Eiropas integrācijas vēsture

(par Līgumu par Konstitūciju Eiropai un Lisabonas līgumu)

8 THE CONSTITUTIONAL TREATY

(i) The European Union Charter of Fundamental Rights and Freedoms and the Treaty of Nice

The achievements of the Treaty of Amsterdam were seen at the time as limited.[107] Ther two areas, in particular, that were seen as 'unfinished'. First, there had been much disc about whether the European Union should have its own Bill of Rights. Whilst reference introduced to fundamental rights and provision was made for expulsion of Member Sta gross violations, a self-standing Bill of Rights was seen by some Member States as a st far. The second matter not addressed head on was the institutional pressures generated b sible enlargement of the Union. A Protocol was therefore signed, agreeing that a confere

[105] S. Currie, '"Free" Movers? The Post Accession Experience of Accession: 8 Migrant Workers in the United Kingdom' (2006) 31 *ELRev.* 207.

[106] Indeed, in 2008, Commission concerns with Bulgarian maladministration led it to suspend payments of € million structural funds to Bulgaria. European Commission, *On the Management of EU Funds in Bulgaria* COM(2008)496. For comment see 'The European Union and Bulgaria: The New Colonialism', *The Economi* 19 March 2009.

[107] K. Hughes, 'The 1996 Intergovernmental Conference and EU Enlargement' (1996) 72 *International Affairs* A. Teasdale, 'The Politics of Qualified Majority Voting in Europe' (1996) *Political Quarterly* 101, 110–15.

convened at least one year before membership of the European Union reached twenty, to carry out a comprehensive review of the composition and functioning of the institutions.

Attention turned, first, to an EU Bill of Rights. The Member States, meeting at Cologne in 1999, agreed that an EU Charter of Fundamental Rights should be established cataloguing such rights. Instead of this being left to intergovernmental negotiations, a special Convention was established to agree the Charter.[108] Chaired by Roman Herzog, formerly the German President, the Convention was composed of fifteen representatives of national governments, thirty representatives of national parliaments, sixteen representatives of the European Parliament and one representative of the Commission. It met in open session, decided upon matters by consensus rather than by voting, and received extensive representations from civil society. Parliamentarians were not only more numerous in the Convention than government representatives, but also more vocal. A total of 805 amendments were put forward by parliamentarians whilst only 356 were put forward by government representatives.[109] It constituted a move away from negotiations between governments to a new form of deliberative decision-making. It was also successful in terms of its outcome: the Convention drafted the European Union Charter of Fundamental Rights and Freedoms which was wide-ranging in the entitlements it recognised. The Charter was adopted by the Convention in October 2000.

On the second matter, institutional reform, discussions began in the same month as the Treaty of Amsterdam came into force: 1 May 1999. There was agreement that negotiations should be exclusively concerned with recasting the institutional settlement so that it would function more efficiently and accommodate new states who might join the Union. Notwithstanding its technicality, this task was a challenging one, for it was a redistributive task involving reallocation of votes or influence within the EU institutions, entailing that for every winner there would be an equivalent loser.

With every state having a veto, no previous IGC had realised its ambitions for management of internal reform. This was also the case for the Treaty of Nice. The Treaty was finally signed on 11 December 2000, after over ninety hours of acrimonious, direct negotiations between the Heads of Government.[110] Even within governmental circles, the agreement was seen as limited and unsatisfactory. Agreement was not reached on many of the items for discussion: most notably the legal status of the EU Charter of Fundamental Rights and Freedoms. Instead, limited reforms were made to the four main institutions, the Commission, the Council, the Parliament and the Court of Justice. QMV was extended into thirty-one further areas, but almost all of these were procedural and were concerned with the appointment of EU officials. The reforms were not only insubstantial but the Treaties were now a confusing and incoherent mess. The Union had now a bewildering gamut of competences, governed by an array of legislative procedures, producing a range of legal instruments. There were thirty-eight combinations of 'possible voting modalities in the Council and participation opportunities of the European Parliament of which 22 were "legislative"'.[111] Whilst, therefore, there did not seem to be many

[108] See G. de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 *EL Rev.* 126.

[109] A. Maurer, 'The Convention, the IGC 2004 and European System Development: A Challenge for Parliamentary Democracy', 7 in *Democracy and Accountability in the Enlarged European Union*, Joint Conference of SWP and the Austrian Academy of Sciences, 7–8 March 2003, www.swp-berlin.org/common/get_document.php?asset_id=689 (accessed 20 July 2009).

[110] M. Gray and A. Stubb, 'The Treaty of Nice: Negotiating a Poisoned Chalice?' (2001) 395 *JCMS* 5.

