THE JEAN MONNET PROGRAM

Professor J.H.H.Weiler
European Union Jean Monnet Chair

Jean Monnet Working Paper 03/08

Gráinne de Búrca

The EU on the Road from the Constitutional Treaty to the Lisbon Treaty

NYU School of Law • New York, NY 10012
The Jean Monnet Working Paper Series can be found at:
www.JeanMonnetProgram.org

ISSN 1087-2221

New York University School of Law
New York, NY 10012
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

The EU on the Road from the Constitutional Treaty to the Lisbon Treaty

Gráinne de Búrca*

Abstract

This paper examines the path taken by the EU following the failure of the Treaty establishing a Constitution for Europe (TECE) in 2005, leading ultimately to the adoption of the Lisbon Treaty in 2007. It examines the reaction of Europe's political leadership to the rejection of the TECE, and considers the implications of the choice to opt for a hasty and secretive drafting and adoption process for the Lisbon treaty. It seeks to account for the apparently paradoxical choice of EU leaders to respond to the popular discontent with the EU expressed by the negative referenda results in France and the Netherlands, and to the increasing demands for greater democracy, openness and transparency in EU affairs over the last two decades, by retreating to a secretive and executive-dominated process. The second part of the paper focuses more specifically on the reactions of various Member States to the TECE, and on specific concerns or opposition they expressed in relation to particular provisions thereof, as well as on the support they expressed for retaining or strengthening specific provisions. The paper identifies these different national concerns and interests and indicates the extent to which they were or were not addressed in the text of the Lisbon Treaty. Finally, the paper reflects on whether there are more general lessons to be drawn from the failure of the latest attempt to provide a formal constitutional foundation for the EU.

Introduction

This paper was originally prepared as a 'General Report' for the twenty-third Congress of FIDE (Fédération International de Droit Européen) 2008,[1] based on information drawn from national reports submitted by FIDE rapporteurs from 17 Member States of the European Union and one candidate State.[2] FIDE is a network of national European law associations which organizes a biennial Congress to bring together leading judges, scholars and practitioners of EU law to discuss selected topics of current importance. The function of the 'general report' can be understood as providing a conceptual framework for, and an overview of, the information provided by the national reports.

In the case of this paper, the topic originally chosen by FIDE for the general report, and for the national reports on which it is based, was "Preparing the EU for the Challenges of the Third Millennium: Revision of Primary Law after the Treaty Establishing a Constitution for Europe". But the trajectory of the report over the past two years tells us a good deal more about the dynamic and unpredictable nature and pace of EU political and legal change. At the time the topic was chosen in mid-2006, the official "period of reflection" which followed the French and Dutch referenda rejecting the Treaty Establishing a Treaty for Europe[3] was not quite over, but there was as yet little hint of what future path the EU reform process might or might not take. By the time the questionnaire for the general report was prepared and sent out to national reporters in November 2006, however, it was evident that alternative political strategies were brewing behind the scenes, and by early-to-mid 2007 it had become clear that some kind of 'reform treaty' based substantially on the Treaty establishing a Constitution for Europe (TECE) was emerging as the preferred solution. The highly mobile nature of the target at which national reporters were aiming became evident as the reports were submitted, and as the essence of the Reform Treaty (as it was then called) was becoming known. By the time the General Report

---

* Professor of Law, Fordham Law School

[1] www.fide2008.org

[2] National reports were received from 18 states (including Croatia, as a candidate state), but not from Bulgaria, France, Italy, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia, or the UK.

[3] For the text of the Treaty Establishing a Constitution for Europe (TECE), see Official Journal of the European Union (2004) C 310, http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML

was written, the Lisbon Treaty had officially been signed, and was already ratified by a number of states. Ireland will be the only Member State to hold a referendum on the Lisbon Treaty, which is scheduled for June 2008. Furthermore, the governments of all of the Member States – despite some heated internal national debates such as in the UK and Poland - appear to be committed to securing ratification of the Treaty, or have already done so, with a view to its coming into force by 2009.

Many of the questions which national rapporteurs were asked to address in 2006 concerned the reaction within each Member State to the TECE and its contents. And despite the fact that the Lisbon Treaty has been adopted since that time, information about the reaction within each state to the content and fate of the TECE remains of great interest. This is for two reasons. In the first place, the failure of the TECE is likely to remain one of the key moments in the EU's history, and a significant turning point in several respects. For that reason alone, it is a moment which deserves close analysis and sustained reflection on its possible meaning and implications. An overview of political, scholarly and public opinion towards the TECE within each state, such as that provided by the various national reports for the FIDE congress constitutes a useful source of information to that end. And despite the difficulty of disaggregating the 'Member State' for the purposes of identifying reactions to particular reform proposals, some clear lines and patterns have nonetheless emerged from the various national reports, indicating what the particular issues of concern were within that state. In the second place, the responses of each of the Member States to the TECE remain very important when it comes to appraising the extent to which their concerns and their interests are likely to have been addressed in the Lisbon Treaty.

The paper is structured as follows. The first part reflects on the aftermath of the TECE, on what might be learned from the course of events which followed its failure, and more specifically from the particular path which was chosen by EU political leaders to move forward with reform. This includes consideration of what lessons were or were not drawn from the results of the popular referenda in France and the Netherlands, and some reflection on the nature of the relationship between the TECE and its successor, the Lisbon Treaty. In the second part, a summary of some of the more specific information provided in the national reports is presented, with a view to highlighting selected issues which were of particular concern to specific member states, and

identifying whether these concerns were addressed by the Lisbon Treaty. The paper concludes with some more general observations on the recent EU treaty reform process, and on the path chosen 'from the TECE to Lisbon'.

Part 1

(a) What can be learned from the aftermath of the TECE and the path which was chosen?

In the wake of the French and Dutch referenda rejecting the TECE, a period of confusion, recrimination, introspection and indirection followed.[4] The Luxembourg Presidency of the European Council in mid-June 2005 announced a kind of official response, by declaring that there would be a period of "reflection, clarification and discussion". In the meantime, some states opted to continue with the ratification process, while others chose to suspend or halt theirs. In all, 18 states ratified the TECE.[5]

While there was no single shared interpretation of the popular rejection of the TECE in France and the Netherlands,[6] and some sought to downplay the significance of the referenda on the ground of the low percentage of voters and the inadequacy of the debates which had preceded the referenda, it was difficult, on any interpretation, to ignore the fact that a damaging, politically significant and unambiguously negative signal had been sounded against the constitutional treaty. The rejected TECE embodied the product of several years of concentrated European political energy, vigorous debate and a broader degree of participation than the EU had experienced during any previous set of treaty negotiations. As a consequence, the rejection of

[4] For a small selection of the wide range of academic reflections on the referenda and their aftermath, see the essays in Volume 1 (2005) of the *European Constitutional Law Review;* also in Volume 13 (2006) of Constellations: Journal of Critical and Social Theory; and in Volume 14 (2007) of the Journal of European Public Policy. See also Gilles Ivaldi „Beyond Frances 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes, and the end of Alternative European Utopia" (2006) 29 West European Politics 47-69

[5] For a useful compendium of this and other information on the origins and fate of the TECE, see www.Euractiv.com/en/future-eu/article-128513, which contains links to a similar compendium on the Lisbon Treaty at www.Euractiv.com/en/future-eu/treaty-lisbon/article-163412

[6] For an interesting summary of the post-mortem on the Dutch no-vote, see the FIDE 2008 Report on the Netherlands, by M. Claes, M. de Visser, G. Leenknegt and L.A.J. Senden, section 1.E. See also L. Besselink, "Double Dutch: The Referendum on the European Constitution" (2006) 12 European Public Law.

that product in a way that – unlike the initial Danish rejection of the Maastricht Treaty in 1992 and the Irish rejection of the Nice Treaty in 2001 - was difficult to ignore or sidestep, delivered a considerable blow to the EU's political leadership and to many others who had become invested in the process of constitutional deepening.

