THE EUROPEAN UNION AFTER THE TREATY OF LISBON

Edited by
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This volume of essays casts light on the shape and future direction of the European Union in the wake of the Lisbon Treaty and highlights the incomplete nature of the reforms. Contributors analyse some of the most innovative and most controversial aspects of the Treaty, such as the role and nature of the EU Charter of Fundamental Rights and the relationship between the EU and the European Court of Human Rights. In addition, they reflect on the ongoing economic and financial crisis in the Eurozone, which has forced the EU Member States to reopen negotiations and update a number of aspects of the Lisbon 'settlement'. Together, the essays provide a variety of insights into some of the most crucial innovations introduced by the Lisbon Treaty and in the context of the adoption of the new European Financial Stability Mechanism.

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Introduction

D. ASHIAGBOR, N. COUNTOURIS AND I. LIANOS

> '[O]nly by force can the gates of Lisbon be opened, and as for these inevitable disasters promised us, should they ever occur, that is something for the future, and to torment us with what has yet to come is nothing more than madness and a deliberate provocation of misfortune'
>
> J. Saramago, *The History of the Siege of Lisbon*, 182

Upon its signing in December 2007, the long-anticipated Treaty of Lisbon was ceremoniously heralded as 'provid[ing] the Union with a stable and lasting institutional framework' and as requiring 'no change in the foreseeable future'.[1] There was undoubtedly a pervasive sense of relief and accomplishment amongst European leaders. The then–Portuguese Prime Minister Mr José Sócrates stated that 'what we are doing here is already part of History. History will remember this day as a day when new paths of hope were opened to the European ideal'.[2] European Commission President José Barroso was perhaps more cautious, but his speech on 'The European Union After the Lisbon Treaty' revealed a considerable degree of satisfaction with what had been achieved in Lisbon, which he summarised as 'improv[ing] the Union's capacity to pursue one of its central tasks: to shape globalization'.[3] This was surely a far cry from the overly optimistic comments made by Mr Giscard d'Estaing, who in 2002 had famously predicted that the EU Constitution would have served Europe 'for at least 50 years',[4] but enough to remind ourselves that

1 Council of the European Union, Presidency Conclusions – Brussels European Council (14 December 2007), 16616/1/07 REV 1, page 2. For a similarly optimistic view, cf. European Parliament, Report on the Treaty of Lisbon (2007/2286(INI)), page 10.

2 Speech given at the ceremony for the Signature of the Treaty of Lisbon, Lisbon, Portugal, 13 December 2007.

3 José Manuel Durão Barroso, 'The European Union after the Lisbon Treaty', 4th Joint Parliamentary Meeting on the Future of Europe, Brussels, 4 December 2007.

4 G. Parker and P. Wise, 'Giscard's "timeless" treaty left to wait in limbo Ratification Delay', 31 May 2005, *Financial Times*, p. 4.

the adoption of the Lisbon Treaty was celebrate with more fanfare than *fado*. Fado here refers to the rather sober, possibly sad Portuguese folk music. We would avoid any translation, certainly any literary one.

There were undoubtedly several good reasons for celebration and satisfaction. The EU was back in business after a long hiatus of Europessimism that had, rather unexpectedly,[5] afflicted the European project since the failed Dutch and French referendums on the 'European Constitution' in 2005. Since then, Europe had gone through a long 'anti-climax', euphemistically referred to as a 'period of reflection',[6] and, according to some well-informed commentators, through the worst political crisis of its fifty-year long history.[7] During this period, a considerable degree of soul-searching had taken place[8] and, in contrast with the comparatively more open and transparent – albeit certainly not flawless,[9] and ultimately sterile – process established by the European Convention, much of the debating started taking place once more behind closed doors, in markedly intergovernmental settings. Between September 2006 and June 2007, the 'Amato Group'[10] was given the task of revisiting the Constitution and

5 Just months before the 2005 referendums, in which the French and Dutch electorates voted against ratification of the draft Constitutional Treaty, a special issue of Eurobarometer reassured the European public, and its political elites, that 'A clear majority of European citizens believes the European Union must adopt a Constitution', with more than three-quarters of the French and Dutch electorates reportedly favouring its adoption. See Eurobarometer, 'The Future European Constitution – Flash EB 159' (February 2004), p. 21.

6 'Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe', European Council, 16 and 17 June 2005.

7 In an interview, Mr Jacques Delors noted that '*j'en viens à considérer . . . que cette crise est vraiment la plus grave*'; 'Keynote Contribution: Lost Leadership, Lost Vision, Lost Union?' Intervention orale de M. Jacques Delors diffusée par vidéo lors de la conférence organisée par TEPSA Helsinki, le 13 juin 2006, available at http://www.proyectos.cchs.csic.es/euroconstitution/library/working%20papers/Delors%202006.pdf.