[111] W. Wessels, 'The Millenium IGC in the EU's Evolution' (2001) 39 *JCMS* 197, 201.

strong reasons to vote against the Treaty of Nice, there did not seem to be many reasons to vote for it. In June 2001, the Irish voted 53.87 per cent against ratification of the Treaty of Nice.[112] A Declaration was added that nothing in the TEU affected Irish military neutrality, something that had been raised as a concern amongst a small number of Irish voters. On the basis of this, a second referendum was held in September 2002, and the Treaty of Nice was approved by 62.89 per cent of the vote.[113]

(ii) The Constitutional Treaty

Dissatisfaction with the substance and the process of Nice had emerged prior to the Irish referendum. At Nice, the Member States announced that there would be yet another IGC in 2004 to consider the significant issues that had not been resolved. These comprised delimitation of powers between the European Union and the Member States; the status of the EU Charter of Fundamental Rights; simplification of the Treaties; and setting out more fully the role of national parliaments in the European architecture. As important as the substance was the process. There was considerable dissatisfaction with this intractable process of closed negotiations between governments running up against deadlines that seemed to be brought by every IGC. In a Declaration at Nice, the Member States called, therefore 'for a deeper and wider debate about the future of the European Union' which would involve 'wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc.'.[114]

This Declaration had been preceded by a significant debate between political leaders about the nature of institutional reform that had been begun by Joschka Fischer, the German Foreign Minister, at the Humboldt University in Berlin in 2000. Fischer considered that European integration had to have a *finalité*, an end-point, and that this should be a European Constitution:

> These three reforms – the solution of the democracy problem and the need for fundamental reordering of competences both horizontally, i.e. among the European institutions, and vertically, i.e. between Europe, the nation-state and the regions – will only be able to succeed if Europe is established anew with a constitution. In other words: through the realisation of the project of a European Constitution centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation-state level. The main axis for such a European Constitution will be the relationship between the Federation and the nation-state.[115]

A number of Heads of Government picked up on this theme. Within two months, Jacques Chirac, the French President, talked of a 'first European Constitution'. Tony Blair, the British Prime Minister, suggested that there should be a new statement of principles about the Union. And in June 2000, Paavo Lipponen, the Finnish Prime Minister, suggested that a special Convention be established to launch a 'constitutionalisation process'.[116]

[112] K. Gilland, 'Ireland's (First) Referendum on the Treaty of Nice' (2002) 40 *JCMS* 527.
[113] The Treaty of Nice came into force on 2 February 2003.
[114] Declaration 23 to the Treaty of Nice on the Future of the Union.
[115] J. Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', Humboldt University, Berlin, 12 May 2000, available at www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf (accessed July 2009).
[116] P. Norman, *The Accidental Constitution: The Story of the European Convention* (Brussels, Eurocomment, 2003) 11–24.

The debate re-emerged a year later, in December 2001, at Laeken in Belgium when Member States had to think about the preparations for the 2004 IGC. There was agreement that the institutional tinkering witnessed at Amsterdam and Nice was neither sufficient to equip the Union for the challenges it faced nor sufficient to engage popular enthusiasm. Instead, what was necessary was a process of democratic regeneration. Such an effort would not only require wide-ranging institutional reform. It was also a process that could not be managed just by an IGC. Accordingly, an extraordinary process was called for. The draft Treaty would be formulated by a Convention, named the Future of Europe Convention, which would be modelled on the Convention used to draft the EU Charter of Fundamental Rights.

Chaired by Giscard d'Estaing, the former French President, the Convention would comprise 105 members from national governments, parliaments, MEPs and the Commission. The accession states would be involved as would civil society. The Convention would meet in plenary session, with all members present, once a month. It was the final decision-making body, responsible for adopting any agreed text. Its decisions were to be taken in public by consensus rather than by vote.

The Convention opened in February 2002. Although its initial mandate was merely to identify options for the subsequent IGC, knowing that a vast majority of the Convention was willing to reach an ambitious agreement, Giscard discarded this idea at the first session stating that its purpose should be a single proposal opening the way for a 'Constitution for Europe'.[117] Sixteen months later, he presented this proposal, the Draft Constitutional Treaty, with much pomp and fanfare to the Member States. The IGC following the Convention was short. There was only one significant item in the Draft Constitutional Treaty which was subject to significant amendment. Spain and Poland were unhappy about the voting rights accorded to them in the EU law-making process. However, after a change of government in Spain and a series of small but important amendments to the text, the Member States changed their position and signed the Constitutional Treaty, at a ceremony in Rome, in October 2004.

To mark both the significance of the Constitutional Treaty and the spirit of democratic renewal, ten Member States arranged for referendums to determine whether or not they should ratify it. The first was held in Spain, where the Treaty was approved by 72 per cent of those who voted. However, in the next referendums, held in France (on 29 May 2005) and in the Netherlands (three days later, on 1 June 2005), the Treaty was roundly rejected, with 55 per cent voting against it in France and 62 per cent voting against it in the Netherlands. Analysis of the reasons for the 'No' vote in the Netherlands and France showed the Constitutional Treaty had little hold or meaning for public debate. Despite voters being reasonably well-informed about the details of the Constitutional Treaty, the reasons for their vote had little to do, in most cases, with its legal details. Opponents were protesting against globalisation, the consequences of the 2004 enlargement, fears about Turkish membership of the Union, and in the Netherlands there was anger amongst voters at the perceived power of the large Member States in the Union.[118]

[117] P. Magnette, 'In the Name of Simplification: Coping with Constitutional Conflicts in the Convention on the Future of Europe' (2005) 11 *ELJ* 432, 436.

[118] Flash Eurobarometer 171 and 172, *European Constitution: Post-Referendum Survey in France and in The Netherlands*. This was notwithstanding that 88 per cent of the French and 82 per cent of the Dutch still had positive perceptions of the Union in the period after the referendum. European Commission, *The Period of Reflection and Plan D*, COM(2006)212, 2.