A wide spectrum of possible responses to the Dutch and French referenda could have been adopted.[7] At one end of the spectrum this could have involved pressing ahead with the widest possible ratification of the TECE, and at the other end it could have entailed abandoning the idea of comprehensive EU reform and continuing with the Nice Treaty settlement for the foreseeable future. For commentators who had viewed the TECE as an ill-judged, unnecessary and aggrandizing gesture on the part of the EU, the best way forward was a pragmatic one which eschewed grand designs and constitutional gestures, and reduced the amount of large-scale reform to what was immediately necessary.[8] To invoke the language used by the UK government, the EU would do better to focus on its 'delivery deficit' and on ensuring a more efficient output,[9] than on its elusive 'democracy deficit' and on misconceived constitutional schemes. And for current candidate states, the symbolic de-constitutionalization which followed the TECE was probably a pragmatically welcome step in so far as winning popular support for accession to the EU is concerned.[10] But for those who applauded the vision of the TECE project in its endeavour to 'constitute' the European Union as a political community and to deepen and strengthen its foundations, it was not so obvious that the best way forward would be a retreat back to an elite-led, low-visibility and pragmatic process of integration. The TECE may have been a bootstrapping exercise, but for some it was nonetheless an idealistic and ambitious exercise which had aimed to engage citizens more actively in the EU polity and to strengthen EU identity and unity.[11] On this view, an abandonment of vision and a retreat to secretive inter-

[7] There had also, of course, been some advance discussion of what the options might be if the TECE were rejected by one or more states, although the particular scenario which eventually resulted (ie rejected by both France and the Netherlands) had not been contemplated. See B. de Witte "The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=836426

[8] See e.g. Andrew Moravcsik "Europe ain't broke" and "Europe without illusions" Prospect Magazine, July 2005.

[9] UK House of Commons, Third Report of the Select Committee on Foreign Affairs , January 2008, see at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/120/12002.htm

[10] See the FIDE 2008 National Report on Croatia, by Tamara Ćapeta and Mislav Mataija, Section 2.1

[11] Such a view of the TECE as a more idealistic endeavour than the Lisbon Treaty is mentioned in some of the national reports. See e.g. in the FIDE 2008 report on Denmark, by Peter Biering "As far as the debate is concerned

governmentalism or technocratic management would only exacerbate the EU's democratic ills and the degree of popular disenchantment with the European integration process which the French and Dutch referenda had made manifest.

Here, in fact, lies one of the conundrums of the TECE experience. The choice of the best path forward after the *Non* and *Nee* clearly depended on how the failure of the TECE was to be interpreted. If the TECE process were to be interpreted as an experiment whose failure need not doom the larger project of EU democratic mobilization and constitutional deepening, but instead as one which provided a salutary lesson from which useful information could be learned about the degree (or lack) of support for aspects of EU integration, then popular debate and stronger public involvement in EU political processes need not be something to be feared. If, on the other hand, the failure of the TECE were to be interpreted as confirmation of the fact that popular involvement in EU affairs, in particular by means of a direct plebiscite, brings forth the extremes of the political spectrum, obscures the real issues which are to be decided, and undermines the modest achievements which have painstakingly been negotiated by national executives, then a retreat to pragmatic, low-profile and elite-led European politics might well be seen as an appropriate response.

Perhaps curiously, given the rather different views which had been held by many different states about the overall desirability and the specific content of the TECE, the EU's political leaders relatively quickly converged around the proposal to move forward with what was effectively the substantive core of the Constitutional Treaty, although stripped of the features which were assumed to have generated most controversy and opposition: i.e. the distinctively 'constitutional' dimensions of the TECE. In other words, both the states which had been sceptical of the constitutional project and those which had been strongly supportive of the TECE

---

there has been a clear feeling in Denmark that whereas the TECE was a vision for the EU, the Lisbon Treaty is nothing more than a legal basis for the cooperation, although better than the Nice Treaty." The FIDE 2008 Report on Spain, by José Martín y Pérez de Nanclares, similarly quotes from Méndez de Vigo's reflections on the Lisbon Treaty: "the absolute lack of vision and ambition of national leaders in European politics has never been as obvious as it is now. This obliges us to analyse what is happening with a project that, after achieving a string of successes in the last five decades, appears to Europeans as worn out, lacking in desire, the enthusiasm for which has gone". The FIDE 2008 report on Germany, by Doris König, also notes that many regretted the removal from the Lisbon Treaty of the constitutional elements and symbols of the TECE: "In diesem Zusammenhang wird allgemein bedauert, dass im Vertrag von Lissabon bewusst auf die Verfassungssymbole verzichtet worden ist."

coalesced over the proposal to move quickly, silently and without debate on a formally de-constitutionalized treaty which would otherwise comprise the bulk of the reforms contained in the TECE.

What might explain this interesting and perhaps unlikely convergence on the appropriate way forward after the TECE? One part of the answer might be that robust state support for the Constitutional Treaty and more generally for democratic strengthening of the EU's foundations is quite compatible with ambivalence or even skepticism about the value of the 'package deal' referendum as a mechanism for participation and public input in EU affairs. A more salient factor, however, may be that the degree of political investment and energy which had been expended on the Convention and IGC processes leading to the TECE was such that virtually all of the Member States – even those who had been lukewarm at best about the TECE project – were by now relatively committed to many of the reforms agreed therein. Thus the proposed Reform-Treaty compromise contained something for the states which objected to the constitutional ambitions of the TECE as well as for the states which supported them, by virtue of its abandonment of the visible constitutional elements even while maintaining the core of the substantive reforms which had been agreed.

