The Lisbon Reform Treaty: Internal and External Implications

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The European integration project is in the midst of conducting a soul-searching exercise, seeking its own *raison d'être*, vision, inspiration, constitutional apparatus, cohesive European identity, institutional efficiency and social legitimacy. Immigration and economic pressures which the EU is facing distance the European masses from Europe's economic, political and bureaucratic elite and render the exercise even more challenging. To make matters more complicated, measures that were once effectively employed to attain these objectives, such as the doctrines of supremacy and direct effect, as well as the Internal Market freedoms, are nowadays taken for granted and to a large extent are exhausted for such purposes.[1] Other instruments might prove to be unhelpful: The enlargement policy suffers from an 'enlargement fatigue', while the Common Foreign and Security Policy is inhibited by its intergovernmental nature.

Would the adoption of a formal constitutional order assist the EU in that regard? The participants of the EU Convention on the Future of Europe (2002-2003) certainly thought that it could. Their efforts culminated in the adoption of the Constitutional Treaty (2004). Following the rejection of the Constitutional Treaty by the French and Dutch electorate, the leaders of the EU and its Member States adopted the Lisbon Reform Treaty, a watered-down version of the Constitutional Treaty.[2]

The Lisbon Reform Treaty purported to provide the EU with a comprehensive and advanced constitutional, institutional, socio-economic regime, a regime which would enhance the EU's legitimacy, cohesiveness, effectiveness and actorness, thereby enabling it to meet its internal and external challenges.[3]

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1 *See* S. Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43/3 Common Market Law Review, 629, at 630 & 651 (2006); A. von Bogdandy, *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, 37 Common Market Law Review 1307, at 1337 (2000).

2 OJ 2007 C 306.

3 For analysis of the Lisbon Reform Treaty *see* M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 Common Market Law Review 617 (2008); D. Dinan, *Governance and Institutional Developments: Ending the Constitutional Impasse*, 46 Journal of Common Market Studies (Annual Report) 71 (2008); S. Kurpas *et al*., T*he Treaty of Lisbon: Implementing the Institutional Innovations* (2007); T. Risse & M. Kleine, *Assessing the Legitimacy of the EU's Treaty Revision Methods*, 45/1 Journal of Common Market Studies 69 (2007); U. Sedelmeier &

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The Leonard Davis Institute for International Relations and the Israeli Association for the Study of European Integration (IASEI), with the assistance of the Czech Association of European Studies, the Friedrich Naumann Foundation for Liberty and Eleven International Publishing, invited renowned scholars from Austria, Belgium, Croatia, Czech Republic, Germany, Italy, Poland, Spain, United Kingdom, United States and Israel to an international conference entitled 'The Lisbon Reform Treaty (and its rejection?): Internal and External Implications'. The conference examined this theme from interdisciplinary, theoretical, and thematic perspectives, critically exploring the normative, institutional, constitutional, legal, economic, and socio-political dimensions of the Lisbon Reform Treaty. The European Journal of Law Reform, for its part, agreed to provide the academic platform for the publication of the conference proceedings and nine of the conference contributions were selected for this Volume.

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The European Coal and Steel Community (1951) and the European Economic Community (1957) were formed as economic entities and as such they offered individuals and corporations economic rights, without providing for a comprehensive constitutional-institutional regime. Into that vacuum entered the European Court of Justice, which refused to treat the original European legal order as a mere international treaty operating solely under traditional public international law. Rather the ECJ regarded itself as serving a "constitutional role,"[4] transforming the constituting treaties into the EC's "Constitutional Charter."[5]

Since then, European integration has been undergoing a continuous and unprecedented process of constitutionalisation, whereby its legal order has been elevated from a set of traditional, horizontal legal arrangements binding sovereign states into a vertically integrated, quasi-Federal, *sui generis* legal regime, conferring enforceable rights on legal entities.[6]

The EU attempted to formalize and concretize this judicial-led constitutional process and the ratification of the Constitutional Treaty was meant to serve as the

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A. R. Young, *Editorial: The EU in 2007: Development without Drama, Progress without Passion*, 46 Journal of Common Market Studies (Annual Review) 1 (2008); T. König, S. Daimer & D. Finke, *The Treaty Reform of the EU: Constitutional Agenda-Setting, Intergovernmental Bargains and the Presidency's Crisis Management of Ratification Failure*, 46/3 Journal of Common Market Studies 337 (2008).