In short, citizens did not buy into the need to create a new form of political community to which they would have loyalty and affinity and which had to be 'democratically regenerated' by them. Part of the reason is that such loyalty or affinity is challenging to generate. Bartolini has observed that it is 'an affective or emotional relationship to the organization or group that one belongs to, and makes it difficult (if not impossible) to contemplate the possibility of abandoning such a group or organization'. He notes that it is built upon the identity, solidarity and trust that exist between members of a group.[119] The development of such elements required much effort within the national context. Most notably, Bartolini has observed that the cultural, economic, coercion and politico-administrative boundaries of any modern state generally coincide and reinforce each other.[120] That is to say, there is a *national* system of law and order, a *national* community with its own myths and symbols, a *national* welfare system, a *national* economy and a *national* administration. For better or worse, this reinforcement generates common identities. By contrast, such elements are almost completely absent in the EU context.[121] To assume that they could be generated by a Convention of 105 people and a ballot was always optimistic. Instead, the absence of these elements gave the process a somewhat surreal feel with both academics and observers noting that much of the debate at the Future of Europe Convention was dominated by a disembodied, elite discourse marked by the absence of significant disagreement.[122]

By the end of June 2005, ratification of the Constitutional Treaty had reached an impasse. A significant majority of Member States, eighteen, had ratified the Treaty, with Luxembourg also having held a positive referendum. Of the remaining seven Member States, six (Czech Republic, Denmark, Ireland, Poland, Portugal and the United Kingdom), were scheduled to hold their own referendums. Of these, there was a significant chance of a 'No' vote in all bar Portugal. When combined with the French and Dutch 'No' votes, this not only suggested that there would be eight states unable to ratify the Treaty. It also suggested a scenario in which, out of the ten states holding referendums, the overwhelming majority, seven, might have voted against the project. The popular vote was out on the European Union.

9 THE LISBON TREATY

(i) The road to Lisbon

The Union was faced not with a single recalcitrant state, such as Denmark and Ireland, as with previous amending Treaties. It was instead confronted with a deep divide in which two-thirds of Member States wished to press ahead whilst one-third did not. A period of reflection was called for by the European Council which lasted until late 2006, when the Finnish government prepared the ground by engaging in a series of consultations on how to achieve institutional reform. Alongside this, a series of prominent politicians, acting under the umbrella of the organisation

[119] S. Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring Between the Nation State and the European Union* (Oxford, Oxford University Press, 2005) 31.

[120] *Ibid.* 410.

[121] For a not dissimilar argument see P. Schmitter, 'Making Sense of the EU: Democracy in Europe and Europe's Democratization' (2003) 14 *Journal of Democracy* 71.

[122] Norman, above n. 116, 326–38; G. Stuart, *The Making of Europe's Constitution* (London, Fabian Society, 2003) 19–24. C. Skach, 'We the Peoples? Constitutionalising the European Union' (2005) 43 *JCMS* 149.

named the Action Committee for European Democracy, began to publish articles in the press indicating that the time for listening was over and that the time for action had begun.[123]

In March 2007, at the fiftieth anniversary of the Treaty of Rome, the German government obtained a commitment from the other Member States to place 'the European Union on a renewed common basis before the European Parliament elections in 2009'.[124] In other words, they had committed to a deadline for ratifying a new treaty.

The German government's strategy for reaching an agreement was to close the gap between the Member States in a highly structured manner. 'Political agreement' on the central points of disagreement was reached in closed, confidential negotiations between ministries, named 'sherpas'. Only when political agreement was reached on the main points would the second stage, an IGC, be opened. Its tasks, however, would be limited by the mandate of the political agreement, and so restricted to translating the political agreement into legal detail and resolving any ambiguities. States wishing to introduce new points or reopen old debates would run the risk of being accused of having breached the existing political agreement, and therefore of having acted in bad faith. The process was thus to be a relatively confined affair subject to few external risks or interventions. In terms of substance, the strategy involved the use of the Constitutional Treaty as a starting point, along with the question of what had to be offered to make the Treaty acceptable to those national governments constituting the recalcitrant one-third. Ultimately, for these states, the Treaty was not a question of reform, but a series of individual concessions.

The Heads of Government met between 21 and 23 June 2007 to conclude the first stage of the process. The outcome was a sixteen-page mandate that was to provide the basis for an IGC that the Heads of Government indicated was to be completed by December 2007 and was to be confined to the terms of the mandate. It also indicated that the new Treaty was to follow the text of the Constitutional Treaty unless otherwise specified by the mandate. The subsequent IGC was, consequently, highly limited. By 19 October a text had been agreed informally between the Member States. On 13 December 2007, the new text, the Treaty of Lisbon was formally signed.

The conclusion of the Treaty was a significant coup. It involved amendments to all of the articles in the TEU and to 216 provisions in the EC Treaty.[125] There were, moreover, significant differences that had to be bridged between the twenty-seven Member States, each with their own distinct agenda and constituencies. Yet this negotiating triumph came at a cost. In particular, it created a double bind. If the Treaty of Lisbon differed significantly from the Constitutional Treaty, its nature of reform was more closed and more accelerated than any other to date. There was a lack of transparency and an exclusion of national parliaments that still remains to be justified. If the Treaty of Lisbon was not substantially different from the Constitutional Treaty, that would open negotiators to charges of arrogance for ignoring the referendum results in France and the Netherlands.

[123] See www.iue.it/RSCAS/research/ACED/MissionStatement.shtml (accessed 18 July 2009).

