

Stefan Griller
Jacques Ziller (eds.)

The Lisbon Treaty

EU Constitutionalism without
a Constitutional Treaty?



SpringerWienNewYork

Stefan Griller
Jacques Ziller (eds.)

The Lisbon Treaty

EU Constitutionalism without
a Constitutional Treaty?

SpringerWienNewYork

Univ.-Prof. Dr. Stefan Griller
Research Institute for European Affairs,
Vienna University of Economics and Business Administration, Austria

Univ.-Prof. Dr. Jacques Ziller
Dipartimento „Libero Lenti“, Sezione di Studi Politico Giuridici
Università di Pavia, Italy

Financial support was given by *Bundesministerium für
Wissenschaft und Forschung*, Wien,
and the
European Commission, DG Education and Culture, Brussels

This work is subject to copyright.
All rights are reserved, whether the whole or part of the material is
concerned, specifically those of translation, reprinting, re-use of illustrations,
broadcasting, reproduction by photocopying machines or
similar means, and storage in data banks.

© 2008 Springer-Verlag Wien
Printed in Austria

SpringerWienNewYork is a part of Springer Science + Business Media
springer.com

Product Liability: The publisher can give no guarantee for all the information
contained in this book. The use of registered names, trademarks,
etc. in this publication does not imply, even in the absence of a specific
statement, that such names are exempt from the relevant protective laws
and regulations and therefore free for general use.

Typesetting: Camera ready by editors
Printing: Ferdinand Berger & Söhne Gesellschaft m.b.H., 3580 Horn, Austria

Printed on acid-free and chlorine-free bleached paper
SPIN: 12278053

Library of Congress Control Number: 2008933214

ISSN 1610-384X

ISBN 978-3-211-09428-0 SpringerWienNewYork

 SpringerWienNewYork

European Community Studies Association of Austria
(ECSA Austria) Publication Series

Volume 11

Schriftenreihe der
Österreichischen Gesellschaft für Europaforschung
(ECSA Austria)



SpringerWienNewYork

Giuliano Amato

Preface

Immediately after the rejection of the Constitutional Treaty in France and in the Netherlands, I was tempted not to comply with a contract according to which I was expected to write on the European Constitution within a very close deadline. "What is the sense of it now?" I tried to argue. "I cannot be obliged by a contract without an object".

I was wrong at that time and we would be equally wrong now, should we read the Irish vote on the Lisbon Treaty and the Lisbon Treaty itself as the dead end for European constitutionalism. Let us never forget that the text rejected in May 2005 was not the founding act of such constitutionalism. To the contrary, it was nothing more than a remarkable passage in a long history of constitutional developments that have been occurring since the early years of the European Community. All of us know that the Court of Justice spoke of a European constitutional order already in 1964, when the primacy of Community law was asserted in the areas conferred from the States to the European jurisdiction. We also know that in the previous year the Court had read in the Treaty the justiciable right of any European citizen to challenge her own national State for omitted or distorted compliance with European rules. Legal scholars were consequently bound to conclude that a Treaty giving ground not just to mutual obligations among the undersigning States but also to individual rights directly stemming from its clauses was a very peculiar Treaty, hybridised by constitutional genes.

The process of hybridisation continued in the following years: the direct election of the European Parliament, the consequent transformation of its role in the legislative process (not only its advisory role *vis-à-vis* the Council of Ministers but increasingly its legislative role in the co-decision procedure), the Commission as the Executive responsible towards the Parliament and subject to a vote of confidence, and finally the adoption of a Charter of Rights, based on the Treaty and on the common constitutional traditions of the Member States. These are just the main developments due to the long march of the constitutional genes throughout our common European architecture.

Despite such developments, the architecture has never become entirely constitutional. Not only have the *Herren* of the Treaty retained their power to ratify some of the main common decisions, but, most significantly, all the new missions to be pursued in common on the basis of the Maastricht Treaty were bestowed upon intergovernmental co-operation, and not upon the Community method. Since Maastricht, we have had two Europes running on parallel tracks, sometimes connected to each other, but basically separate. The distinction between European Union and European Community is the clearest (and most confusing) evidence of such ambivalence.

If it is true that "*nomina sunt substantia rerum*", you would have expected the Constitution to do away with it. But it did not. To be sure, it did enhance the rate of constitutionalism by adding constitutional symbols and by several other far more substantive innovations (merging the Union and the Community was one of them). But it has also maintained most of the procedures of the intergovernmental Europe and the ratifying role of the States, when such elements were already embedded.