8 For a review of the debate taking place during those crucial months, see the essays in the special issue of *Constellations*: 'Europe After the *Non*' (2006) Vol. 13(2), especially the essays by R. Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda', on pp. 151–164, R. Bellamy 'The European Constitution is Dead, Long Live European Constitutionalism', on pp. 181–189, and by G. De Búrca, 'The European Constitution Project after the Referenda', on pp. 205–217.

9 Paul Craig reminds us that 'some cast doubt on the participatory credentials of the Convention'; see P. Craig, *The Lisbon Treaty – Law Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010), 21, but also his comments on pp. 30–31.

10 A formally independent and technocratic body headed by the former Vice-President of the Convention on the Future of Europe, Mr Giuliano Amato, but with two European Commissioners appearing among its ranks.

stabilising its critical condition, keeping alive at least its essential organs and features. The slimmed-down version of the Treaty produced by the Group[11] remained an essentially academic exercise, partly because of the objection of a considerable number of Member States to the very concept of a 'mini treaty' and partly because it failed to address some of the hot issues which, perhaps divisively, the Constitution had at least sought to engage with, from the Union's legal personality to the status of the Charter of Fundamental Rights. In effect, this 'period of reflection' paved the way for a return to the more traditional and intergovernmental approach to Treaty reform, and in June 2007, soon after the confidence boost given by the so-called Berlin Declaration,[12] the Council adopted a fairly detailed mandate for the next Intergovernmental Conference,[13] which, among other things, clearly instructed the drafters within the IGC to purge from the new 'Reform Treaty' any item with even a distant 'constitutional' echo. The jury is still out as to whether the IGC mandate, and indeed the Lisbon Treaty as a whole, was a victory for the Eurosceptics or the Europhiles. It was, in all likelihood, a compromise solution – which in European discourse is almost inevitably a term synonymous with the word 'success'.

Much of the immediate debate that followed the adoption of the Lisbon Treaty focussed on the (rather sterile) question of whether the new Treaty was something like the old Constitution in disguise, or whether the IGC had indeed produced a novel institutional set-up, in keeping with the letter and spirit of its mandate.[14] This particular question was so politically charged that very few commentators succeeded in engaging with it impartially.[15] Perhaps predictably, Mr Giscard d'Estaing claimed that the new Treaty was in effect the Constitution in all but name,[16] whereas Mr Gordon Brown – then UK prime minister and at the opposite end of

11 Action Committee for European Democracy, 'A New Treaty and Supplementary Protocols' (Brussels, June 2007).

12 Declaration on the occasion of the fiftieth anniversary of the signature of the Treaty of Rome.

13 Council of the European Union, 'IGC 2007 Mandate' (Brussels, 26 June 2007), 11218/07.

14 For a review, see J. Roy and R. Domínguez (eds), *Lisbon Fado: The European Union under Reform* (University of Miami: Thomson-Shore, 2009), 11–17.

15 Amongst them J. Ziller, 'Comparing the Lisbon Treaty with the Constitutional Treaty: Transparency in Process vs. Transparency in Results' in J. Roy and R. Domínguez (eds), *Lisbon Fado: The European Union under Reform* (University of Miami: Thomson-Shore, 2009), 61.

16 http://www.telegraph.co.uk/news/worldnews/1556175/New-treaty-is-just-constitution-in-disguise.html.

the spectrum on EU integration – asserted it was fundamentally different. As Laurent Pech notes in Chapter 1 of this volume, the considerable similarities between the two documents should not have been a surprise. The challenges faced by the EU had not dramatically changed between 2002 and 2007, and one would expect any reform treaty to address them in similar way. Secondly, the 'reflections' taking place during the period of reflection had abundantly shown that the compromises (painfully) achieved in the Constitutional Treaty could not be easily unpacked or 'cherry-picked', as somebody's cherry was almost inevitably somebody else's Brussels sprout. Eventually this kind of discourse died away with the completion of the ratification process and the entry into force of the Treaty in December 2009. It is hardly a coincidence that early commentators and leading authorities such as Jean-Claude Piris and Paul Craig preferred to focus instead on the substance of the institutional, procedural and policy innovations contained in the new Treaty itself.[17] Such early scholarly works provided us with an invaluable assessment of the Treaty's impact on the Union's operational profile.[18] What emerged was a Treaty that, for all its assertiveness and innovative features, was strongly characterised by elements of incomplete contracting,[19] perhaps more so than any other EU treaty before it. Some of the most important and radical innovations introduced in Lisbon, from the reform of key institutions such as the Commission (discussed by Laurent Pech in Chapter 1) to the relationship of the EU with the European Convention on Human Rights (on which Tobias Lock offers a fascinating set of alternative options in Chapter 4), were effectively formulated in a rather loose and open-ended way, and their concrete implementation was effectively delegated to default rules or default institutional mechanisms.