[124] EU Council, Declaration on the occasion of the fiftieth anniversary of the signature of the Treaty of Rome, Brussels, 25 March 2007, para. 3.

[125] Statewatch, www.statewatch.org/news/2007/oct/eu-refrom-treaty-tec-external-relations-3-5.pdf (accessed 20 July 2009).

(ii) The Treaty of Lisbon[126]

(a) Two treaties of equal value: the Treaty on European Union and the Treaty on the Functioning of the European Union

The Treaty of Lisbon created two new treaties to replace the previous framework.[127] One, confusingly, is named the Treaty on European Union (TEU). The central items set out by it are as follows:

- the mission and values of the European Union: respect for the rule of law, the principle of limited powers, respect for national identities and upholding democracy and fundamental rights;
- the democratic principles of the Union and providing for the active contribution of national parliaments to the functioning of the European Union;
- a neighbourhood policy, whereby the Union is to develop a special relationship with neighbouring countries;
- the composition and central functions of the EU institutions;
- detailed provisions on the Union's external action in the TEU, in particular both its Common Foreign and Security Policy and its common security and defence policy;
- procedures are set out for amendment of the two Treaties;
- legal personality for the Union;
- provisions governing asymmetric integration; these include the circumstances in which a Member State may leave or be expelled from the Union and when states may engage in enhanced cooperation, the procedure whereby some Member States may develop EU legislation amongst themselves where there is not sufficient will for that legislation to be adopted by all Member States.

The second treaty is the Treaty on the Functioning of the European Union (TFEU). This sets out the explicit competences of the Union and, with the exception of external action, the detailed procedures to be used in each policy field. In legislative style, it is similar therefore to the existing EC Treaty. There is, however, one significant adaptation taken from the Constitutional Treaty: the competences and their nature are catalogued at the beginning of the TFEU.[128]

Article 3 TFEU

1. The Union shall have exclusive competence in the following areas:
   (a) customs union;
   (b) the establishing of the competition rules necessary for the functioning of internal market;
   (c) monetary policy for the Member States whose currency is the euro;

[126] As with discussion of other Treaty amendments in this chapter, the section below covers only the most salient features with detailed discussion left to subsequent chapters.

[127] On the Treaty of Lisbon see P. Craig, 'The Treaty of Lisbon: Process, Architecture and Substance' (2008) 33 *ELRev.* 137; M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds not Hearts' (2008) 45 *CMLRev.* 617; Y. Devuyst, 'The European Union's Institutional Balance After the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39 *Georgetown Journal of International Law* 247. A thoughtful and detailed assessment is provided by House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment* (London, HL,10th Report, Session 2007–08, 2008).

[128] The discussion is set out in more detail in Chapter 5 at pp. 206 *et seq*.

(d) the conservation of marine biological resources under the common fisheries policy;
(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

Article 4 TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
   (a) internal market;
   (b) social policy, for the aspects defined in this Treaty;
   (c) economic, social and territorial cohesion;
   (d) agriculture and fisheries, excluding the conservation of marine biological resources;
   (e) environment;
   (f) consumer protection;
   (g) transport;
   (h) trans-European networks;
   (i) energy;
   (j) area of freedom, security and justice;
   (k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5 TFEU

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro.
2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

Article 6 TFEU

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:
(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, vocational training, youth and sport;
(f) civil protection;
(g) administrative cooperation.

Each treaty is to have 'the same legal value'.[129] It is however unclear what this means. Is each to be interpreted in the light of the other? If that is the case, it could lead to the more detailed TFEU being given an expanded remit as a result of the broader mission of the TEU. Or does it mean that each curtails the other? In this case, many of the broader provisions of the TEU will be little more than rhetorical as they will be curtailed by the substance of the TFEU.

(b) Enhancing the democratic credentials of the Union

A different ethos permeates the Lisbon Treaty than the Constitutional Treaty. The latter was concerned to establish an autonomous pan-European constitutional democracy. The Constitutional Treaty therefore carried a number of procedures and symbols associated with constitutional democracy. At the most ephemeral level, there was provision for a European Union flag, anthem, motto and holiday. The Constitutional Treaty also contained all the tools of an autonomous European constitutional democracy. There was a primacy clause asserting the precedence of EU law over national law within the limits of the Treaty. A Bill of Rights of sorts was established with the incorporation of the EU Charter of Fundamental Rights, and EU Regulations and Directives were to become known as 'laws' or 'framework laws'. The Union was to have its own legal personality and Foreign Minister. Whilst the exact working out of these provisions resulted in much curtailed powers than those enjoyed by most liberal democratic states, they did convey the imagery of statehood.

The Treaty of Lisbon, in the words of the mandate to the IGC, abandoned the 'constitutional concept'.[130] Almost all the above provisions were removed by the Treaty of Lisbon. The provision establishing the primacy of EU law over national law and the detailed elaboration of the Charter were removed from the main text of the Treaty. A Declaration was instead attached setting out the primacy of EU law and a provision added requiring the Union to respect the rights, freedoms and principles in the Charter. Union legislative measures were to return to their traditional designation as Regulations and Directives, and the Foreign Minister was to be known as the High Representative. To be sure, sixteen Member States signed a Declaration stating that the symbols of the Union (the flag, the anthem, the motto, the provision on the

[129] Article 1(2) TFEU.
[130] EU Council, IGC 2007 Mandate, Brussels, 26 June 2007, para. 1.

euro as the European Union currency and the holiday) would remain as 'symbols to express the sense of community of the people in the European Union and their allegiance to it'.[131] Yet the fact that this was hidden away as a remote Declaration signed by a bare majority of states indicated constitutionalism's fall from grace.

