international organizations of the multipolar world are committed to international law differently. It is the fundamental cause of the successful formation of an international terrorist network and threats of war that come from some states. These facts not only potentially undermine the quality of social life, but also determine the formation of a new social security policy in the EU. Here the ordinary rhetoric of implementation of human rights is no longer sufficient to full protection of the achieved life quality. Indispensable prevention of attacks of international terrorist organizations and of hybrid threats of war will continue to make a negative impact on the extensive interpretation of human rights and freedoms in the future. This is a matter of concern of human rights defenders, as if it could be possible to maintain the same standards of individual freedom, which we used at the time of peaceful coexistence without appropriate preventive actions.

#### 4.2. The tension between order and justice

The decrease of social (communal) safety inevitably forces societies of the EU members to assess national law and order more strictly and to raise the question of justice more often. The societies of Eurozone, which have not recovered after the economic crisis in 2008 yet, observe the actions of politicians and bankers accurately because they already know that law as a sense of justice does not match the law as an order regulated by legislation. This situation is also proved by the EU's economic and security crisis, the depth of which in different EU Member States was determined by incomplete fulfilment of legal liability assumed by their national governments. In other words, the primary reason of any social crisis, which occurs under conditions of liberal democracy, most often arises from the crisis of the application of law. Therefore, the growing difference between justice and order can be considered as a deep source of distrust in law and politics. Therefore, the European Central Bank President Mario Draghi stresses that at an unacceptably high level of unemployment in the euro area as the biggest risk can be the cause of losing the confidence in the future (Kaupinis 2014).

H. Berman (1999, p. 41) was one of the first authors who revealed the distinction between justice and order in the development of the Western legal tradition. He emphasizes that perhaps '( ... ) failure to provide the fundamental changes in time and respond to them (are) determined by an internal contradiction which is rooted in the nature of the Western legal tradition, one purpose of which is to protect the order and the other - to implement justice. The procedure itself is understood as that which covers the inner tension between the need for change and the need to maintain stability. Justice ( ... ) involves the tension between individual rights and public welfare. The implementation of justice was proclaimed as the mechanistic ideal of law. ( ... ) The overthrow of previously existing law as order was justified by the revival of more fundamental law as justice'.

Justice is the concept of society's obligations to its members (or the concept of the common good) and its practical implementation. Public obligations are moral, social, political and legal ones. Obligations refer to what is appropriate and what must be done. We explain their performance from the normative approach: justice is the rules according to which freedom, rights and duties, the various material goods are distributed. Justice as rules of social distribution is subordinated to the concept of common good. This means that the distribution of freedoms, rights and duties or different material goods must comply with the concept of the common good. Justice can also be interpreted as a subjective feeling, which in most cases is formed through the implementation of social justice (allocation of resources).

Liberal democratic ideology relates to the concept of common good with the protection of human rights. The interaction of different ideologies at international politics level on the second half of the 20th century made the concept of social justice more relevant. 'Social justice first appeared in United Nations texts during the second half of the 1960s. ( ... ) Why was it that social justice appeared on the agenda of the United Nations by the end of the 1960s? ( ... ) The separation in the United Nations between human rights activities and the work being carried out to promote economic and social advancement was completed in the 1960s. Linked in the United Nations Charter, as they are in human experience, these two domains became identified with different disciplines (law for human rights, and economics for what the Charter refers to as 'social progress and better standards of life', which came to be called 'development'), and also with different political philosophies ( ... ), and with different clients and constituencies ( ... ). The promotion of economic and social advancement, or development,

became a global cause, strengthened by the provision of substantial resources and the creation of a number of funds and programmes' (United Nations 2006, p. 52-53).