However, the rapid political consensus which developed behind this alternative nevertheless leaves us with the uncomfortable fact that, ostensibly in the name of reforming the EU in a more democratic, legitimate and effective direction, the Lisbon Treaty was rushed into being in a manner which seems to undermine the painstaking steps which were taken from the 1990s onwards to render the EU treaty-making process more open, more transparent and more publicly accountable. The retreat to a classically intergovernmental, closed and secretive process in which – assuming the allegations of MEPs are well-founded[12] – some Member States had apparently not seen the final text of the Treaty when they came to sign it in Lisbon in December

[12] Jens Peter Bonde in particular has alleged that none of the heads of state or government who signed the Lisbon Treaty in December had seen the final version of the text beforehand. For a live version of his allegations, see http://www.youtube.com/watch?v=qkHK_EFfTCM
See also in the FIDE 2008 Report from Denmark by Peter Biering: "The Folketing's European Affairs Committee complained about the closed process leading to the Berlin declaration and the fact that national capitals only received the draft document two days before its adoption, thus making it difficult for them to debate the contents."

2007, seems at first glance to make rather a mockery of the novel Convention process and the emphasis on openness and wider participation which it seemed to symbolize.

How are we to interpret this turn of events? Does it represent a triumph for the pragmatic conception of Europe? For the vision of an EU in which political leaders are accepted as having the strongest strategic vision, and in which EU affairs are best conceived as 'foreign policy' to be negotiated and carried out by rational and experienced executives and diplomats? Does it signal the beginning of the end of a long, slow but ultimately misconceived attempt to politicize, democratize and eventually constitutionalize the European integration process which gained momentum with the events surrounding the Maastricht Treaty? Or does it simply reflect an awkward moment in the process of gradual but inevitable democratization of the EU, a reactionary impulse following the shock of the 2005 referenda, but one which cannot – other than temporarily - dislodge the EU from the compelling path which it has gradually taken towards a more open, politically accountable and publicly responsive European polity?

From the point of view of this author, the negative referenda results on the TECE should not be hastily dismissed or brushed over as a regrettable stumble on the otherwise smooth path of European integration.[13] The results are certainly politically unsettling and confusing to interpret, but whatever the flaws and weaknesses of direct plebiscitary forms of participation, in particular as a means of seeking retrospective public support for an intricate and complicated treaty, thus far they represent one of the all-too-few opportunities for real public and popular engagement with the EU process. From an instrumental perspective, there is undoubtedly useful information to be gained and lessons to be learned from the public debates and the outcome of the two referenda. But more importantly, from a democratic perspective, they represent one of the infrequent moments during which the EU project ceases to be a purely executive-led and distant business, and in which significant parts of the public temporarily had the opportunity for voice. And, however crude a vocal opportunity it was, due to the particular form and nature of an ex-post treaty-ratification referendum, it was nevertheless a voice to which, for once, European political leadership was required to listen. There appears to have been an overall decline in support for European integration since the early 1990s, and the causes of this decline are

[13] See G. de Búrca, "The EU Constitutional Project After the Referenda" (2006) 13 Constellations 205.

complex and not well understood. But one dimension of the change in public opinion seems unquestionably related to the growth in the scale and size of the EU, and in the increased visibility of its activities and the scope of its powers. The depiction of the EU as an expert agency writ large, with specialized limited 'administrative' functions delegated to it by internally democratic states which remain the primary source of its legitimacy is increasingly strained and difficult to defend. [14] Furthermore, the outcome of the recent referenda suggests that the argument that the EU enjoys a sufficient degree of 'double-legitimacy' via the combination of national democratic delegation on the one hand and the directly democratic nature of the European Parliament on the other hand, is also not fully convincing. The dilemma at the heart of the European integration project which has become ever more apparent and urgent over the last decade is that the autonomous powers of the EU are increasing and strengthening without the corresponding development of an autonomous and sufficient source of democratic (or other) legitimacy.

Yet the proper reaction to the popular discontent reflected in the referenda results surely cannot be to turn away from opportunities for public participation and to close off the treaty-making process from public scrutiny. Perhaps the 'Lisbon strategy' – by which is meant here not the processes of economic and social policy coordination launched in 2000, but rather the post-referenda strategy of fast-tracking the 'scrambled version of the TECE' [15] through a secretive and hurried intergovernmental process to its rebirth as the Lisbon Treaty – may succeed as a temporary solution to an unexpected and politically demoralizing blow to the series of ambitious reforms that had been hammered out in the novel Convention-plus-IGC process. But in the longer term, popular frustration, alienation and discontent with the EU and its policies can only properly be addressed by *increasing* rather than reducing the opportunities for genuine democratic participation in EU politics. To end on a less pessimistic note, the fact that the Lisbon Treaty retains and in some cases reinforces most of the (mildly) democracy-enhancing provisions of the TECE, such as the provisions on the role of national parliaments, subsidiarity, the citizens' petition, and the provision introducing the more representative Convention method

[14] The vision of the EU as akin to a specialized agency is most closely associated with the work of Giandomenico Majone. For a related analysis see Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community," *Columbia Law Review*, vol. 99 (1999), 628

[15] Bruno de Witte "The Lisbon Treaty and National Constitutions: More or less Europeanisation?" RECON Workshop Madrid, January 2008.

as part of the ordinary (though not the only) Treaty-revision procedure, offers some hope that the Lisbon Treaty strategy does not represent a definitive turn away from the path of democratizing the European integration process.

(b) Does the Lisbon Treaty respond to the objections generated by the TECE?

When a draft of the TECE was first agreed in 2004, Giuliano Amato, who had been Vice-President of the Convention on the Future of Europe which produced the initial text for the Intergovermental Conference, famously commented that the result was not what had been expected. Using the metaphor of expectant parents, he said that while they had hoped for a girl (une constitution/ una costituzione), they had produced a boy (un traité/un trattato).[16] The national rapporteurs for Estonia have invoked Amato's metaphor in their discussion of the post-TECE events, suggesting that perhaps the Reform Treaty (RT) lacks any gender.[17] If we explore the metaphor further, however, it might help to illuminate some aspects of the relationship between the TECE and the Lisbon Treaty. Sociologists have long argued that the category of gender is socially constructed,[18] and that there is nothing essential about the supposedly biological foundations of gender. If 'constitutional nature' is the analogue to 'gender' in Amato's metaphor, we might similarly suggest that there is little fixed or essential about this category either. While the Lisbon Treaty has undergone a certain amount of 'reassignment', with the removal of key provisions from, and the addition of crucial protocols to, the corpus of the original TECE, the answer to the question whether the final product can be viewed in constitutional terms or not is likely to depend on the eye of the beholder, or more precisely, on the interpretative stance of the observer.