If the constitutional conceit was abandoned by Lisbon, there was still a concern that the democratic qualities of the Union should have a more autonomous presence so that a Frankenstein should not be created which develops large numbers of laws and administers lives in an undemocratic way. This ethos is rooted around a twin set of principles.

The first is that the European Union is founded upon and must respect a set of liberal values that are shared across the Union and form part of a common identity. The nature and content of these values are set out in the first substantive provision of the TEU.

Article 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

These values are not rhetorical, nor do they form some general aspirational goal. Instead, they are to be recognised by the Union, must not be violated by it, and the Union commits itself to external policing by the European Court of Human Rights.[132] The commitment to respect fundamental rights was not uncontroversial. It begs questions as to which values were to be protected and whether they would be used to bootstrap new roles for the European Union. These concerns were strongly articulated by the British and Polish governments and a Protocol was therefore added, which stated that the Charter did not extend the ability of any court to declare Polish or British measures incompatible with EU fundamental rights law. As these states had particular concerns about the development of EU social rights, the Protocol provided that Title IV of the Charter, in which most of these rights were incorporated, was only justiciable in these states insofar as the latter provided for them in national law.

The other set of principles is a more explicit commitment by the Union to democracy. The Lisbon Treaty, in particular, requires the Union to respect two forms of democracy: representative democracy and participatory democracy.[133] These principles are not just constraints that the Union must not violate. They are also a statement of its qualities. The idea of the European Union being a representative democracy was challenged before the German Constitutional Court in a challenge to the ratification of the Lisbon Treaty. Whilst allowing for the ratification of the Treaty, in that it only provided for limited powers to be conferred on the European Union, the German Constitutional Court agreed that the European Union was not a democracy when measured against national standards. It considered representative democracy, the principle of a legislator based upon one person per vote, as the heart of a democratic system. It also

[131] Declaration 52 to the Treaty of Lisbon on the symbols of the European Union.
[132] Article 6(1) TEU. This is dealt with in much more detail in Chapter 6 at pp. 259–62.
[133] Article 10 TEU.

considered the Union to be characterised by what it termed 'excessive federalisation'. By this, it meant the principle, as in federal systems, of equality between the constituent elements. In the case of the European Union, this meant equality of votes between the nation-states.

2 BvE 2/08 *Gauweiler* v *Treaty of Lisbon*, Judgment of 30 June 2009

280. Measured against requirements in a constitutional state, the European Union lacks, even after the entry into force of the Treaty of Lisbon, a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people. What is also lacking in this connection is a system of organisation of political rule in which a will of the European majority carries the formation of the government in such a way that the will goes back to free and equal electoral decisions and a genuine competition between government and opposition which is transparent for the citizens, can come about ... contrary to the claim that Article 10.1 TEU Lisbon seems to make according to its wording, the European Parliament is not a body of representation of a sovereign European people. This is reflected in the fact that it, as the representation of the peoples in their respectively assigned national contingents of Members, is not laid out as a body of representation of the citizens of the Union as an undistinguished unity according to the principle of electoral equality.

281. Also in their elaboration by the Treaty of Lisbon, no independent people's sovereignty of the citizens of the Union in their entirety results from the competences of the European Union. If a decision between political lines in the European Parliament receives a narrow majority, there is no guarantee of the majority of votes cast representing a majority of the citizens of the Union. Therefore the formation, from within Parliament, of an independent government vested with the competences that are usual in states would meet with fundamental objections. Possibly, a numerical minority of citizens existing according to the ratio of representation could govern, through a majority of Members of Parliament, against the political will of an opposition majority of citizens of the Union, which does not find itself represented as a majority. It is true that the principle of electoral equality only ensures a maximum degree of exactness as regards the will of the people under the conditions of a system of strict proportional representation. But also in majority voting systems, there is a sufficient guarantee of electoral equality for the votes at any rate as regards the value counted and the chance of success, whereas it is missed if any contingent that is not merely insignificant is established.

282. For a free democratic fundamental order of a state ..., the equality of all citizens when making use of their right to vote is one of the essential foundations of state order ...

288. It is true that the democracy of the European Union is approximated to federalised state concepts; measured against the principle of representative democracy, however, it would to a considerable degree show excessive federalisation. With the personal composition of the European Council, of the Council, the Commission and the Court of Justice of the European Union, the principle of the equality of states remains linked to national rights of determination, rights which are, in principle, equal. Even for a European Parliament elected with due account to equality, this structure would be a considerable obstacle for asserting a representative will of the parliamentary majority with regard to persons or subject-matters. Also after the entry into force of the Treaty of Lisbon, the Court of Justice, for instance, must always be staffed according to the principle 'one state, one judge' and under the determining influence of the Member States regardless of their number of inhabitants. The functioning of the European Union continues to be characterised by the influence of the negotiating governments and the subject-related administrative and formative competence of the Commission even though the

rights of participation of the European Parliament have been strengthened on the whole. Within this system, the parliamentary influence has been consistently further developed with Parliament's being accorded the right to veto in central areas of legislation. With the ordinary legislative procedure, the Treaty of Lisbon makes a norm what is already factually decisive under the currently applicable law in many areas: in the co-decision procedure, a directive or a regulation cannot be adopted against the will of the European Parliament.