This is precisely the context that triggered the main research question behind the Public Lectures Series, organised in 2010–2011 by the Centre for Law and Governance in Europe of the Faculty of Laws at UCL, which forms the backbone of the present publication. One of the central questions explored by all the chapters in the present book is the

17 P. Craig, *The Lisbon Treaty – Law Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010); J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge: Cambridge University Press, 2010).

18 And credit should be given to other early commentaries such as D. Chalmers et al., *European Union Law: Cases and Materials, 2nd ed.* (Cambridge: Cambridge University Press, 2010); T. Hartley, *The Foundations of European Union Law, 7th ed.* (Oxford: Oxford University Press, 2010).

19 On the Treaty of Rome as an 'incomplete contract', see A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004), 24.

extent to which some of the key Lisbon innovations, even the ones that appear to be ostensibly more straightforward and comprehensive – such as the (supposed) rationalisation of EU competencies, brilliantly deconstructed by Takis Tridimas in Chapter 2, or the legal status of the Charter, painstakingly and methodically analysed by Paul Craig in Chapter 3 – are in effect marred by elements of incompleteness and therefore require to be re-elaborated and revisited in the future.

The answer to this fundamental research question has become increasingly obvious in recent months, partly under the pressure of an ongoing economic and financial crisis. This crisis is having the paradoxical effect of punishing the Lisbon compromise for being both too bold – in designing an extremely sophisticated but increasingly intricate institutional division of power within the EU – and too cautious in its overly optimistic view that important institutional, policy and economic questions could be left half-addressed or ignored altogether. So for all its boldness and institutional ingenuity, the Treaty of Lisbon, as Panos Koutrakos implies in Chapter 7, is still unable to answer the question: 'Who do I call when I want to speak with Europe?' Conversely, as Jean-Victor Louis discusses in Chapter 11, the Treaty which, in the Council's words, required 'no change in the foreseeable future' was quickly and hastily subject to a significant revision, although even this may just prove to be a temporary papering exercise over some very deep policy cracks that Lisbon has failed to address.

On the other hand – and this is something that the authors and editors of this volume feel rather strongly about – the Lisbon Treaty should not be seen as a 'failed treaty' or even as a missed opportunity. Lisbon follows, to borrow a term employed by Pech in Chapter 1, the *tendances lourdes* of institutional change permeating treaty reforms since the entry into force of the Treaty on European Union (TEU) in 1993. It is a step forward in the process of European integration but also, and most crucially, a step forward in that incremental evolutionary process that seeks to render the EU more democratic, transparent and accountable. This is a point strongly argued by P. Nikiforos Diamandouros in Chapter 8 of this volume, but one that finds similar echoes in other contributions, such as the ones by Paul Craig (Chapter 3) and Tobias Lock (Chapter 4). The democratic credentials of the EU are arguably strengthened by the enhanced powers conferred on the European Parliament, which Sabina Anne Espinoza and Claude Moraes so usefully elaborate on in their chapter on the migration and asylum policy after Lisbon (Chapter 6). And as Niamh Nic Shuibhne suggests in her chapter on the concept of citizenship after Lisbon (Chapter 5),

'there is also a clearly deliberate humanising force rippling across several aspects of the Lisbon Treaty'. In this respect, Lisbon fulfils some of the constitutionalist ambitions that were overtly pursued by the failed Constitutional Treaty, even though, as Lucinda Miller points out in Chapter 9, it fails to bring to the fore some of the less obvious constitutionalising dynamics, such as the one that is arguably underpinning the process of harmonisation (and possible codification) of European private law. The constitutionalising dimension affects also the area of competition law, with potentially transformative effects with regard to the substance and procedure of competition law, as Ioannis Lianos argues in Chapter 10.