From the perspective of EU constitution-sceptics, the reassignment of the TECE's constitutional nature may appear complete. The supremacy clause is gone, as are the symbols (anthem, flag etc) and much of the symbolic language concerning foreign ministers and even 'laws'; there is

[16] G. Amato, "Prefazione" to Jacques Ziller, *La nuova costituzione europea* (Bologna: Il Mulino, 2003), 9.
[17] FIDE 2008 Report on Estonia, by Julia Laffranque and Lembit Uibo. A somewhat bleaker birth-related metaphor is also mentioned in the Estonian report, which cites the reference by an Estonian commentator to the TECE as a stillborn baby. Report on Estonia, footnote 27.
[18] See e.g. Judith Lorber and Susan Farrell (eds) The Social Construction of Gender (Sage, 1990)

no longer a single document; the text of the Charter of Rights is absent; and there are protocols and declarations purporting to protect various national interests. However, from the perspective of constitution-idealists, a great deal of the important substance remains the same as between the TECE and the Lisbon Treaty: the European Council has a long-term President, there is a foreign minister in all but name, voting in the Council and membership of the Parliament are more closely related to demographic criteria, the Commission is reduced in size and majority-voting in the Council is extended, the Charter of Rights becomes legally binding, the EU has explicit legal personality, and shall accede to the ECHR etc. It is true that there is an exit-option provided for states, and that the main method of Treaty revision requires the unanimous agreement of the Member States, both being features which are more consistent with traditional international treaties than with a constitution, but these features are equally present in the TECE and the Lisbon Treaty, and so do not distinguish the latter from the former. Considered together with the fact that by now, the collection of all previous EC and EU treaties are broadly understood as having established a constitutional framework for the EU, the concrete legal and political implications of the argument that the Lisbon Treaty has been "de-constitutionalized" are not evident, even if the symbolism remains perfectly clear.

Some examples of the variety of perspectives on question of the constitutional nature of the TECE, on the one hand, or the non-constitutional nature of the Reform Treaty (RT), on the other, can be found several national reports. The Dutch Council of State, for example, in its Opinion on the TECE, concluded that the TECE was different in degree rather than in kind from earlier EC and EU Treaties, and that it could best be understood as a constitutional amendment.[19] According to the Council of State, the novel constitutional elements added by the TECE were the single, merged institutional and decision-making structure, and the integration of the Charter of Rights. Similarly, the changes to the TECE which the Dutch government considered to be necessary in order for the Lisbon Treaty to be sufficiently 'devoid of constitutional characteristics', included removing the use of the term 'constitution', and symbolic terms like flag, anthem, law and minister . Further, the Council of State in its later Opinion on the June 2007 mandate for the RT pointed also to the abandonment of the Convention method in favour of

[19] "Ceci n'est pas une Constitution", FIDE 2008 Report for the Netherlands, M. Claes, M. de Visser, G. Leenknegt and L.A.J. Senden section 1.C.

the traditional IGC, the removal of the text of the Charter of Rights and the exclusion of the symbols of European unification. In the report from Denmark, nine separate features of the TECE were identified by the Danish Ministry of Justice as issues of constitutional concern for Denmark, and several of these clearly bear on the constitutional nature of the EU itself.[20] In the Estonian report, it is reported that the Working Group established by the national parliament to report on the constitutional impact of the TECE concluded that the TECE did not significantly alter the nature of the EU.[21] In the report on Slovenia, reference is made to the lively debate between Slovenian scholars Matej Accetto and Matej Avbelj as to whether the international-treaty elements or the constitutional elements predominated in the TECE.[22]

The array of diverse perspectives on the question whether the TECE really did establish a 'constitution' for the EU, whether it was more distinctively 'constitutional' in nature than any of the previous treaties, or whether the Lisbon Treaty is *less* distinctively constitutional in nature than the TECE, demonstrates that this is not a debate which can readily be settled or concluded. The questions raised are not susceptible to being answered by the application of some uncontroversial check-list, nor are they simply questions of legal and textual analysis. They are ultimately premised on deep and contested questions of political theory, and a debate on the legal features of the respective treaties – important though it is - can only take us so far. Perhaps the best that we can say for now is that while the TECE was clearly presented as a constitutional project of some kind, the official presentation of the Lisbon Treaty has been rather the opposite, with an emphasis instead on this as an 'ordinary' EU treaty in the mold of many others which have gone before. While matters of presentation and matters of substance are unquestionably very different things, the self-understanding of the political actors involved is nonetheless an important and arguably constitutive part of any law-making or constitutional activity.

Apart from the intractable question of the constitutional nature or otherwise of the TECE and the Lisbon Treaty respectively, there is a more practical and formally measureable question about the textual differences between them. This paper does not contain a detailed analysis of the

[20] FIDE 2008 Report on Denmark, Peter Biering , section on "Constitutional Concerns".
[21] FIDE 2008 Report on Estonia by Julia Laffranque and Lembit Uibo, response to question 3 (& footnote 32).
[22] FIDE 2008 Report on Slovenia by Maja Brkan, Section II: Period between the rejection of the TECE and discussions on the Reform Treaty.

differences between the TECE and the Lisbon Treaty (LT) in this report, not least because this would duplicate excellent work which has been done elsewhere.[23] Below, however, is a brief summary of some of the main differences between the TECE and the LT.

1. The provision on 'symbols' in Article I-8 TECE has been omitted
2. The single-documentary structure of the TECE is abandoned in favour of a two-treaty set: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).
3. The supremacy clause in Article I-6 TECE has been omitted
4. The phrase on 'free and undistorted competition' has been omitted from the objectives clause (Art I-3(2) TECE, amended by LT to become Art 2(2) TEU)
5. The text of the Charter of Rights is not contained in the Treaties, but is referred to in Art 6 TEU and is given the same legal status as the Treaties. A Protocol on the position of Poland and the UK in relation to the Charter is annexed. (Part II of the TECE is replaced by Art 6 TEU as amended by LT). It is unclear what procedure would be used for amending the Charter.
6. A provision bringing together the different roles envisaged for national parliaments is added (Art 8C TEU, created by LT) to the title on 'democratic principles', and the role of national parliaments is enhanced further under the Protocol on National Parliaments and under Art 7 of the Protocol on Subsidiarity (to an 'orange card' procedure where a legislative proposal will require the support of Council and the European Parliament if a majority of national parliaments opposes it; they are also given 8 weeks – 2 weeks more than under the equivalent provision of the TECE - to consider proposals).
7. The coming into effect of the weighted majority voting procedure in the Council is postponed (Art 9C(4) and (5) and Protocol on the Decision of the Council relating to Art 9C(4) etc)
8. The jurisdiction of the ECJ over existing Third Pillar *acquis* is postponed for up to 5 years (Art 10 of the Protocol on transitional provisions)

[23] See http://www.statewatch.org/euconstitution.htm for a range of very useful commentaries on the TECE and the various versions of the draft Reform Treaty and Lisbon Treaty, and a comparison of their contents, most of which were prepared by Professor Steve Peers.

