

## JCER Special Commentary Series

# Commentary Editorial: The Lisbon Treaty and the Constitutionalization of the EU

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### Constitutionalizing the European Union

When final result showed 67.1% of Irish voters in favour of the Lisbon Treaty, with 32.9% voting against, Irish political elites were visibly relieved. Irish Taoiseach Brian Cowen celebrated that 'today we have done the right thing for our own future and the future of our children'. Irish Foreign Minister Michael Martin concurred 'I am delighted for the country'. Thus, fortunes reversed by a massive 20% swing towards the 'yes' campaign compared to the first Lisbon referendum in June 2008. Voter turnout was up by 6% to reach 58%. European Commission President José Manuel Barroso celebrated that the support for the treaty 'shows the value of European solidarity and I am really glad with the result we are receiving from Ireland [...] it shows the very positive response that Europe is bringing to the economic and financial crisis.' In agreement, Guy Verhofstadt, leader of the Liberal ALDE group in the European Parliament and former Belgian Prime Minister expressed his joy: 'Today is a beautiful day for Europe. Today is the first day of a new future for Europe, united, democratic, effective and strong. With this new Treaty the European Union will be able to tackle important problems such as the financial and economic crisis in a more European, coherent and effective way. We will be able to speak with one voice in the world and to provide the answers our citizens need.' Jerzy Buzek, President of the European Parliament, even suggested that 'Europe is back on track' (all above quotes cited in: Euractiv 2009).

However, the road to the entry into force of the Lisbon Treaty was very long and hard. The aim of this editorial, in addition to introducing the four commentaries, is to establish the larger context in which the Lisbon Treaty was negotiated. The Lisbon Treaty evolved out of the rejected 'Treaty Establishing a Constitution for Europe' and is part of what is commonly referred to as the process of treaty reform. This includes all EU treaties from the Treaty of Rome (1957) to the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997), and the Nice Treaty (2001). Very soon after the Nice Treaty was signed, the so-called 'Post-Nice Process' was launched to start a significant debate about the future of Europe (Christiansen and Reh 2009). Christiansen (2008) suggests that this debate about a 'European Constitution' was deeply embedded in an active process of politicisation by EU elites, in particular the inclusion of language, symbols and other

trappings of statehood in that particular treaty. The outcome of this debate was first included in the Convention on the Future of Europe, which provided the blueprint for the Constitutional Treaty. However, when the treaty was rejected in two separate referenda in France and the Netherlands in 2005, a 'period of reflection' followed by another Intergovernmental Conference (IGC) led to the Lisbon Treaty, signed on the 13 December 2007.

Christiansen and Reh (2009: 4) analyse the process of treaty reform as a process of 'constitutionalization' on the basis of three major premises: (1) constitutionalization is a continuous process whereby Europe's normative basis is being transformed driven by formal and informal, explicit and implicit mechanisms, with each reform being connected to the previous one; (2) treaty reform is an important mechanism behind constitutionalization, amongst others; and (3) constitutionalization is a struggle between various actors over institutional choices overlapping with EU policy-making. Furthermore, they distinguish between three different key mechanisms in this process: (1) formal and explicit constitutionalization, which is the process most closely modelled on the domestic constitution-founding experience, leading to a 'European finalité' (the Constitutional Treaty falling into this category); (2) formal and implicit constitutionalization, which is the process which generates an 'EU constitutional order' through international treaties whereby the legal order increasingly moves away from traditional international law (successive EU treaties from Rome, to Maastricht, Amsterdam, Nice and Lisbon); and (3) informal and incremental constitutionalization, which de facto move the EU's legal order towards a constitutional order without relying on EU treaty reform (such as European Court of Justice verdicts).

Christiansen and Reh (2009) conclude that the process of formal and explicit 'constitutionalization' failed. This links to the argument advanced by Christiansen (2008) that the experiment of 'politicisation' of treaty reform was unsuccessful. The constitutional debate had been a radical departure from the previous practice of avoiding politicisation at all costs. Yet, the success of the Lisbon Treaty indirectly confirms also the failure of the Constitutional Treaty. Reforming the treaties of the European Union is possible only under conditions of low politicisation, despite the lessons of Nice which had seemed to indicate that a greater involvement of the European public would be beneficial for the European integration project (Christiansen 2008).