However, the attitude of the EU's political elite towards social justice is weakened by the search of solutions of the EU's development and integration of its Member States issues. On the one hand, the practice of the social justice implementation in the spirit of neo-liberalism must comply with the principle of subsidiarity, but on the other hand, we need to pay attention to the fact that after the Second World War, European public law went ahead riding simultaneously two horses: the constitution as any 'State order', and constitutionalism as a specific 'content' of guarantees (Sartori 1962, pp. 856). Thus, in terms of constitutionalism, it is necessary to provide more legal guarantees for the protection of social justice within Central and Eastern European societies in order to strengthen the security of the EU. Therefore, according to the UN International Forum for Social Development, 'Notwithstanding the implied associations between social justice, redistributive justice, and justice as a more general concept, the fact is that the explicit commitment to social justice has seriously deteriorated; over the past decade, the expression has practically disappeared from the international lexicon and likely from the official language of most countries' (United Nations 2006, p. 13).

In order to assess social justice members of society there is a usage of two relatively independent - micro and macro - principles of justice that meet the individual and state levels. Micro justice is based on the attitude that distribution of social resources is best performed by the market (market justice). Macro justice is defined by the attitude that justice is better achieved when social resources are distributed within the social security system (political justice). The difference of the perception of these principles reflects the assessment of the relationship between market justice and political justice. At a national level, the elite of society exercises the collective choice, while at the micro level, each individual has to find his best suitable methods and strategies how to adapt oneself to changing market conditions. Studies have shown that people's choice to rely on a micro or macro principles of justice depends on their trust in the government (Burinskienė & Rudzkienė 2013).

The perception of social justice varies in different countries. The global network of social scientists WVS (World Values Survey) together with EVS (European Values Study) conducted a representative study of societies of 97 countries, which covers the period 1981-2007. The comparative analysis of this study data enables V. Rudzkienė and A. Kanopka (2013, p. 11-14) to maintain that the social justice was rated much better in the economically developed countries. On this basis they conclude: 'the success of the implementation of social justice is determined not as much by the society's development model as by the principles of its implementation, the compatibility of social policy with expectations of the population, historical-cultural experience of countries and traditions'.

The analysis of this study reveals that on the one hand, more successfully developing societies pay more attention to the purposeful pursuit of coherence between market justice and political justice, expressed in terms of the relevant legislation. In this case, emphasis is placed on liberal democratic model of the majority, which is based on the idea that 'the nation as unity' is involved in the government of a state and the search for social justice. But, on the other hand, in terms of functionality of civil society, more developed EU Member States tend to implement pluralist liberal democratic model, which is based on the idea that democracy is more efficient when a nation is involved in the government through competing interests of different social groups. In the latter case the EU Member States, transnational and supranational EU organisations play the role of political lobbying agents, the interactions of which at the EU legislative level often become enacted mistakes. According to M. Leonard (2005, p. 12), there are plenty of mistakes starting from absurd EU common agricultural policy and the weakness of the immigration policy ending with the absence of active international policy and excessive zeal in developing standards. The increase of the number of legislation, which meets interests of lobbying groups, promotes a gradual latent increase of the discrepancy of perception of legal order and social justice. This process is most often noticed when the difference reaches dangerously critical limits: increased tension between the perception of rights of the individual and understanding of the public welfare, or between the law as justice (the common good) and the law as an organised order (rules of distribution). Such a process has a negative impact on the concept of law: members of society feel that positive concept of law lacks justice.



The conscious differentiation of law as justice and law as organized order becomes the feature of the political elite in Western societies. However, the perception of the unity of order and justice is characteristic to the mentality of the Western societies, social groups and individuals that wish to base the legal system on it. Therefore, the strengthened legal power of state government (legal positivism) inevitably actualizes the dilemma between law as justice and law as order in society because the sense of justice of various social groups is different. This is one of the deepest sources of the rise and development of constitutionalism because different social groups hope that the drafting and adoption of the constitution in society will help to avoid this dilemma or at least to limit the pace of its emergence.

#### **4.3. The tension between government and society**

This tension is not relevant yet because the majority of EU citizens consider the social problems of their own or of their nation as more important. Many EU Member States still lack the awareness that even the strongest EU Member States remain extremely vulnerable in contemporary world without cooperation (Česnakas 2014).