9. The Minister of Foreign Affairs is renamed the High Representative for Foreign Affairs and Security Policy (Art 9E TEU, as amended by LT)
10. The number of Member States required to trigger enhanced cooperation is fixed at 9, rather than one-third of all states as it was under the TECE (Art 10(2) TEU, as amended by LT)
11. Reference is made to the accession criteria set by the European Council in the clause on admission of new Member States (Art 49(1) TEU as amended by LT)
12. Reference is made to the possibility of reducing (as well as increasing) Union competences in the clause on amendment of the Treaties (Art 48 TEU(2) as amended by LT).
13. There are several other new provisions further underlining the limits of EU competences or the competences which are retained by the states (e.g. Art 3a(1) TEU added by LT; the addition of the word 'only' in Art 3b TEU by LT – "the union shall act only within the limits of the competences conferred"; the clarification specifying that EU complementary competences are to support *Member State* action in Art 2E TFEU; the Protocol on shared competence)
14. There is express reference to climate change in the provisions on environmental competence (Art 174(1) TFEU), and there is a new 'solidarity clause' concerning the possibility of adopting economic measures where severe difficulties arise in the supply of energy (Art 100(1) TFEU) and a reference to solidarity in energy policy in Art 176 A(1) TFEU.
15. The denominations "Regulation", "Directive" etc. have been reinstated (Art 249 TFEU) in place of "laws' and "framework laws' as they had been renamed (in Art I-31 of the TECE).
16. The 'emergency brake' procedure is applied to the area of social security for migrant workers (Art 42 TFEU, as amended by LT)

For the remainder, the bulk of the reforms introduced by the TECE are similarly to be found in the Lisbon Treaty. The major institutional reforms, including the reduction in size of the Commission, the reform of the formula for majority voting in the Council, the extension in the scope of application of majority voting, the principle of degressive proportionality for allocating

seats in the European Parliament, reform of the third pillar, and the creation of the longer-term post of President of the European Council and the renamed, double-hatted foreign minister post, are all retained in the LT.

Part 2

This part begins by identifying, in broad terms, the official attitude of the various Member States to the TECE, as well as their attitudes to the subsequent Reform Treaty compromise, in so far as this information was provided by the 17 FIDE national reports provided. It then goes on to identify, in the case of each state for which a report was received, some of the specific and distinctive concerns and interests of that state in relation to the TECE, and indicates whether these concerns have been addressed in some way in the Lisbon Treaty.

(a) National Reactions to the TECE and to the subsequent Lisbon Treaty compromise

All national rapporteurs were asked about the reaction to the TECE within their state. The information which was most consistently available within all of the reports concerned the reaction of the national government, and (to a lesser extent) the reaction of the other major national political parties, to the TECE. Information on the level of popular support, media debate, and academic commentary is more uneven across the reports, but where it exists it provides interesting and often illuminating insights into the concerns were particularly salient within different states.

I have loosely divided the main responses into three broad groupings, to reflect those states in which:
(1) the official position was overall strongly supportive of the TECE, and hoped for as much of the TECE as possible to be retained in the LT, even while recognizing the need for compromise;
(2) the official position was one of moderate or mixed support for the TECE (e.g. where support varied across different parties and political actors), with differing degrees of support for the LT;

(3) the official position was at best reluctantly supportive or wary of the idea of the TECE, with differing degrees of support for the LT.

Two factors should be borne in mind when looking at these groupings. The first is that the political leadership changed within certain states (such as Poland) during the period covering the negotiation of the TECE and the LT. Another relevant feature is that the categorizations are fairly broad, so that the description of moderate/mixed support covers those states in which some of the political parties were opposed to the TECE even while the main parties were supportive, or where key national political figures (e.g. the Finnish President, in the case of Finland) were critical or ambivalent about it.

	Strong support for TECE	**Moderate/Mixed Support for TECE**	**Weak support or Opposition to TECE**
Arguing for as much as possible of TECE to be retained in LT	Austria, Belgium, Cyprus, Estonia Germany Greece Hungary Ireland Luxembourg Slovenia Spain		
Eventual broad support for overall LT compromise		Finland	Czech Republic
Arguing for removal of constitutional symbolism from LT		Croatia The Netherlands	
Tepid support for LT compromise		Denmark	Poland

What can be seen from this table, and from a closer reading of the national reports, is that all of the states whose official position was strongly supportive of the TECE were also in favour of retaining as much as possible of the TECE in the subsequent Reform Treaty/Lisbon Treaty, and in several cases they regretted the changes which were ultimately made, such as the abandonment of constitutionalism symbolism and the omission of the text of the Charter. More predictably, states in which the degree of official support for the TECE was mixed, ambivalent or weak were generally in favor of excluding the formal constitutional trappings from the LT, and in some cases their support for the ultimate LT compromise was at best tepid. Nonetheless, it is striking that, despite the shock administered by the French and Dutch no votes, all of the Member States ultimately rallied behind a revived and reorganized version of the failed constitutional treaty, and proceeded to adopt it after one of the shortest and fastest Intergovernmental Conferences ever held.

Finally, an overview of the state of public opinion within the various states in relation to the TECE has not been included, because the amount of information contained in the national reports was uneven in this regard and there was not enough overall data provided to generate a useful general report. Further, just as the post-mortems on the Dutch and French referenda reveal a complicated set of issues and a confused debate, which have made precise analysis of the causes of discontent and the sources of objection difficult to identify with confidence, it is all the more difficult to carry out a systematic analysis of the public and popular response to the TECE and its provisions.

However, there is one interesting trend which seems to emerge from the description in the different reports of the spectrum of political opinion within each state for and against the TECE, which may be worthy of note here. And that is that opposition to the EU and to the European integration process, at least as reflected in the degree of opposition to the new EU treaties being proposed in recent years, now appears to come primarily from actors on the left of the political spectrum. Although there is still a significant amount of Euroscepticism to be found on the extreme right in countries such as Belgium and the Netherlands, (and also from parts of the centre-right 'business community' in member states such as the UK and Ireland) it seems from the information presented in the national reports that the more vocal and mobilized opposition to the latest stages of European integration in the shape of the TECE and the LT has come from the communist and socialist parties, trade unions and other left-wing parties (such as Sinn Féin in Ireland). Even if this reflection is somewhat removed from the more formal and legally focused question of the significance for the EU of the treaty changes introduced by the TECE and LT, it is worth reflecting on whether this apparent trend suggested by the data provided in the national reports is reflective of political changes occurring within the Member States. It may also be interesting to consider, further, whether it suggests that there has been a general move to the right in the overall political direction of the EU itself, or even a perception on the part of political actors within the Member States that such a shift has been taking place. The controversy over the TECE 'objectives' clause referring to the EU's "internal market where competition is free and undistorted" suggests that in at least some Member States, the EU and the European integration process in general is perceived, in broad terms, to prioritize market liberalization over social protection, and to have moved increasingly in that direction in recent years. The inclusion

of the Charter of Rights, the provisions on climate change and environmental protection, and the existence and strengthening of EU anti-discrimination law, do not appear to have been sufficient to persuade some of the civil society organizations and parties on the left of the political spectrum that they are an adequate counterweight to the forces of economic globalization in general, and more particularly the strength of the EU's own commitment to trade liberalization both internally and externally, as compared to its political and constitutional commitment to social protection and other non-economic values.