### **The process from a 'Constitutional Treaty' to a 'Reform Treaty'**

How did the EU reach this point at which Lisbon, the failure of the formal and explicit constitutionalization, would be seen as a success in Brussels? At the very minimum it is still a formal and implicit step towards greater European integration via treaty reform. Initially, the outcomes of Nice were perceived as questionable, in both content and process in which they had been negotiated. The actual experience of the final summit was damaging, when negotiators bargained for three entire days (and nights) over the final issues, and were perceived to be more concerned with individual member state interests than 'European' interests as a whole. Consequently, the Nice summit ended in Declaration 23 intended to launch a wider debate about the 'Future of Europe' (Christiansen 2008: 40). Belgium, the EU Council Presidency in the second half of 2001, ensured a 'maximalist' interpretation of the post-Nice process. The decision to entrust the preparation of an IGC to a Convention was taken in Laeken (Norman 2003: 24). This Convention started in February 2002 and produced the first incomplete draft of the Constitutional Treaty on the 13 June 2003 in time for the Thessaloniki Council a week later. Subsequently, the Convention gained two more sessions to finish by 10 July 2003 for some 'purely technical' work (Norman 2003: 301). Under the Irish Presidency, the IGC finally approved the Constitutional Treaty on the 18 June 2004.

The participants of the Constitutional Convention were of considerable significance. Valéry Giscard d'Estaing, a former French President, was nominated as the Chairman of the Convention, with Jean-Luc Dehaene and Giuliano Amato, former prime ministers of Belgium and Italy respectively, as Vice-Chairs. Sir John Kerr, a former UK Permanent Representative with excellent connections to the British establishment, was appointed as Secretary-General. Thus, the Convention had considerable and clear political and administrative leadership (Christiansen 2008: 40). The Convention was composed of national governments, members of the European Commission, and members of national parliaments and the European Parliament. While members of the Convention organised themselves in different sectoral working groups, the Convention can be seen as a top-down affair with the 'Presidium', bringing together the 12 key members of the Convention, steering the drafting of the treaty (Christiansen 2008: 40).

In the end, the Convention managed to set the agenda decisively for the Constitutional IGC. The IGC had the formal powers to decide on treaty reform, and followed the Convention in most respects. The Italian Presidency during the IGC in the second half of 2003 followed more or less a strategy of avoiding re-opening individual articles. While it practically failed in December 2003, it handed over the same strategy to the Irish Presidency, which succeeded in June 2004. However, as Christiansen (2008: 41) suggests, given the constitutional aspirations of the Constitutional Treaty, the Convention created significant public interest in a large number of member states, which subsequently made referenda a much-used method of ratification. Spain, France, the Netherlands, Britain, Ireland, Luxemburg, Portugal, Sweden, Denmark, and Poland all agreed to hold referenda in order to ratify the Treaty. However, during their respective referenda, on 29 May 2005 France voted No with 55%, on 1 June 2005 the Netherlands voted No with 62%, and, subsequently, Britain froze ratification of the Treaty on 6 June 2005. Subsequently, the feeling across member states became clear that France and the Netherlands were so central to the European integration project that the treaty would have to be re-negotiated (Christiansen 2008: 42).

The Commission identified a gap in the communication between the EU and its citizens, which was aimed to be filled through a programme of dialogue between citizens and elites, the so-called 'Plan-D'. The European Council summit of 17 and 18 June 2005, decided that a 'reflection-period' lasting until 2007 was necessary, which would enable a renegotiation of the treaty. Despite this official reflection amongst member states in the hope for better domestic conditions for re-negotiation and ratification, a possible re-negotiation of the Constitutional Treaty was very much helped along by EU-level factors. A number of domestic factors also made this signing more likely. Firstly, France elected Nicolas Sarkozy as President, who argued successfully for a smaller 'reform treaty' in the French presidential (May 2007) and parliamentary elections (June 2007). He suggested that he would choose to ratify this 'mini-treaty' by parliament. Given that France presented the most significant stumbling block to ratification of the CT, this became a formidable chance for the EU to maintain the momentum for treaty reform. EU political elites still regarded treaty reform as necessary, but following Sarkozy, they argued that the new treaty should not be presented as a constitutional project, but rather a 'mini-treaty'. Ratification of an 'ordinary' treaty was perceived to be more easily achievable. This resulted in a strategy of active de-politicisation of negotiations towards a 'Reform Treaty' (Christiansen 2008: 42).