289. The deficit of European public authority that exists when measured against requirements on democracy in states cannot be compensated by other provisions of the Treaty of Lisbon and to that extent, it cannot be justified.

290. The European Union tries to compensate the existing considerable degree of excessive federalisation in particular by strengthening the citizens' and associations' rights aimed at participation and transparency, as well as by enhancing the role of the national parliaments and of the regions. The Treaty of Lisbon strengthens these elements of participative democracy aimed at procedural participation. Apart from the elements of complementary participative democracy, such as the precept of providing, in a suitable manner, the citizens of the Union and the 'representative' associations with the possibility of communicating their views, the Treaty of Lisbon also provides for elements of associative and direct democracy (Article 11 TEU Lisbon). They include the dialogue of the institutions of the Union with 'representative' associations and the civil society as well as the European citizens' initiative. The European citizens' initiative makes it possible to invite the Commission to submit any appropriate proposal on the regulation of political matters. Such an invitation is subject to a quorum of not less than one million citizens of the Union who have to be nationals of a 'significant number of Member States' (Article 11.4 TEU Lisbon). The citizens' initiative is restricted to issues within the framework of the powers of the Commission and it requires concretisation of its procedures and conditions under secondary law by a regulation...

293. Also the institutional recognition of the Member States' Parliaments by the Treaty of Lisbon cannot compensate for the deficit in the direct track of legitimisation of the European public authority that is based on the election of the Members of the European Parliament. The status of national parliaments is considerably curtailed by the reduction of decisions requiring unanimity and the supranationalisation of police and judicial cooperation in criminal matters. Compensation, provided for by the Treaty, by the procedural strengthening of subsidiarity shifts existing political rights of self-determination to procedural possibilities of intervention and judicially assertable claims of participation; this was concurringly emphasised in the oral hearing.

294. Neither the additional rights of participation, which are strongly interlocked as regards the effects of their many levels of action and in view of the large number of national parliaments, nor rights of petition which are associative and have a direct effect vis-à-vis the Commission are suited to replace the majority rule which is established by an election. They are intended to, and indeed can, ultimately increase the level of legitimisation all the same under the conditions of a *Staatenverbund* (association of States) with restricted tasks.

The view of the German Constitutional Court is not simply that the European Union is not yet sufficiently democratic. It is that it can never be fully democratic. For the Union to realise the standard of democracy set by the German Constitutional Court, it would have to turn itself into a unitary state. One would need a single legislative assembly in which representation in the dominant chamber was not allocated according seats per Member State but simply on the

basis of European citizenship. As we shall see, the only directly elected body, the European Parliament, is not the dominant chamber, and there is no prospect of seats being allocated other than on a national basis. Indeed, the idea of national allocation (or excessive federalisation in the language of the German Constitutional Court) permeates all EU decision-making structures. To eradicate it is not only politically unrealistic but would create a beast unrecognisable from the current European Union.

The judgment is thus a powerful indictment of the European Union. Whilst used by the German Constitutional Court to limit the tasks which can be granted to the Union,[134] it also begs questions about the legitimacy of the European Union when acting within its aegis. For, if the Union can only look at best for what the German Constitutional Court terms 'democratic supplementation'[135] there is a challenge to justify why it should have wide-reaching authority over our lives or precedence over national laws or local traditions.

(c) Supranationalisation of the Union

The Lisbon Treaty kept the new explicit competences enumerated by the Constitutional Treaty: energy, intellectual property, space, humanitarian aid, sport and civil protection. In addition, it added a further one: that of climate change. Yet there was already competence to carry out activity here under other legal bases, and the Union had already taken significant measures in all these fields. The most important reform was not a formal extension of EU powers but an abolition of the three pillar structure established at Maastricht. All three pillars were brought into a single framework. Whilst provision was made for the Common Foreign and Security Policy to continue to be treated discretely, activities governed by the third pillar, namely policing and judicial cooperation in criminal matters, were now to be governed by the same procedures as those traditionally applied to EC activities. This reform had two important implications. The first was a significant extension of the supranational qualities and procedures of the Union to govern more extensively the sensitive fields of policing and criminal justice. The second was the extension of the so-called flexibility provision which permits legislation to be adopted to realise broad EU objectives if no more specific legal provision allows this. As the previous procedure applied only to the EC Treaty, the new procedure has a wider remit as it applies not merely to Community but to all Union activity.

Member States sought to draw some of the teeth from the unification of the pillars through the insertion of a new proviso stating that national security remains the sole responsibility of each Member State. The flexibility provision was amended so that it cannot be used as a legal base for matters relating to common and foreign security, and a Declaration was inserted stipulating that it could not be used to enable de facto amendment of the Treaties. In addition, specific provision was made for the United Kingdom and Ireland. A Protocol was introduced which amends and extends that granted at Amsterdam. In addition to being free to decide whether or not to participate in individual pieces of legislation on visas, asylum, immigration and other policies related to free movement of persons, they had now a parallel entitlement in the fields of policing and judicial cooperation in criminal justice. If either Member State chooses not to participate, it would not be bound by that legislation.

[134] See pp. 194–8.

[135] This term is used at para. 272 of the judgment, above n. 82.