Paul Craig is undoubtedly right when he notes that 'the desire for instant assessment of "success" or "failure" has become more prevalent in an age where every word is subject to immediate scrutiny by a plethora of media forms'.[20] The Lisbon Treaty is no doubt too complex, too rich and too multifaceted for any commentator to provide a holistic or comprehensive evaluation of its actual impact, let alone an assessment in terms of success or failure. Many of its innovations are deliberately, and perhaps inevitably, couched in open-ended and often indeterminate terms, and their assessment will very much depend on how they are actually interpreted, used and applied by various institutions, bodies and actors that the Treaty has sought to make sense of. There is hardly any doubt that we live in uncertain and challenging times, and that with the benefit of hindsight we could now start pointing at precise weaknesses in the complex apparatus of rules, norms and procedures embodied in the Treaty on the Functioning of the European Union (TFEU) and the revised TEU. But even though we refrain from making any broad-brush assessment of Lisbon Treaty itself, we feel confident enough to suggest that both the route leading to Lisbon and the paths and trajectories traced by its adoption clearly contribute to the perception that the process of economic and political integration instigated by the Treaty of Rome is becoming a hard-wired trait of the European psyche. '*And as for these inevitable disasters promised us, should they ever occur, that is something for the future, and to torment us with what has yet to come is nothing more than madness and a deliberate provocation of misfortune*'.[21]

20 P. Craig, *The Lisbon Treaty – Law Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010), 454.

21 J. Saramago, *The History of the Siege of Lisbon* (Orlando, FL: Harcourt Books, 1996), 182.

1

The institutional development of the EU post-Lisbon

A case of *plus ça change*...?

LAURENT PECH*

> ... *DESIRING to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action,*
>
> *HAVE RESOLVED to amend the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community*...
>
> Final recitals of the preamble to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

1. Introduction

To remain masters of their destiny, six European countries agreed to establish among themselves a European Economic Community (EEC) in 1957.[1] To remain masters of their creation, the national governments devised a rather unique institutional system whose fundamental features can only

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1 For the argument that the creation of the EEC 'has been an integral part of the reassertion of the nation-state as an organisational concept', and that 'without the process of integration the west European nation-state might well not have retained the allegiance and support of its citizens in the way it has', see A. Milward, *The European Rescue of the Nation-State* (London: Routledge, 2nd ed., 1999), pp. 2–3.

be amended by unanimity.[2] In fact, to enter into force, any amendment made to the European founding treaties has always required ratification by all Member States in accordance with their respective constitutional requirements. Remarkably, this demanding procedural requirement has not precluded a spectacular 'widening' of the membership of what is now known as the European Union as well as a considerable 'deepening' of the competences conferred on the EU by its Member States. Indeed, from an organisation originally consisting of six countries with a narrow focus on economic matters, the EU has grown beyond recognition. Its twenty-seven Member States now pursue an extensive and diverse set of objectives amongst which one may mention the promotion of balanced and sustainable development of economic activities, the implementation of a common foreign and security policy and the tackling of cross-border crime. To effectively pursue these objectives, the EU has also gradually gained the power to legislate in the areas of monetary policy, social policy, environment, consumer protection, asylum and immigration, amongst other things.

Perhaps predictably, the continuous expansion of the EU, both geographically and functionally, increasingly strengthened the view that radical institutional reform was required. Indeed, in the late 1990s, most national governments appeared to agree that the Union's institutional system could not and in fact had not been intended to accommodate a large and disparate number of Member States, and that the time had come to improve its democratic credentials in light of the ever-increasing expansion of the tasks conferred on the Union.[3] This consensual orthodoxy largely explains why national leaders unanimously agreed in 2001 to call for a Convention on the Future of Europe to draft a new treaty with

2 Strictly speaking, one may argue that the EEC's institutional structure dates back to the European Coal and Steel Community (ECSC) Treaty of 1951, as the ECSC Treaty established four institutions (a High Authority, an Assembly, a Council of Ministers and a Court of Justice) which were a model for those used by the EEC in 1957. See e.g. A. Dashwood, 'The Institutional Framework and the Institutional Balance' in M. Dougan and S. Currie (eds.), *50 Years of the European Treaties. Looking Back and Moving Forward* (Oxford: Hart, 2009), pp. 2–4.

3 In the words of the European Parliament, since the Treaty of Maastricht, the Member States have 'tried to settle the institutional structure of the Union' because they recognised the 'need to reform and strengthen the structures of the Union in order to consolidate [the Union's] achievements and to improve the capacity of a Union of twenty-seven, and potentially more, Member States to function effectively so as to enable it to face common new challenges and to be subject to greater democratic accountability'. European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI)), points B and C.