4 Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, submitted to the European Council in preparation for the IGC (May 1995), at 4; B. de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, *in* P. Alston (Ed.), The EU and Human Rights 878, at 869 (1999).

5 Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-06079, as analyzed by L. R. Helfer & A-M. Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 Yale Law Journal 273, at 293 (1997-1998).

6 U. Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 European Law Journal 14 (2003).

culmination of that attempt.[7] Yet, the Constitutional Treaty (which was ratified by eighteen Member States) was rejected by the French and Dutch electorate, sparking a constitutional crisis and creating an impasse.[8] Following a 'period of reflection', the Lisbon Reform Treaty was adopted instead.

The Lisbon Reform Treaty stripped the Constitutional Treaty of its symbols, shedding the form, language and symbols of the "European Constitution."[9] Yet it reincarnated to a large extent most of its institutional-constitutional reforms, possibly affording the EU improved institutional-constitutional architecture.[10]

As such it should be seen as an ambitious albeit disguised constitutional document, designed to simplify and re-organize the prevailing legal order, to increase the EU's competencies, to enhance the efficiency, transparency, democratic accountability and popular legitimacy of the EU's institutional apparatus and its decision-making process and to buttress the EU's external actorness.[11]

For these purposes the Lisbon Reform Treaty accorded international legal personality to the EU, abolished the EU's three-pillar structure, enhanced the role of national parliaments and the EU citizens in the decision-making and legislative processes, broadened the EU's competencies in general and in the fields of Freedom, Security and Justice, in particular.[12] In addition, it reorganized and enhanced the Foreign, Defence and Security Policy, provided the EU with a President of the European Council and a Foreign Minister (the latter titled High Representative for Foreign Affairs), accorded the Charter on Human Rights a binding legal force and the EU a mandate to accede the ECHR,[13] reformed the decision-making instruments, powers and procedures,[14] including in particular the scope of the co-decision legislative process and Qualified Majority Voting, reduced the size of the Commission, further empowered the European Parliament in the legislative, budgetary and supervisory spheres and extended the competencies of the EU's judiciary.[15]

Can one therefore conclude that the Lisbon Reform Treaty succeeded in providing the EU with a modern quasi-constitutional formal basis, striking the right delicate equilibrium between institutional-procedural efficiency and democratic accountability and social legitimacy, between supranationalism and intergovernmentalism, between competitiveness and social cohesion? Would it

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7 *See* Treaty establishing a Constitution for Europe, OJ 2004 C 310/01, at http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML. For analysis of the constitutional process and its various stages, *see* Dougan, *supra* note 3, at 618-620.

8 S. Hug & T. Schulz, *Referendums in the EU's Constitution Building Process*, 2/2 The Review of International Organizations 177 (2007).

9 Dougan, *supra* note 3, at 620.

10 For analysis, *see* Dougan, *supra* note 3, at 620-637.

11 *See* König, Daimer & Finke, *supra* note 3, at 352.

12 For analysis, *see* Dougan, *supra* note 3, at 672-687.

13 *Id*., at 671-682.

14 For analysis, *see* id., at 637-651.

15 *See* König, Daimer & Finke, *supra* note 3, at 352; Dougan, *supra* note 3, at 672-680.

bring the European integration project closer to the EU citizens, as envisaged in the Laeken Declaration? Would it obtain their widespread acceptance? Not necessarily.

It was Michael Dougan who warned us in his extensive survey of the Lisbon Reform Treaty that despite the overall impressive achievements of the Lisbon Reform Treaty one must not conclude in the words of Shakespeare that "all's well that ends well."[16] Indeed the leaders of the Member States were not convinced that they should bring the Lisbon Reform Treaty to the approval of their citizens. Instead they reverted to their own parliaments for ratification and the Lisbon Reform Treaty was approved by twenty four national parliaments. Only Ireland, which was bound under domestic legislation to obtain popular approval, called for a referendum, which ended up to the dismay of EU leaders with a clear-cut no-vote. The fate of the Lisbon Reform Treaty thus remains unclear.

This Volume attempts to analyse the Lisbon Reform Treaty as well as the various implications and ramifications of its ratification or its rejection, focusing on three central themes: (i) the procedure of ratification; (ii) the EU's own nature and its interface with the constitutional process; and (iii) the impact of the Lisbon Reform Treaty on the EU Regional Policy, the Foreign, Security and Defence Policy (CFSP/ CSDP) and on the Area of Freedom, Security and Justice (AFSJ).