(b) Specific interests and concerns of States over the TECE provisions

In addition to the question of overall political support for the TECE, however, each Member State also had its own specific interests and concerns, some of which were related to the constitutional requirements of that state, others related to particular EU policies being developed or modified, and others to proposed changes which had particular importance for the state. In some states, such as Denmark and the Czech Republic, a major focus of the domestic debate seems to have been the question of how to ratify the TECE, while in others, such as Estonia, the impact on the national constitution of the TECE was a significant focus. However, each state also expressed particular interest in or concern about a range of the provisions of the TECE, and these responses are explored in the following section.

Below, the main issues highlighted in each of the national reports as matters of particular interest or concern to that state are set out. These are followed by an indication, in parentheses, of the extent to which or the way in which the Lisbon Treaty does or does not respond to these interests and concerns. Two qualifications should be made about the presentation of this information. In the first place, just as is true of the information analysed in part (a) above, the extent of the information provided by the different national reports in this part varies, and there is considerably more detail about some states than about others. Secondly, the categories I have used to sort the information are broad, so that, for example, the category of "concern over" may include matters which were highly controversial within a particular state, as well as matters over which there was some unhappiness expressed but on which the state eventually agreed to compromise. The aim is to give as much information as is available about the interests and

preferences of particular states, and the extent to which these preferences have or have not been addressed in the Lisbon Treaty.

This information can be interpreted in different ways, but a number of interesting features may be noted. In the first place, it is clear that the concerns and interests of some states were taken into account to a much greater extent than other states. There are a number of likely explanations for this. One is probably the concern of EU leaders and EU institutional actors to be seen to be responsive to the states in which the referendum results were negative (France and the Netherlands), as well as to those states which were considered likely to hold a referendum on the Lisbon Treaty (e.g. Denmark, Ireland). It may also be a consequence of the strength with which a particular state (e.g. Poland) bargained before and during the brief Reform-Treaty IGC. In the case of the states where the TECE referendum results were negative, it is likely that the drafting of the Lisbon Treaty responded to the pressure upon political leaders within those states to demonstrate that the LT was significantly different from the TECE, and that it was different in ways that answered the objections to the TECE which the referenda were believed to express. And in the case of states which were considered likely to hold a referendum on the Lisbon Treaty, the drafting of the Treaty in all probability sought to respond to the national concerns which were thought likely to threaten its approval by the public. In the case of states which bargained more forcefully than others, it may simply have been the fact of this which led to their concerns being responded to in the Lisbon Treaty, or it may have been a combination of this and a more general fear of a rise in Euroscepticism within such states which explains their relative success in achieving what they sought.

A second factor worthy of note is that the nature of the various states' concerns and interests differ significantly. In some cases, the concern relates to many aspects of a major field of policy affecting all states (such as AFSJ), whereas in others it is a concern which is quite specific to one particular state (e.g. the references to the British sovereign bases in Cyprus). Consequently, the ways in which the Lisbon Treaty addresses the concerns raised vary considerably. The strongest form of response is where a specific provision opposed by the state is removed (e.g. the supremacy clause, for Austria, Greece and the Netherlands) or where a specific provision requested by the state is added (e.g. the energy solidarity clause in Art 100 TFEU, for Poland).

This is usually done by a change in the text of the Treaty itself. An equally strong (legally speaking) but state-specific response consists of giving the objecting state an opt-out from the provision(s) (AFSJ for Denmark, Ireland and the UK), which is usually done by means of a Protocol, or some other way of avoiding the application of the offending provision (e.g. data-protection measures covering AFSJ issues, for Denmark). Weaker responses include adopting a Declaration, although in some cases (such as the additional permanent Advocate General for Poland) a Declaration may in fact be a sufficiently effective way of achieving the result desired.

Member State	**Issues of particular concern/interest in the TECE**	**Extent to which these issues were addressed in the Lisbon Treaty**
Austria	*concern over*:	
	1. the supremacy clause;	1. Omitted by the Lisbon Treaty, but Declaration no. 17 attaches an opinion of the Council Legal Service on the existing principle of primacy under ECJ case law
	2. neutrality;	2. The "Irish clause" protecting the 'specific character' of neutral states is retained unchanged, and repeated in Declarations 13 and 14
	3. the separate status and legal personality of Euratom	3. See Protocol no. 2; also Declaration no. 54 by 5 Member States asserting the need for an IGC on Euratom
	4. long-term Presidency of European Council	4. Unchanged
	5. closer cooperation	5. The number of states required to trigger it is changed from 1/3 of Member States to 9; there is some clarification of the emergency brake and the

		possibility of enhanced cooperation in criminal law & justice
	6. loss of permanent Commissioner	6. Unchanged
Belgium	*particular interest in*:	
	1. European Security and Defence Policy	1. Unchanged
	2. closer cooperation	2 The number of Member States required to trigger it is changed from 1/3 to 9
	3. further reform of Art 230(4) EC to include the regions	3. Unchanged
	concern over:	
	1. how the provision on national parliaments would apply to its different parliamentary assemblies	1. Unchanged
	2. whether the reservation of certain civil service jobs to Belgian nationals was compatible with the TECE provision on free movement of workers	2. Unchanged
	3. weighted voting, and specifically the difference between the position of Belgium and the Netherlands as compared with the previous situation.	3. The application of the new weighted voting is postponed under the transitional provisions, Art 9C(4) & (5) & Protocol on transitional provisions
	4. long-term president of European Council	4. Unchanged
Croatia (candidate state)	*particular interest in*:	

	1. provisions on subsidiarity and national parliaments	1. Addition of Art 8C TEU; some enhancement of role of national parliaments re subsidiarity under the Protocols on Subsidiarity & national parliaments
	2. competence-catalogue	2. Mostly unchanged; some slight modifications to the provisions on shared competence in Art 2E TFEU and the Protocol on shared competence; some alterations to Art 308 TFEU.
	concern over:	
	2. Communautarization of the third pillar and AFSJ in general	2. Postponement of ECJ jurisdiction over third pillar acquis in the Protocol on transitional provisions
Cyprus	*concern over*:	
	1 .References to the UK sovereign bases in Cyprus, and to the 1960 London-Zurich agreements	1. Art IV-441(6)(b) which referred to these has been omitted, and Art 311 TFEU as amended by the LT replicates the existing Article 299 EC, which specifies that the EC Treaty shall not apply to the UK sovereign base areas in Cyprus; TECE Declarations 33 and 34 on the UK Sovereign base areas have been omitted from LT
Czech Republic	*concern over*:	
	1. The constitutional impact of the Charter of Rights	1. Arguably unchanged despite omission of the Charter text; since the Charter is given same legal

		force as the Treaties in Art 6 TEU
	2. The title of 'foreign minister'	2. The title has been changed to High Representative, Art 9 TEU.
Denmark	*particular interest in*:	
	1. the provisions on transparency	1. Unchanged
	2. The environment/climate change	2. New provision mentioning climate change in Art 174 TFEU
	3. Social protection & welfare	3. Protocol on services of general interest; The application of majority voting with the 'emergency brake' procedure to the area of social security for migrant workers in Art 42 TFEU
	4. 'Consistent but conservative' enlargement;	4. Reference to the Copenhagen criteria set by the European Council has been added to Article 49 TEU on accession
	concern over:	
	1. Ruture Danish participation in AFSJ	1. The Danish opt-out in the Protocol on Denmark includes a future right of opt-in to individual measures.
	2. Measures concerning capital movements e.g. freezing of terrorist funds;	2. The provision on EU competence to impose financial sanctions on terrorists has been moved from the title on free movement of capital to the JHA title in Article 61H TFEU, which means the Danish opt-out will apply