the obviously laudable aims of making the EU's functioning more democratic, transparent and efficient.[4] The drafters of what became known as the Constitutional Treaty (CT) sought to achieve these objectives by replacing the EC Treaty of 1957 and the Treaty on the European Union (TEU) of 1992 with a brand new text. As is well known, the French '*Non*' and the Dutch '*Nee*' in 2005 proved ultimately fatal to the CT. In 2007, the Member States finally agreed 'that, after two years of uncertainty over the Union's treaty reform process, the time has come to resolve the issue and for the Union to move on'.[5] In other words, it was agreed to abandon the 'constitutional concept' and to convene an intergovernmental conference to draw up what became known as the Treaty of Lisbon (TL). The TL, which did not repeal the EU's two founding Treaties but substantially amended them both, nevertheless retained nearly all the reforms contained in the CT. In the words of then–Irish Prime Minister Bertie Ahern, '90 per cent of it [was] still there',[6] the most significant departure from the CT being the abandonment of the word 'constitution'.[7] The fact that the institutional provisions in the TL almost entirely replicate those in the CT is not utterly surprising. First of all, the TL pursued similar aims: to enhance the efficiency and democratic legitimacy of the Union and improve the coherence of its action. Secondly, there was little appetite left amongst national governments to reopen the compromises that were painfully agreed on during the negotiations on the CT.[8]

This chapter focuses on the Union's institutional framework. It offers a critical overview of the principal institutional changes contained in the TL and evaluates their present and potential impact on the functioning of the Union's main institutions as well as on the inter-institutional balance of powers. Several concerns have indeed been expressed about the Union's

4 See Treaty of Nice, Declaration on the future of the Union [2001] OJ C 80, p. 85, and European Council of Laeken, Presidency Conclusions, 14–15 December 2001, Annex I: Laeken Declaration on the future of the European Union, in *Bulletin of the European Union* 2001, No. 12, pp. 19–23.

5 European Council of Brussels, Presidency Conclusions, 21–22 June 2007, Doc. No. 11177/07, 23 June 2007, p. 2.

6 Editorial, 'Constitution no more', *The Irish Times*, 25 June 2007.

7 See e.g. G. Búrca, 'Reflections on the Path from the Constitutional Treaty to the Lisbon Treaty', *Jean Monnet Working Paper* no. 03/08.

8 See e.g. P. Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' (2008) 33(2) *European Law Review* 137, p. 158. See also H. Bribosia, 'The Main Institutional Innovations of the Lisbon Treaty' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Vienna/New York: Springer, 2008), p. 57. Bribosia contends that this is also because the substance of the institutional reforms contained in the CT did not explain its rejection in France and in the Netherlands.

'institutional settlement' post-Lisbon. First and foremost, there is no consensus on whether the TL's institutional reforms are likely to improve or, on the contrary, disturb the functioning of the EU institutions. There is also disagreement as to whether they satisfactorily democratise its institutional structure or alter the pre-Lisbon institutional balance to the benefit of either the institutions representing the national interests such as the European Council or the supranational institutions such as the European Parliament, which directly represents EU citizens at the EU level.

It is argued here that the TL does not mark a radical departure from the past. Writing in 1999, Gráinne de Búrca offered the view that the basic institutional framework enshrined in the foundational treaties remained much as it was, but that the practice of EU governance had been fundamentally affected by the formal creation of the EU in 1992, as well as the increase in formal and informal bodies playing a role within EU lawmaking and policy making, with the consequence that the inter-institutional balance established under the EC Treaty of 1957 had been profoundly affected.[9] This diagnosis remains valid. In fact, one may reasonably contend that the TL does not introduce a single revolutionary reform as regards the EU institutions responsible for making policy and adopting legislative measures.[10] It does, however, codify the *tendances lourdes* of institutional change since the entry into force of the TEU:[11] It further strengthens the legislative, budgetary and supervisory roles of the Parliament and in particular firmly establishes it, jointly with the Council, as a co-legislator; it also makes clear that the Council should continue to be viewed as the main (intergovernmental) decision-making body that acts on the basis of the political directions and priorities set by the (also intergovernmental) European Council, which is finally formally

9 G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), p. 55. For a broadly similar diagnosis, see also J. Peterson and M. Shackleton, 'The EU's Institutions. An Overview' in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union* (Oxford: Oxford University Press, 2nd ed., 2006), p. 7.

10 See contra Y. Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39(2) *Georgetown Journal of International Law* 249, p. 289 ('In comparison with this institutional framework of the 1950s, the Lisbon Treaty constitutes a revolution' as it provides for the creation of the posts of European Council President and of High Representative of the Union for Foreign Affairs and Security Policy).

11 In doing so, the TL merely follows in the steps of the CT. In support of this view, see P. Ponzano, 'Les Institutions de l'Union' in G. Amato et al. (eds.), *Genèse et destinée de la Constitution européenne* (Bruxelles: Bruylant, 2007), p. 480.