Under the German Presidency of 2007, rapid progress was made to renegotiate what was eventually to become the Lisbon Treaty. In addition to positive domestic conditions with the fresh election of French President Sarkozy, a number of other coincidental factors also helped. UK Prime Minister Tony Blair had announced his forthcoming resignation from government, which may have provided him with more room for manoeuvre to take

political decisions that his successor would have to implement (Donnelly 2008: 21). Finally, German Chancellor Angela Merkel proved to be an expert and very skilled negotiator, especially to overcome Polish obstructions against the new voting procedure. The fact that the German 'Grand Coalition' proved much more stable than expected added a sense of leadership from Germany.

However, despite some Polish obstructions by President Kaczynski, it was in fact (again) the British delegation that had again become the biggest obstacle just before the IGC summit. A significant new opt-in/opt-out mechanism to the Justice and Home Affairs provisions, even in areas that Britain and Ireland had not previously received such a mechanism, meant that the Lisbon Treaty was a 'different beast' to the Constitutional Treaty, at least in the British and Irish version. In the British context, this concession strengthened the domestic argument against holding a referendum as a method for ratification, subsequently often used by Prime Minister Gordon Brown to ensure British ratification.

The Lisbon Treaty was eventually signed by the Heads of State or Governments in December 2007. It is notable that the vast majority of provisions of the Constitutional Treaty were also included in the Lisbon Treaty:

1. The EU's voting system will become streamlined and more reflective of population size. A majority vote in the Council of Ministers will need 55% of member states representing 65% of the overall EU population to approve.
2. In addition, majority voting will also become the rule in significant policy areas previously decided by unanimity: migration, criminal justice and judicial and police co-operation; the European Court of Justice (ECJ) will also gain jurisdiction in these areas for the first time.
3. The treaty creates a full-time standing president of the European Council, who will be selected by the European Council for a two-and-a-half-year period, renewable once. The person will also prepare and host EU summits.
4. A new 'foreign minister' or 'High Representative for Foreign and Security Policy' will be created by merging the posts of External Relations Commissioner with the current 'High Representative' in the European Council. The post will also lead a 'European External Action Service'.
5. The treaty gives legal force to the Charter of Fundamental Rights.
6. National parliaments will acquire new rights to stop Commission proposals from becoming legislation. If half of all 27 national parliaments disagree with a proposal, then a majority of national governments (or a majority of members of the European Parliament) can insist for this draft measure to be deleted.

### **How can we explain the constitutionalisation process?**

Various scholars (Haas 1958; Lindberg 1963; Moravcsik 1998, 1999; Pollack 1997, 2003; Tallberg 2003, 2006; Beach 2004, 2005; Stone Sweet and Sandholtz 1997; Stone Sweet *et al.* 2001; Kaunert 2005, 2007, 2009) analyse EU treaty reform and EU institutional design in detail.

The predominant explanatory theory used in the European integration literature is liberal intergovernmentalism. According to this theory, European integration can best be explained as a series of rational choices made by national leaders (Moravcsik 1998: 18). Throughout a large series of works, Moravcsik (1998, 1999) portrays the EU as largely intergovernmental and dominated by national interests. National leaders make choices in response to constraints and opportunities derived from economic interests of powerful domestic constituents and the relative power of each state in the international system.

Moravcsik offers a model of a two-level game consisting of a liberal theory of national preference formation and an intergovernmentalist account of strategic bargaining between states. This model is then tested across the five most salient negotiations in the history of the European Community (as it was then called) in his view: (1) the Treaty of Rome in 1957; (2) the consolidation of the customs union and the common agricultural policy during the 1960s; (3) the establishment of the European monetary system in 1978/79; (4) the negotiations of the single European act in 1985/86; and (5) the Maastricht treaty on the European Union signed in 1991.