The limits of the innovations introduced by the Constitution disappointed the most fervent supporters of the "ever closer integration". Assuming, as I do assume, that the Lisbon Treaty will eventually be ratified, why then, should it be seen as the end of European constitutionalism? Its name is not Constitution and the clauses on the constitutional symbols have been deleted, but the bulk of the substantive changes enhancing the rate of constitutionalism remain. If one looks back at the long history of our incremental constitutional developments, no reason can be found to deny that this history would continue.

The impact of the downgrading of the Constitution might be another one. The fall of the name and of the symbols, accompanied by the protocols and declarations by which our Member States assert and re-assert their existing sovereign prerogatives, is the unequivocal expression of a mood not precisely in favour of bold steps towards further integration. It is not necessarily a generalized mood. It more likely reflects the price the majority (and Ireland was an active component of it) had to pay to a very rigid eurosceptic minority. In any case, the foreseeable impact is a slowing down in the implementation of the clauses of the Treaty which offer the Member States the opportunity to go beyond the existing levels of

integration, such as crossing *passerelles* that lead from unanimity to majority voting.

However, such clauses are there, and, if and when the Treaty will be ratified they will be ready to be used whenever the Member States decide to take advantage of the opportunity they offer to them. Nobody can predict when, but the mood of the States depends on variables that at least in some cases may rapidly change and consequently isolate the most stubborn ones. What has happened in Poland after the electoral victory of the Civic Platform is very instructive. Furthermore, other clauses rescued by the Lisbon Treaty may be activated in spite of the reluctant Member States and may produce far-reaching effects in terms of constitutional innovation. Let me take two examples.

The first example refers to individual rights and the limits the Union meets in regulating them. The principle expressed by the Court of Justice before the proclamation of the Charter in 2000 was that the Union cannot violate the rights protected at the European level (nor can the Member States do it, when implementing Union law), but it has no power to *promote* them, the only exception being anti-discriminatory measures based on article 13 of the EC Treaty. The Charter does not intend to change that principle, as one of its final clauses explicitly states that the Charter is not aimed at widening the competencies of the Union, and on this assumption the Member States have accepted to give it legal force with the Lisbon Treaty.

But look at the Area of Freedom, Security and Justice. Look at new articles 62 and 63, which respectively provide for the ordinary legislative procedure (which means co-decision and majority voting) to set a uniform status of asylum for national of third countries, valid throughout the Union, and the rights of third-countries nationals residing legally in a Member State. Look also at new article 69A, para. 2, which offers a legal basis for a directive (to be adopted, again, by the ordinary legislative procedure) establishing minimum rules concerning the rights of individuals in criminal procedure and concerning the rights of victims of crime. These clauses confer to the Union a legislative competence that goes beyond the pre-existing obligation not to violate human rights when regulating sectors under its jurisdiction. The promotion of human rights is necessarily included in such competence. Nor is the notion of 'minimum rules' inconsistent with the promotion of rights. To the contrary, minimum rules have substance and meaning as long as

they enhance the pre-existing standards in those Member States with the lowest ones. A gate to the future has thus been opened.

The second example goes to the heart of the European ambivalence, and to the future of the co-existing Europes (the communitarian and the intergovernmental ones). Despite the merging of the European Union and the European Community into one legal entity, most of the previously intergovernmental missions – as already noted – remain intergovernmental in terms of responsibilities and procedures. Only in the Area of Freedom, Security and Justice has the already ongoing process of transferring some competencies from the co-operative method to the communitarian one been continued. In other areas, the Constitution and subsequently the Lisbon Treaty have preserved the distinction between the two methods, but they have also built bridges between them, for the sake of better delivery. The most symbolic one is the double hatted High Representative, who will exercise the joint (but still separate) responsibilities of the Common Foreign and Security Policy of the Council and of the External Relations of the Commission, with the support, however, of a single diplomatic service (a very elaborate bridge...). All of us know that these bridges are not the same as the real ones, for they not only connect the two sides of the gap but may also reduce the distance between them. Will it happen in the foreseeable future? In the case of the double hatted High Representative, this development is entirely in the hands of the Member States and the declarations and protocols accompanying the Lisbon Treaty make it quite unlikely, at least at the moment. It is not so in the crucial area of the relationship between the Council and the Parliament, where the gap between the two Europes generates an increasingly unsustainable vacuum of democratic responsibility.