(d) Recasting the institutional setting

The Constitutional Treaty was largely about institutional reform. Its proposals were adopted largely unscathed in the Treaty of Lisbon. QMV was extended to about fifty new areas. Provision was also made for legislative procedures based on the unanimity vote in the Council to be altered to QMV without the need for an IGC. In terms of the powers of the European Parliament, the co-decision procedure, which grants it a veto, has been applied to forty new areas. In addition, it has been granted significant powers of assent, most notably with regard to Article 352 TFEU and anti-discrimination, whereby its agreement must be obtained before any legislative proposal can become law. The Treaty of Lisbon also extended the powers granted to national parliaments. They were given additional time to consider legislative proposals and increased powers to call for a proposal to be reviewed on the ground that it does not comply with the principle of subsidiarity, which provides that EU measures should only be adopted if the objectives of the action cannot be sufficiently achieved by Member States and by reason of their scale or effects can be better realised through Union action.

This increase in QMV and European Parliament powers led to the introduction of some caveats. 'Brake' procedures were added where national governments could insist that the matter be discussed at European Council level – and therefore be subject to unanimity – if a measure touched fundamental aspects of their social security or criminal justice systems. The French government, in particular, was concerned that market liberalising measures might in some way undermine national public services. A Protocol on Services of General Interest was therefore added which stated that nothing in the Treaties affected the competence of Member States to provide, commission or organise non-economic services of a general interest.[136]

Internal reforms were also made to the EU institutions. Commission membership is slimmed down to comprise, from 2014, a number corresponding to two-thirds of the number of the Member States. The President of the Commission was also given the unilateral power to dismiss individual Commissioners. With regard to the European Parliament, the cap on the number of MEPs in the European Parliament, 732, is retained. The central change to the Council was the introduction of a new formula for QMV in which there will be a qualified majority if 55 per cent of states representing at least 65 per cent of the population vote for it, and at least four states are required to vote against a measure for it to be blocked. Finally, the European Council was finally recognised as a formal EU institution.

There were also a number of institutional innovations. First, a President of the European Council elected by the European Council for a once renewable two and a half year period is established. Her job will be to drive forward and prepare the work of that institution. Secondly, a High Representative of the European Union is established. A member of both the Council and the Commission, her duty is to represent the Union in matters relating to the Common Foreign and Security Policy and ensure the consistency of the Union's external action. Finally, provision is made for citizens' initiatives whereby the Commission is obliged to consider proposals for legal measures made by petitions of one million citizens who are nationals of a significant number of Member States.

[136] See pp. 1035–7.

(iii) Ratification of the Lisbon Treaty

The ratification of the Lisbon Treaty was to follow the new ethos set out by that Treaty. This was to be no big pan-European constitutional moment in which, through referendums, the peoples of Europe participated in the creation of a new pan-European constitutional democracy. Instead, ratification was to take place, discretely, through national processes, which were in most cases national parliamentary ones. Indeed, Hungary set a record by ratifying the Lisbon Treaty four days after its signature. Only one state, Ireland, was to have a referendum, and this was because it was constitutionally required to do so.

If the ethos and symbolism of the Lisbon Treaty were different from the Constitutional Treaty, for the overwhelming majority of states, the institutional detail and extension of supranational competences were not significantly so.[137] This begged the question as to what weight was being given to the referendum results in the Netherlands and France and for the promises to hold referendums in the five other states which had promised to do so and had never held a referendum.

The question was particularly challenging for two very different reasons. The first relates to the nature of the Constitutional Treaty process. As has been said, this process had (unsuccessfully) been about mobilising popular loyalty, affection and support for the European integration process. The route chosen was to garner these elements around a particular document, the Constitutional Treaty. European publics were asked to bless a text that had been developed in a civil and plural manner. This was always an optimistic strategy, but, alongside this, it conveys the message to all that this text has a significance of the highest order. If the substance of this text is now to be adopted not only through different processes but through processes that seem to fly against previous wishes, a climate of mistrust is unsurprising. The second relates to the nature of the European Union. Selling institutional reform to the public is hard work in any circumstances, as procedures seem arcane and there is no obvious large policy goal, such as the single market or EMU, around which debate can be mobilised. The European Union is particularly difficult, for, as the German Constitutional Court pointed out, its procedures are hybrid ones, oscillating between being similar but not identical to those found in national democracies and intergovernmental ones. Ratification was not therefore straightforward.

On 12 June 2008, the Irish referendum on the Lisbon Treaty was held; 53.4 per cent of the voters rejected it. Subsequent analysis of the 'No' vote suggested lack of information about the Lisbon Treaty as an important determinant, as well as concerns about perceived threats to Irish abortion laws and neutrality, as well as possible conscription to a pan-European army. None of these were countenanced by the Lisbon Treaty amendments. The only amendment that weighed heavily was the possible loss of an Irish Commissioner generated by the reduction of the Commission.[138]

In response, in December 2008, national governments agreed that they would take a Decision upon the entry into force of the Lisbon Treaty providing that the Commission would retain

[137] For a thoughtful comparison see House of Commons, *EU Reform: A New Treaty or an Old Constitution*, Research Paper 07/64 (London, House of Commons, 2007). Ireland and the United Kingdom obtained opt-outs from the most significant extension of supranational competences, policing and judicial cooperation in criminal matters, something not granted to them by the Constitutional Treaty.