The first stage in his model accounts for national preferences (Moravcsik 1998: 24). They are defined as ordered and weighted sets of values placed on substantive outcomes. These preferences are exogenous to a specific political environment, and thus are not changed in response to any action of any actor (Moravcsik 1998: 25). In his model, two categories of motivation account for underlying national preferences for and against European integration (Moravcsik 1998: 26), notably geopolitical and economic interests. The second stage of his model (Moravcsik 1998: 50) is interstate bargaining. If one chooses an intergovernmental setting for analysis, it is hardly a surprise to find that the character is intergovernmental. Wincott (1995: 602) makes this point lucidly. Moravcsik chooses to isolate treaty reform from day-to-day policy-making. Treaty reform is constructed as an event rather than a process. This seems to be at odds with the fact that the EU has negotiated a significant amount of different treaties, each reforming the predecessor. This in itself is an indicator of the procedural nature of treaty reform.

### **The missing dimension: ratification as part of the process**

The problems encountered in the ratification process of the Constitutional Treaty, which later became the Lisbon Treaty raise serious questions as to whether there is not, at least, one dimension missing in Moravcsik's model. While he clearly emphasizes the control of member states on the treaty formation process, he fails to see the importance of domestic political factors at the next stage – the ratification process.

During their respective referenda, on 29 May 2005 France voted No with 55%, on 1 June 2005 the Netherlands voted No with 62%, and, subsequently, Britain froze ratification of the Treaty on 6 June 2005. Ratification of the Lisbon Treaty began in December 2007 and also ran into serious problems. While most EU Member States ratified the treaty by parliamentary vote, Ireland put the text to a referendum. The first Irish no-vote (53%) in a referendum on the Lisbon Treaty on 12 June 2008 made ratification of the treaty uncertain. Subsequently, Eurosceptic commentators (again) called for an abandonment of the treaty. However, in sharp contrast to the aftermath of the no-votes in France and the Netherlands, no member state stalled ratification.

This meant that Ireland (similarly to the situation after the first Nice referendum) became the most significant and obvious obstacle to ratification. 53% of voters rejected the Lisbon Treaty either because of a tangible lack of knowledge about the treaty or because they felt they had not been properly informed. Given the fact that there was absolutely no appetite for renegotiating the Lisbon Treaty (again) amongst other EU governments, the Irish government decided to enter into non-treaty negotiations, in which it secured a series of legal guarantees. At the EU summit on 18-19 June 2009, the Irish Taoiseach Brian Cowen received a declaration designed to reassure the Irish reservations derived from the first referendum.

It is at this point that the first commentary in this special series picks up the story. **Ben Tonra** examines the Irish ratification process in its complexity and importance. In the end, 67.1% of the Irish electorate voted in favour of the Lisbon Treaty, while 32.9% voted



against. However, while European elites were relieved by this result, the outcome was by no means assured. A much better yes-campaign than in June 2008 alongside a favourably changed, i.e. negative, economic climate provided some help to the Lisbon Treaty.

However, there were significant obstacles to ratifying the Lisbon Treaty, both before and after the Irish referendum: from Karlsruhe, to Warsaw and Prague. Prior to the Irish Referendum, the German Constitutional Court had to decide whether the Lisbon Treaty could be seen as compatible with the German 'Basic Law', i.e. the German Constitution. The commentary by **Lars Hoffmann** provides an excellent analysis of the verdict of the German Constitutional Court, which will 'come to haunt the Europhiles amongst us'. Nonetheless, the court eventually approved the Lisbon Treaty with the requirement to make changes to the German accompanying laws to ratification. The third commentary in the series, by **Kamil Zwolski**, however, sheds light on the extraordinary situation in Poland, where President Kaczynski had first signed the Lisbon Treaty in 2007, before delaying ratification significantly from Spring 2008 until October 2009. Nonetheless, this problem was ultimately also resolved. The final commentary, by **Petr Kratochvíl** and **Mats Braun** analyses the situation in the Czech Republic, where after all member states had completed ratification, one Head of Government still held out against the treaty to delay entry into force. In fact, there were even significant fears in the corridors of Brussels that Czech President Klaus might hold out until the next UK election in May 2010, whereby a new Conservative government under Prime Minister (hypothetically) elect David Cameron might withdraw the British ratification act in order to hold a referendum against the Lisbon Treaty. In the end, it did not come to this, but the commentary by Kratochvíl and Braun analyses lucidly how domestic political factors influenced the 'near death' situation in the Czech Republic very significantly. Thus, all commentaries put together provide an excellent picture just how much ratification needs to be analysed as a process separate from treaty formation. As such, European integration theories, such as liberal intergovernmentalism, are still in need of improvement in order to capture these important processes.

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