	3. Provisions on identity cards and related documents;	3. The provision has been moved from where it would have been in new Art 18(3) EC on citizenship (Art III-125 TECE) to Art 62(3) TFEU in JHA provisions, which means that the Danish opt-out applies.
	4. data protection	4. A new provision on data protection in CFSP is added in Art 25a TEU, by way of exception to the general provisions of Art 16B TFEU on data protection. Also Declaration no 21 on data protection measures under Art 16B TFEU. The Danish Protocol also provides an opt-out from AFSJ includes an opt-out from any data-protection measures adopted under Art 16B TFEU concerning the AFSJ.
Estonia	*concern over*:	
	1. the impact of the TECE on the Estonian constitution	1. The constitutional symbols and constitutional language of the TECE have been removed from LT; otherwise content of LT is substantially unchanged.
	2. creation of a European Public Prosecutor	2. Art 69E(1) provides for referral to the European Council, and for enhanced cooperation, where Council cannot reach unanimity
Finland	*particular interest in*:	
	1. The status of the Charter of Rights	1. Text of Charter omitted from TEU & TFEU, but Art 6 TEU as amended by LT

		gives the Charter the same status as the Treaties
	Concern over 1. Creation of a European Public Prosecutor	 1. Art 69E(1) provides for referral to European Council, and for enhanced cooperation, where Council cannot reach unanimity
Germany	*particular interest in*: 1. the status of the Charter of Rights	 1. Weakened slightly by not including text of Charter as part of Treaties which may imply a different amendment procedure
	2. the democracy-enhancing provisions of the TECE on increased European Parliament powers and a role for national parliaments	2. Slightly enhanced role for national parliaments with new Art 8C TEU & Protocols on national parliaments and on subsidiarity, and Art 65(3) TFEU giving national parliaments a say in the use of majority voting in the adoption of family law legislation
Greece	*concern over*: 1. the supremacy clause	 1. Omitted, but Declaration no. 17 attaches opinion of Council Legal Service on the existing principle of primacy under ECJ case law
	2. The objectives clause concerning an internal market with free and undistorted competition	2. Clause omitted, Protocol on competition and Article 308 added
	3. the reference to NATO in Art I-41 TECE	3. Unchanged

Hungary	*particular interest in*: 1. Charter of Rights	1. Status weakened slightly by not including text of Charter as part of Treaties, which may mean a different amendment procedure
	2. protection of national minorities	2. Unchanged; however, some TECE Declarations relevant to this topic, e.g. on the Sami people, have been omitted from LT
	3. cultural and linguistic diversity	3. Unchanged : Declaration no. 16 on Article 53(2) TEU, mainly replicates TECE Declaration no. 29 on Art IV-448(2), concerning the translation of the text of the new Treaties into other languages which enjoy official status within Member States
	4. energy policy	4. New solidarity clause in Art 100(1) TFEU on emergency economic measures in the field of energy, and a reference to solidarity in energy policy in Art 176 A(1) TFEU
Ireland	*concern over*: 1. The Charter of Fundamental Rights	1. Status has been weakened slightly by not including text of Charter as part of Treaties, which may means a different amendment procedure; Ireland debated whether or not to join the UK & Poland Protocol on the Charter but decided against
	2. The AFSJ	2. Under the amended

		Protocol, Ireland has secured an opt-out and can choose whether or not to opt-in to any AFSJ measure, including former pillar 3 measures on criminal law & policing
	3. Neutrality	3. Unchanged, the clause preserving 'specific character' is repeated in Declarations 13 and 14
	4. loss of permanent Commissioner	4. Unchanged
Luxembourg	<u>*particular interest in*</u>: 1. legal status of the Charter of fundamental rights	1. Its status has been weakened slightly by not including text of Charter as part of Treaties, which may mean a different amendment procedure.
	2. Extension of co-decision	2. Unchanged
	3. Communautairization of third pillar	3. Postponement of ECJ jurisdiction over third pillar acquis in Protocol on transitional provisions
	4. Horizontal social clauses	4. Unchanged – the equivalent of Articles III-117 to III-122 TECE are now contained in Arts 5a, 5b, 6, 6a and 6b TFEU as amended by LT
	5. Environment	5. An explicit reference to climate change is now included in Art 174 TFEU
	6. Energy policy	6. There is a new solidarity clause in Art 100(1) TFEU on emergency economic

		measures in the field of energy and a reference to solidarity in energy policy in Art 176 A(1) TFEU
	7. Foreign policy and security	7. These provisions have been moved back into the TEU and not together with other external relations provisions in TFEU as they had been under TECE; A new clause 11 TEU refers to the limits of ECJ's role in CFSP; A clause added to Art 308 TFEU prohibits its use for CFSP objectives ; Declarations 13 and 14 reassure Member States of their ongoing powers and responsibilities in foreign affairs
	Concern over 8. Long-term president of European Council	8. Unchanged
The Netherlands	*particular interest in*: 1. strengthening the provisions on subsidiarity, and on the role of national parliaments	1. There is a slightly enhanced role for national parliaments with Art 8C TEU and the Protocols on national parliaments and on subsidiarity; also Art 65(3) TFEU gives national parliaments a say in the use of majority voting in the adoption of family law legislation.
	2. environment/climate	2. An explicit reference to climate change is now included in Art 174 TFEU
	3. Area of Freedom, Security and Justice	3. ECJ jurisdiction over the third pillar acquis has been postponed under the Protocol on transitional

		provisions
	concern over: 1. the constitutional language and symbolism	1. This has been removed from the LT.
	2. competence over social policy and services of general interest	2. There is a new Protocol on services of general interest; and Art 42 TFEU applies majority voting with the 'emergency brake' procedure to the area of social security for migrant workers.
	3. the pace and nature of enlargement	3. Reference to the Copenhagen criteria set by the European Council (including, by implication, absorption capacity?) has been added to Article 49 TEU on accession
Poland	*particular interest in:* 1. an extra Advocate General for Poland	1. Declaration no. 38 on Art 222 TFEU provides for this
	2. a solidarity clause for energy in times of crisis	2. There is a new solidarity clause in Art 100(1) TFEU on emergency economic measures in the field of energy and a reference to solidarity in energy policy in Art 176 A(1) TFEU
	3. delimitation of competences	3. There are slight modifications to the language of Art 3b TEU and the provisions on shared competence in Art 2E TFEU and the Protocol on shared competence; also changes to Art 308 and Declarations 41 and 42 on Art 308
	concern over:	

