From the Constitutional Treaty to the Reform Treaty

Gil Carlos Rodríguez Iglesias*

The Lisbon Treaty can only be understood with regard to the Treaty Establishing a Constitution for Europe, which was intended to provide the European Union with a formal Constitution. After the failure of its ratification as a consequence of the negative results of the referenda in France and the Netherlands, the Lisbon Treaty was the solution chosen to overcome the constitutional crisis of the European Union, by keeping most of the important reforms envisaged in the Constitutional Treaty while abandoning the formal constitutional dimension which was its most significant innovation.

However, the constitutional dimension of the European Union existed long before the process leading to the Constitutional Treaty was embarked upon. It is well known that the Treaty establishing the European Community (formerly the European Economic Community) – which remains, according to the treaties currently in force, the basic pillar of the European Union – has been characterized by the European Court of Justice as the constitutional charter of a Community based on the rule of law. This characterization sums up the result of a jurisprudential process which began in the early sixties with the judgments in *van Gend en Loos* and *Costa v. ENEL*, which identified the basic principles of direct effect and the supremacy of Community Law. The relevance of this process for the European Union is comparable to the impact on the constitutional history of the United States of America of *Marbury v. Madison* (1803), by which the Supreme Court recognized the supremacy of the Constitution and the power of the judiciary to ensure this supremacy with regard to all public authorities.

In my opinion, the characterisation of the basic treaties of the European legal order as a constitution is best understood as a characterisation by analogy. It is useful and legitimate insofar as it underlines the fact that the treaties play a constitutional role in the European system: they are the supreme norm, in that they provide the legal basis for the powers of the common institutions and establish their limits. In short, they contain the basic principles of a legal system which ensures the rule of law, just as a national constitution seeks to do.

However, from a strictly formal legal point of view, the treaties remain international Treaties and their modification requires the consent of all Member

* Director, Real Instituto Elcano, Professor of Law, Universidad Complutense de Madrid, and former President of the European Court of Justice.

I should like to thank the Editors of this Special Issue of the European Journal of Law Reform for their kind invitation to write this brief foreword. This gives me an opportunity to make up for my involuntary absence from the Conference on *The Lisbon Treaty (and its rejection?): Internal and External Implications*, organised by the Davis Institute for International Relations and the Israeli Association for the Study of European Integration, in Jerusalem, on 12-14 July 2008.

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States, a requirement which implies that any substantive change must be compatible with each and every national constitutional system. Moreover, whereas the treaties provide a clear legal legitimacy for the European institutions, the political legitimacy of these institutions and of the European *Constitution* itself is basically an indirect legitimacy, which can only be channelled through the Member States.

The Constitutional Treaty was, of course, also an international Treaty. However, it introduced modifications of a constitutional nature which went far beyond a mere confirmation of the constitutional analogy enshrined in the jurisprudence of the Court. It was intended to establish a normative text which would be perceived as a Constitution by all citizens, and not just by experts in European Union law.

In my opinion, three aspects of the Constitutional Treaty are decisive in this respect: the name chosen, the method followed for its adoption, and the incorporation of the Charter of Fundamental Rights.

The use of the term *Constitution* was a clear expression of the intention to implement a qualitative change in the nature of European integration by giving the Union a political dimension. Moreover, in my view the use of that term would have had a normative value if the Treaty establishing a Constitution for Europe had finally entered into force.

Secondly, and for the first time ever, the Convention method introduced elements of non-governmental representation – already present in the institutional makeup of the Community – with regard to its Treaty making (or constituent) power, which had traditionally been monopolised by the Member States, the true 'Masters of the Treaties' (*Herren der Verträge*).

Finally, the inclusion of the Charter of Fundamental Rights as part of the Constitution was particularly relevant not only from a legal, but also from a political point of view. It was intended to become a privileged instrument with which to proclaim shared fundamental values, to ensure the visibility of our fundamental rights, and as a way of encouraging citizens to identify with their constitutional rights and with their constitution as a whole.

The Lisbon Treaty, conceived and characterised as a Reform Treaty, has been carefully drafted in order to eliminate not only the term 'Constitution', but also the symbols of the Union and any other elements which could evoke its constitutional dimension.

As we know, the Convention method was not followed during the drafting of the Lisbon Treaty (rightly, in my view, given the very special circumstances in which it was adopted). The negotiation was basically intergovernmental, and it was conducted with a high degree of opacity and even secrecy. However, the new Treaty includes the requirement to convene a Convention in the ordinary revision procedure and in the same terms as the Constitutional Treaty had done. In other words, the new method for treaty reform inaugurated with the Constitutional Treaty will thus be incorporated into the *acquis communautaire*.

As to the Charter of Fundamental Rights, although it was not included in the text of the Lisbon Treaty, Article 6.1 makes it clear that it will have the same legal value as the Treaties. From a legal point of view, therefore, the result is the same as in the Constitutional Treaty. Unfortunately, a Protocol on the Application of

the Charter to Poland and the United Kingdom limits its legal effects in these two Member States quite drastically. From a political point of view, the relevance of the Charter has undoubtedly been undermined, both because of its overall lack of visibility and due to the inequality of rights resulting from the aforementioned Protocol on the Application to Poland and the United Kingdom.

The comparison of these three elements in the Constitutional Treaty and in the Lisbon Treaty is not sufficient to draw far-reaching conclusions, but it is certainly symptomatic. It shows that, in spite of the manifest purpose of those who drafted the Lisbon Treaty to depart from the constitutional model, there is considerable continuity between the two, even in areas which were at the core of the constitutional project. Needless to say, there is also significant continuity in other areas as well.

As far as the constitutional dimension of the European Union is concerned, the new Treaty represents a return to the Community tradition. This may be regrettable, but it seemed inescapable after the failure of the Constitutional Treaty's ratification process. In my view, the Lisbon Treaty offers a reasonable and pragmatic solution to the constitutional crisis this had led to. Admittedly, it does not have the same potential to strengthen the direct democratic legitimacy of the European Union as the Constitutional Treaty had, but it has retained many of the most important reforms introduced by the latter, including a number of provisions intended to improve the observance of democratic principles and methods in the functioning of the Union.

Unfortunately, the ratification process of the Lisbon Treaty has also clashed with a national referendum, this time in Ireland. At the time of writing, it is not yet clear whether or how this obstacle can be overcome. Nevertheless, I am reasonably confident that, sooner or later, we will find a solution that will allow us to move forward, thereby enabling the European Union to meet the increasingly complex demands it will have to face in the future.