The alienation of government and society or the absence of tension between government and society is as dangerous as its excessive growth. One of the main reasons of wrong public policy practices is inadequate assessment of existing situations, which are influenced by inappropriate and inadequate system of citizens' participation in decision-making (Bartle & Leunenberger 2006). On the one hand, EU citizens do not have any influence on the EU-wide political and legal decisions. On the other hand, they try to affect the EU Commission and Parliament very rarely. This situation is dangerous for the further functionality of the EU. As political commentators emphasize, the EU crisis will continue as long as the EU is conceived through the prism of internal policy and short-term national interests rather than through the common good, which allows to ensure economic prosperity and the creation of a favourable international environment (Česnakas 2014).

In fact, the EU is a child of political elite of Western Europe. In all cases the primary goal of the creation of the EU was the political one, which is being implemented mainly through economic means (Castells 2006, p. 326). On the other hand, the role of law was often narrowly perceived as the help to legalize political objectives and economic measures. In this context the European constitutionalism, which might be considered as an example of international constitutionalism, was developing respectively.

The concept of international constitutionalism was influenced by the emergence of liberal political philosophy. In its terms, at the end of XX century the modern representative, constitutional and secular democracy, based on a strong market economy was considered as the only one model of democratic government. 'However, the current triumph of liberal democracy did not eliminate alternatives ( ... ). The choice is basically between two versions of liberal democracy as between the two versions of equality' (Beneton 2009, p. 265). The first is so-called essential equality, which is based on a political recognition that humans are characterized by the same inherent dignity, which demands equality and freedom. The second version of equality is a procedural or formal: liberal democracy is identified with the rules of the game, procedures designed to give people who do not have a common principle and inherent goals, the opportunity to achieve personal goals (Beneton 2009, p. 331).

From the viewpoint of the concept of formal equality, we talk not about human equality but about the equality of citizens, which follows from the equality of opinions and the latter comes from the fact that there is no truth. Everyone has his or her own 'truth' and no one can claim to have the only Truth. Pluralism of approaches is proclaimed as an exceptional value. The use of political rights is simplified: 'Citizen is inherently autonomous, so there is no need to teach him; his choice has the same value, no matter by what it was dictated: a mind or an emotion; even the distribution according to the mind and emotions is pointless; it is not necessary to take into account constitutional forms because simple rules of the game are enough' (Beneton 2009, p. 331).

The essential political equality has completely different reasons. Equality of citizens is only an agreement, but this agreement complies with primary human equality and dignity the most. Entrenchment of the principle of democracy - granting votes to modest, unknown and not influential individuals - means that the version of

essential equality is related to the social position and its change towards the greater integration of society. According to P. Beneton (2009, p. 332), rules of the game are not sufficient to create a political society because many things depend on the actors' behaviour. He emphasises the irreplaceable value of social communication, political duties or rules of conduct while developing the essential equality and liberal democracy. Therefore, for instance, the distinction between liberal democracy and the people is very dangerous. However, the concept of international constitutionalism is not suitable for the European Union if we want to create a European identity.

We should pay attention to the fact that constitutionalism is also the practice of politics according to 'rules of the game', which insure effective restraints upon governmental and other political action, and the theory — explanatory and justificatory — of this practice (Friedrich 1968). Therefore, we need such 'rules of the game', which could lead to the development of the European nation. For instance, the US, French and German constitutional systems, with their respective characteristic judicial practice and cultures of interpretation — their constitutionalism — concern the same object: the rules concerning the working of an independent and self-governing political community of human beings and their fundamental rights. 'European constitutionalism', on the other hand, seems to embody something which is both more removed from 'the people' and more vague than national constitutional law. However, the development of European integration makes these differences disappear. This is not only due to the fact that Europe becomes similar to that of the state. This is also because the European states themselves and their characteristic constitutionalism are being transformed by the process of European integration. This is visible most clearly in the jurisprudence of European Courts in Strasbourg and Luxembourg. The jurisprudence of the European Court of Human Rights necessarily influences and harmonizes national human rights jurisprudence. To a lesser extent, similar developments are taking place in the area of state organization (Nolte 2005, p. 5). However, the European constitutionalism still needs to enhance the development of rules, which could influence the creation and activities of the independent, self-governing EU's political community and its fundamental rights.