The Council of Ministers in its several formations, and still more so the European Council, have the formal task to define policies (*Richtlinien*, we would call them in German), both in the intergovernmental sectors and in the communitarian ones, which are European in nature. To whom do they respond for defining and pursuing such policies? National Governments have always argued that the Council is formed by national Ministers, or Prime Ministers, who respond to their national Parliaments and have nothing to do with the European Parliament. But national Parliaments politically and institutionally devote their attention to safeguarding their national interests at the European level, not to the European quality of the policies adopted at that level. There is a European Parliament

here, but the European Parliament is limited to scrutinising the proposals and the activities of the Commission. If you look at this matter in constitutional terms, you conclude that in the Union we have not one, but two Executives, one with a capital E and another one with a small e, and the European Parliament has a political relationship with the latter, not with the former.

Now, if we carefully read the Lisbon Treaty, we find clauses designing the first arches for bridging this vacuum. In the areas where the open method of co-ordination applies, "the European Parliament will be kept fully informed". In the area of Foreign and Security policy, whatever the European Council and the double hatted High Representative do, they have to report to the European Parliament. In the area of police co-operation, regulations adopted by co-decision "shall lay down procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments". Finally, the President of the European Council "shall present a report to the European Parliament after each of the meetings of the European Council".

That is not a fully fledged political responsibility of the Councils before the European Parliament, but the wall behind which national Governments have protected their intergovernmental activities is falling down. The long history of our national parliaments tells us how political responsibility may grow out of initially limited and narrow prerogatives. Whether this growth will occur in the case of the European Parliament is an open and intriguing question.

Along the same lines, a second and no less intriguing question is open. If the European Parliament should succeed in extending its political scrutiny upon both the existing Executives, for how long would those Executives remain separate? This question too finds a fragment of an answer in the Treaty. When the proposal was advanced in the Convention to merge the Presidency of the European Council and the Presidency of the Commission into a single figure, quite predictably it was rejected. But something of it has remained: while the two positions were initially defined as incompatible with each other, according to the final text and to the Lisbon Treaty, the President of the Council "shall not hold a national office". No other incompatibilities are set forth.

Nobody is so naïve as to expect future developments to depend on written clauses rather than on those who will use them. However, written clauses give such developments the necessary underpinnings, pointing in some directions and excluding other ones. The

Treaty of Lisbon does not shut the door to a future of enduring European constitutionalism. To the contrary, it paves the way for it. This volume is a valuable map illustrating the routes to be followed by those who want European constitutionalism to continue. I warmly recommend it to the Irish electors, who have always been and remain sincere supporters of a better Europe.

Preface by the editors

It was during the German Council Presidency in 2007 that ECSA Austria decided to organise an international conference on the EU's constitutional developments irrespective of an eventual outcome of the ongoing political debates. When the draft treaty finally saw the light as "Lisbon Treaty", it was decided to join forces with the Law Department of the European University Institute and with its Robert Schuman-Centre for Advanced Studies in Florence.

Consequently, on April 11 and 12, 2008, when spring was supposed to be in full blow in Tuscany and the Irish referendum was still quite far ahead, a conference was held in Florence to discuss the changes of the European Union's constitutional framework that were to be expected, should the Lisbon Treaty enter into force. Special strain was laid on the envisaged reforms in the fields of institutions, fundamental rights, democracy, external relations, justice and home affairs, and economic and monetary policy. All this was addressed against the background of the general debate on the constitutional developments in Europe. The book at hand includes the revised version of the papers presented during these two days in Florence. In addition, *Giuliano Amato*, who had to cancel his participation in the conference due to the Italian elections on 13 April agreed to write a preface. We appreciate that very much!

During the printing process, the Irish referendum on June 12, 2008, produced a negative result. Whatever the final consequences of this rejection will be in a more or less distant future, we decided to go ahead with publishing this book without delay: First, it is still unclear whether or not the Lisbon Treaty, or a revised version of it, eventually might enter into force, and second (and perhaps more important, at least from an academic point of view) this uncertainty does not reduntantise a thorough debate of this stage of the constitutional project which has been occupying the political and also the academic agenda in Europe for almost a decade, first in the shape of the Treaty establishing a Constitutional Treaty for Europe, and later in the version of the Lisbon Treaty. Only *Giuliano Amato's* preface and *Jacques Ziller's* contribution on the process of ratification were modified in order to take these most recent developments into account.

We would like to thank all supporters of the conference and the publication of this book: In financial terms, these are in the first line the European Commission, Directorate General for Education and Culture, and the Austrian Federal Ministry for Science and Research. Without their support, it would have been impossible even to think of a reunion like that in Florence or to produce this book. Special thanks go to the hosts of the conference in Florence, the Law Department of the European University Institute and the Robert Schuman Centre for Advanced Studies, RSCAS. The RSCAS's conference centre provided for a perfect organisation as well as an inspiring atmosphere, both of which contributed largely to the outcome of the meeting, and thereby to the quality of the book at hand.