Addressing the process of Treaty adoption, Sarah Seeger analyses the shift that took place in numerous Member States from referendum euphoria, in respect to the Constitutional Treaty, to referendum phobia, in respect to the Lisbon Reform Treaty. Seeger explores how Member States decided whether to ratify the Lisbon Treaty, either in Parliament or through a referendum. Applying a comparative analysis across five Member States, Seeger analyses governments' framing patterns of the Lisbon Treaty and their positive and negative impact on the decision-making process.

Three articles examine the formation of the EU's persona and constitutional identity by taking different approaches: the article by Sergio Fabbrini focuses on the level of understanding between Member States of what the constitutional identity of the European polity is and what it should be; the article of Luk Van Langenhove and Daniele Marchesi provides a three-generation typology of the evolution of regional integration and attempts to situate the EU in that analysis in light of the reforms proposed by the Lisbon Reform Treaty; while Maya Sion-Tzidkiyahu's contribution emphasises how Member States' opt-out actions shape the formation of the EU.

Fabbrini analyses the dynamics of EU constitutionalisation, arguing that these dynamics are underlined by constant tensions between competing views and between different understandings of the desired constitutional nature of the European Union. In the absence of common constitutional language, any attempt to create a stable and fixed European constitutional identity is likely to be contested. Luk Van Langenhove and Daniele Marchesi explore the implications of the Lisbon Reform Treaty pertaining to the EU's attempt to move beyond first generation regionalism (extensive economic integration) and second generation

[16] For analysis, *see* Dougan, *supra* note 3, at 617.

regionalism (a developed political and institutional entity with a spectrum of internal policies) into third generation regionalism, under which the EU would serve as a fully-fledged actor in international relations, engaging proactively and in a unitary manner with other regions and at the multilateral level. Sion-Tzidkiyahy unravels the issue of opt-outs, taking a historical perspective from the first introduction of opt-outs in the Maastricht Treaty to the Lisbon Treaty. Focusing on the areas of Justice and Home Affairs (JHA) and AFSJ, she examines the United Kingdom, Denmark and Ireland and how their opt-outs influenced the development of a Europe *à la carte*.

The final theme of this Volume analyses the effects of the Lisbon Reform Treaty on the EU's regional policy, the human rights regime, the AFSJ, as well CFSP/ CSDP. The impact of the Treaty on regional policy is addressed at different layers of governance.

Claudio Mandrino investigates whether the Lisbon Treaty improved the position of the regions in terms of governance in the EU and whether the regions' legal role has advanced when compared with the roles played by governments and EU supranational institutions. His investigation looks at five key areas: recognition, consultation, representation, justiciability and subsidiarity. Through these lenses, Mandrino argues that changes in the Lisbon Reform Treaty were more a matter of formality than any substantial redistribution of powers and competencies. Reaching similar conclusions, Anna-Lena Högenauer observes multi-level governance at the EU by employing the logic of two-level games. She explains that while the Lisbon Reform Treaty empowers the regions with several new participatory rights, these remain limited in scope, and that overall the Lisbon Treaty is not likely to lead to substantial changes in regions' ability to influence EU decision-making processes and legislation.

Eve C. Landau argues that the attempt by the Lisbon Reform Treaty to accord binding legal force to the EU Charter of Fundamental Rights is to be welcomed because it would provide the EU with an advanced and comprehensive human rights regime. In such a scenario, the accession of the Union to the ECHR, as prescribed by the Lisbon Reform Treaty, would, however, be redundant, if not harmful.

Juan Santos Vara examines the implications of the Lisbon Treaty for the external dimension of the AFSJ. He shows that external challenges related to AFSJ can be met by the EU through various legal instruments and actions, grounded in the legal basis provided by the new Treaty. Nevertheless, EU's ability to significantly act as international actor in AFSJ is undermined by Member States who completely retain competences in AFSJ matters or opt out of certain areas.

Concluding this Volume, Edith Drieskens addresses the CFSP/CSDP. She uses a principal-agent theory to examine whether the Treaty of Lisbon will lead to an increased EU actorness – the capacity to act – at the United Nations. Addressing conceptual issues such as representation, specialisation, autonomy and authority, Drieskens shows that the Treaty proposes little improvement for greater EU actorness, particularly since the latter depends on the willingness of the Member States and their capacity to act as agents of the EU.

It is to be hoped that when combined, the nine contributions will broaden the analytical breadth of existing scholarship on the EU's constitutional, institutional, socio-political, legal and economic persona, as affected by the Lisbon Reform Treaty (and its possible rejection).