## Conclusions

1. Constitutionalism is based on the perception of constitution as specific guarantees and on the idea that the political order is subject to a stable and independent of various changes 'higher law'. The constitutional system, which relies on this idea is characterized by three essential features: limited and accountable government, adherence to the rule of law, and protection of fundamental rights. These features are also revealed in the main EU documents, which are considered as the EU's constitutional basis, so we can reasonably talk about the EU's constitutionalism.

While the EU is still moving towards enlargement and integration, European constitutionalism as a political process confronts the issues of public acceptance. However, it remains a significant element of the EU integration and identity on the legal level.

2. Constitutions of the EU Member States were adopted at different stages of their development and reflect both the changes of constitutional regulation and changes of the attitude towards the constitution. The constitution has long been seen as a symbolic document which declares the basic principles and legitimizes the rule of law. Lately, it gradually forced the state to recognize its autonomy and supremacy as the only real pedestal of the state governed by the rule of law. States, faced with the question, what is the constitutional basis of the EU membership, mostly states supplemented their constitutions with norms which directly designate the EU membership.

Supremacy of the Constitution implies the establishment of its effective security mechanism. Therefore, one more trend of the development of constitutionalism is the increasing role of constitutional control of institutions in the political life. At the national level those institutions are constitutional courts (European model of constitutional justice) or courts of general jurisdiction (American model of constitutional justice), at the EU level this role is attributed to the European Court of Justice. In the twentieth century constitutional justice has become the most effective form of legal protection of a democratic regime established in the constitution.

3. The study of dynamic of security and freedom, order and justice and government and society tensions causes suggests that they will continue to influence the further formation of the EU's identity.

3.1. The growth of the tension between security and freedom within EU will be influenced by substantial actions of a multipolar world. For more than 50 years the EU and its legal identity has been developed under symmetry conditions of a bipolar world. They guaranteed the international security system of the European states. This enabled the EU Member States and the EU institutions to develop the judicial practice of extended interpretation of human rights and freedoms. Now the EU Member States' security situation is changing since it is affected by the multipolar world states' interactions. It will take uncertain transitional period until this fundamental international security change will be perceived by the EU Member States and the EU's supra-national judicial authorities. One thing is clear, that the practice of extended interpretation of the rights and freedoms does not meet the essential changes of the EU's security conditions anymore.

3.2. The growing tension between security and freedom will inevitably promote the strict interpretation of national law and order. It will also raise questions more often about justice and social justice in particular. Therefore, one can predict that in the near term, the classical tension between order and justice will increase in the EU. In this case the EU should purposefully enhance the legal regulation of immigration, employment and social protection, transparency in polity and business relations and prevention so that the potential growth of the tension between order and justice will not become a threat to the integrity of the EU.

3.3. The growing tensions between security and freedom, order and justice will inevitably actualize the tension between government and society not only in the EU Member States, but across the EU. From the viewpoint of the EU's legal identity, the relationship between the EU's government and society still functions very weak. The procedural version of equality was too exaggerated during the development of European constitutionalism and possible alternatives to liberal democracy were not noticed on time. This situation was determined by a permanent pursuit of the EU's supra-national institutions to avoid the discrimination phenomena and to respect multicultural conditions of the EU Member States functioning emphatically. Consequently, the development of European constitutionalism has accepted the liberal democracy as the rules of the game, which did not result in the creation of the European nation. From the long-term perspective and in the context of growing tensions between security and freedom, order and justice, the formal European constitutionalism does not meet the needs of the EU's internal integration. Therefore, the further evolution of European constitutionalism still needs to enhance the development of the rules, which could influence the creation and activities of the independent, self-governing EU's political community.

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