Vienna and Pavia, August 2008

Stefan Griller

Jacques Ziller

Abbreviations

ACAS: Advisory, Conciliation and Arbitration Service
ACP: African, Caribbean and Pacific Countries
ADB: African Development Bank
AETR: *Accord relatif au travail des équipages des véhicules effectuant des transports internationaux effectuant par route*
(European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport)
AFSJ: Area of Freedom, Security and Justice
Art.: Article
AT: Accession Treaty

BEPG: Broad Economic Policy Guidelines
BIS: Bank of International Settlements

CCP: Common Commercial Policy
cf.: confer
CFI: Court of First Instance (of the European Court of Justice)
CFSP: Common Foreign and Security Policy
CHR: Charter of Human Rights
Coreper: Committee of Permanent Representatives
CSDP: Common Security and Defence Policy
CT: Constitutional Treaty

DG: Director General
DGE: Council of the EU, Directorate-General E – External Economic Relations, Politico-Military Affairs
DTC: *Declaración de Tribunal Constitucional* (Declaration of the Spanish Constitutional Court)
DWP: Department of Work and Pensions

e.g.: *exempli gratia*
EBRD: European Bank for Reconstruction and Development
EC: European Community/ies
ECB: European Central Bank
ECHO: European Commission Humanitarian Aid department
ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms; European Court of Human Rights

ECJ: European Court of Justice
ECR: European Court Report
ECSC: European Coal and Steel Community
ed(s).: Editor(s)
EEA: European Economic Area
EEAS: European External Action Service
EEC: European Economic Community
EFTA: European Free Trade Area
EIB: European Investment Bank
EMS: European Monetary System
EMU: Economic and Monetary Union
EP: European Parliament
ESCB: European System of Central Banks
esp.: especially
et al.: *et alii*
et seq.: *et sequentis*
EU: European Union
EUI: European University Institute, Florence

FAC: Foreign Affairs Council
FAO: Food and Agriculture Organization of the United Nations
FDI: Foreign Direct Investment
fn: Footnote
FOC: Flag of Convenience
FSU: Finnish Seaman's Union

GAC: General Affairs Council
GAERC: General Affairs and External Relations Council
GATS: General Agreement on Trade in Services
GATT: General Agreement on Tariffs and Trade
GMO: Genetically Modified Organism

HL: House of Lords

i.e.: *id est*

Ibid: *Ibidem*

IBRD: International Bank for Reconstruction and Development
IGC: Intergovernmental Conference
IIA: Interinstitutional Agreement
ILO: International Labour Organization
IMF: International Monetary Fund

ITF: International Transport Workers' Federation

JHA: Justice and Home Affairs

litt.: *littera*

LT: Lisbon Treaty

MEP: Member of the European Parliament

MS: Member State(s)

NAFTA: North American Free Trade Agreement

NATO: North Atlantic Treaty Organisation

NCB(s): National Central Bank(s)

NGO: Non Governmental Organisation

No: Number

OECD: Organisation for Economic Co-operation and Development

OJ: Official Journal of the European Union

OLAF: *Office Européen de lutte anti-fraude* (European Antifraud Office)

OMC: Open Method of Co-ordination

OSCE: Organization for Security and Co-operation in Europe

para: Paragraph

PRAC: *Procédure de réglementation avec contrôle* (regulatory procedure with scrutiny) (according to Decision 2006/512/EC)

PSC: Political and Security Committee

QMV: Qualified Majority Voting

REACH: European Community Regulation on chemicals and their safe use (EC 1907/2006)

RELEX: External Relations

SAR: Special Administrative Region (of Hong Kong)

SGP: Stability- and Growth-Pact

TEAEC: Treaty establishing the European Atomic Energy Community

TEC: Treaty establishing the European Community

TEU: Treaty on European Union (before the amendments by the Lisbon-Treaty)

TEU-L: Treaty on European Union as amended by the Lisbon Treaty

TFEU: Treaty on the Functioning of the European Union

TRIMS: Trade-Related Investment Measures

TRIPS: Trade Related Aspects of Intellectual Property Rights

TULR(C)A: Trade Union Labour Relations (Consolidation) Act

UK: United Kingdom of Great Britain and Northern Ireland

UN: United Nations Organization

UNESCO: United Nations Educational, Scientific and Cultural Organization

UPOV: *Union internationale pour la protection des obtentions végétales* (International Union for the Protection of New Varieties of Plants)

US(A): United States of America

Vol.: Volume

WHO: World Health Organization

WTO: World Trade Organization