[138] The main research for the Irish government was carried out by Milward Brown IMS, Post Lisbon Treaty Research Findings, available at http://angl.concourt.cz/angl_verze/cases.php (accessed 20 July 2009).

one Commissioner from each Member State.[139] This will, of course, prevent its being reduced to two-thirds of the number of Member States, and is, in effect, an amendment to the Lisbon Treaty. In June 2009, the Member States set out three sets of guarantees in a European Council Decision that nothing in the Lisbon Treaty would:

- affect the scope or applicability of the rights to life, protection of the family or in respect of education as set out in the Irish Constitution;
- change in any way, for any Member State, the extent or operation of EU competence in respect to taxation;
- prejudice the security and defence policy of any Member State, provide for the creation of a European army or conscription, or affect a state's right to decide whether or not to participate in a military operation.[140]

On the basis of this, the Irish government held a second referendum on 2 October 2009. The Lisbon Treaty was approved by 67 per cent of the vote. However, this was not the end of the process. The Czech government extracted a final concession before ratification. The same guarantees granted to Poland and the United Kingdom in respect of the EU Charter of Fundamental Rights were to be granted to it.

The tawdriness to the conclusion of this process contrasts markedly with the fanfare surrounding the beginning of the Future of Europe Convention; for the Heads of Government took the opportunity in the Decisions on Ireland to bring in a series of general amendments and interpretations to the Treaty of Lisbon on the size of the Commission, its ambit on taxation and its impact on national security and defence policies. In addition, at the June 2009 summit, they passed a further Solemn Declaration on Workers' Rights, Social Policy and Other Issues.[141] Whilst only repeating the wording of the Treaty of Lisbon, it emphasised the responsibility of Member States for delivery of education and health, and importance of local autonomy in the provision and organisation of services of general economic interest: a message that EU law is to interfere as little as possible in these fields as well. Whatever the substantive merits of the case, the status of these is unclear. They are not formal amendments that have gone through appropriate EU or national processes or through any form of deliberation. Their legality and relationship to the Lisbon Treaty is uncertain. And it may be that this casualness with procedure will come back to haunt the Member States if, for example, the size of the Commission is challenged before a court.

The Irish referendums carried another message for those interested in European integration. The lack of knowledge about the process and the power of the 'myths' surrounding the Treaty of Lisbon illustrated the lack of depth of popular interest in the process, and the difficulty of mobilising popular loyalty for the project. This raises doubts about how democratically legitimate the process can ever be, and raises immediate concerns to make sure that the process is properly contained.

To this end, the process was challenged before national constitutional courts, most notably those in the Czech Republic[142] and Germany.[143] Both constitutional courts focused on whether excessive powers had been granted to the Union, albeit that the bases were different. For the Czech Constitutional Court, this derived from the Czech Republic being a democratic state

[139] Conclusions of the Brussels European Council, 11/12 December 2008, I.2, EU Council, 17271/1/08 Rev. 1.
[140] Conclusions of the Brussels European Council, 18/19 June 2009, Annex 1, EU Council 11125/2/09/Rev. 2.
[141] *Ibid.* Annex 2. [142] Pl ÚS 19/08 *Treaty of Lisbon*, Judgment of 26 November 2008, available at www.usoud.cz/clarek; Pl ÚS 29/09 Treaty of Lisbon II, Judgment of 3 November 2009.
[143] 2 BvE 2/08 *Gauweiler* v *Treaty of Lisbon*, Judgment of 30 June 2009.

based upon the rule of law. This entailed that unlimited powers could not be transferred to another body such as the European Union. For the German Constitutional Court, it lay in the principle of self-determination incorporated in the right of each German citizen to vote in the Bundestag (the German Parliament). This entailed that the competences central to Germany's constitutional identity were not transferred to the EU level, as the latter lacked sufficient democratic structures to safeguard this principle.

In both instances, the language used by the courts was similar in tone to that used by the national constitutional courts vetting the Maastricht Treaty. Yet this time, both courts went a step further than simply placing a marker over the integration process. Whilst allowing for ratification of the Lisbon Treaty, both expressed concerns about individual provisions, thereby holding out the possibility of future review. Both also expressed concerns about the vagueness and possibility for abuse of the simplified revision procedure. The German Constitutional Court, in particular, considered that any revision using that procedure was a formal amendment, which would be open to constitutional review and would need ratification by both German parliamentary chambers, the Bundestag and the Bundesrat. There were further concerns from both courts. The Czech Constitutional Court was unhappy about the lack of clarity surrounding the Union's treaty-making powers and the German Constitutional Court was concerned about the vagueness and breadth of the flexibility provision. Whilst these amounted to grumblings in both cases rather than opposition, these grumblings suggested that use of these procedures is likely to be subject to particular scrutiny by these courts.

This brings us to the final paradox of the Treaty of Lisbon. It started as a process intended to open up European integration to greater popular participation. It has been allowed to be realised by the most intergovernmental body of the Union, the European Council, and by national constitutional courts. The price exacted by these bodies is a far more active control over European integration in the future. The European Council has taken it upon itself to interpret the Treaties and national constitutional courts have suggested that they are more amenable to challenges to EU acts on the grounds that these are ultra vires. Neither the European Council nor the courts are majoritarian institutions. Yet, it is they who have taken on the burden of the safeguarding of the European ideal, whilst, in the case of the German Constitutional Court at least, seriously questioning its democratic credentials.

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