	1. weighted voting in the Council of Ministers (& desire for a 'square root proposal' to be adopted)	1. Application of the new weighted voting provisions has been postponed under Art 9C (4) & (5) and the Protocol
	2. absence of any reference to Christian character of EU	2. Unchanged
	3. closer cooperation in defence/risk to NATO	3. Unchanged
	4. long-term president of European Council	4. Unchanged
	5. Foreign Minister	5. Title changed to High Representative for Foreign and Security Policy but functions unchanged.
	6. equal rotation of Commission	6. Unchanged
	7. communautairization of the third pillar	7. ECJ jurisdiction over third pillar acquis has been postponed by the Protocol on transitional provisions
	8. the impact of the Charter of Rights on 'sensitive areas of national law'	8. See the Protocol on the application of the Charter to Poland and the UK, and Declarations no. 61 & 62 of Poland on the Charter
Slovenia	*particular interest in:* 1. respect for cultural and linguistic diversity	1. Unchanged
	2. legal status for Charter of Rights	2. Status weakened slightly by not including text of Charter as part of Treaties, which may imply a different amendment procedure
	3. principle of solidarity	3. The defence solidarity clause and other references to solidarity in AFSJ and CFSP/ESDP are unchanged; there is a new solidarity

		provision in Art 100 TFEU on energy supply in case severe difficulties and a new reference to solidarity in energy policy in Art 176 A(1) TFEU
	4. Foreign Minister	4. Title has been changed to High Representative for Foreign and Security Policy but functions are unchanged
	5. CFSP and external action service	5. CFSP provisions are no longer together with other external relations provisions as under TECE; new clause in Art 11 TEU refers to the limits of ECJ's role in CFSP; a new clause in Art 308 TFEU prohibits its use for CFSP objectives ; Declarations 13 and 14 reassure Member States of their ongoing powers and responsibilities in foreign affairs
	6. Diplomatic representation for EU nationals in other EU consulates in third countries	6. Art 20 TFEU which provides legal basis for consular protection appears more limited in scope than Art III-127 TECE (which was to amend current Art 20 EC); refers only to EU 'coordination and cooperation measures'
	<u>*concern over*</u>: 1. possible impact of 3rd pillar developments on criminal law and civil rights	1. ECJ jurisdiction over third pillar acquis has been postponed by Protocol on transitional provisions.
Spain	<u>*particular interest in*</u>: 1. the role of the regions, including reform of Article 230(4) and in the provisions on subsidiarity	1. Unchanged, apart from slight enhancement in role of national parliaments under the Protocols on

		national parliaments and subsidiarity
	2. communautairization of third pillar	2. ECJ jurisdiction over third pillar acquis has been postponed by the Protocol on transitional provisions
	3. closer cooperation	3. The number of states required to trigger it changed from 1/3 of Member States to 9.
	<u>*concern over*</u>:	
	1. the weighted voting formula	1. Application of new weighted voting provisions has been postponed under Art 9C (4) & (5) and the Protocol
	2. the absence of any reference to the Christian character of the EU	2. Unchanged
Sweden	<u>*particular interest in*</u>: 1. transparency [unchanged]	1. Unchanged
	2. Charter of Rights	2. Its legal status is weakened slightly by not including the text of the Charter as part of the Treaties, which may imply a different amendment procedure
	3. Accession to ECHR	3. Unchanged
	<u>*concern over*</u>: 1. communautairization of the third pillar	1. ECJ jurisdiction over third pillar acquis has been postponed by Protocol on transitional provisions
	2. the impact of the 'flexibility clause' on the powers of the Riksdag	2. A new paragraph (4) has been added to Art 308 TFEU to provide that it cannot be used to attain CFSP objectives and that any acts adopted under Art 308 must not undermine the

		exercise of EU competence in CFSP; Also Declarations 41 and 42 on Art 308.
	3. long-term President of the European Council	3. Unchanged
	4. Foreign Minister	4. Title changed to High Representative for Foreign and Security Policy but functions otherwise unchanged
	5. reduction in Commission size	5. Unchanged
	6. mutual defence clause and development of defence policy	6. Unchanged

Conclusion

We have a reached an interesting and perplexing stage in the course of European integration. There have been three serious attempts over the past half-century at enacting a kind of formal constitutional foundation for the European integration process. The first was the draft European Political Community Treaty in 1953, the second was the Maastricht Treaty on European Union in 1991, and the third was the Treaty Establishing a Constitution for Europe in 2004. The European Political Community Treaty was stopped in its tracks at an early stage because of the non-ratification of the European Defence Treaty by the French national assembly.[24] The Maastricht Treaty, despite its creation of the 'European Union' and its formal institutionalization of EU foreign policy and justice and home affairs policy, was a disappointment to those who had hoped for a more ambitious text.[25] The TEU's curious mixture of supranational and international legal elements, its cumbersome and fragmented structure, and its many qualifications, opt-outs and compromises, were difficult to reconcile with a constitutional vision. More importantly, perhaps, the Maastricht Treaty moment – not least because of the initial

[24] A.H. Robertson, *European Institutions* (Stevens & Sons, 2nd edn., 1966), 19–21.
[25] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CMLRev*. 17.

rejection of the Treaty in the Danish referendum and the 'petit oui' in the French referendum - has come to signify a watershed, a symbolic turning point in the process of European integration to date, and one which represents the end of the era of 'permissive consensus' and the beginnings of a phase of more sustained popular criticism and opposition to the project of European integration.

During the decade following the ratification of the Maastricht Treaty up until the adoption of the Treaty establishing a Constitution for Europe, there were two further treaties – the Amsterdam and Nice Treaties of 1997 and 1999 respectively – and several other significant initiatives such as the drafting of the Charter of Fundamental Rights[26] and the governance reform project of the Commission.[27] This was a decade of simultaneous deepening and widening, with the rapid growth and expansion of the area of Justice and Home Affairs (later AFSJ) after the Amsterdam Treaty, and the dramatic enlargement of the EU which saw thirteen new member states join between 1994 and 2004. Yet paradoxically, despite these objective indicia of success and support for European integration, signs of diffuse public discontent and growing critical opposition, directed not just at specific policies and laws of the EU but more generally at the very nature and pace of the European integration process, have continued to manifest themselves. The Nice Treaty was initially rejected in Ireland, a country which had long been assumed to be an enthusiastic supporter and beneficiary of European integration, following a negative popular referendum.[28] The presence of Euro-skeptical representatives and parties in the European Parliament continued to grow.

Each of the attempts to provide a constitutional foundation for the European integration process appears to have failed on account of apprehension and uncertainty about taking the symbolic step towards a more tightly and deeply united Europe. The apprehension was initially on the part of the political elites (as in the case of the EPC), but more recently it has been on the part of citizens, even when the political elites have rallied behind the move. This repeated failure over more than 50 years raises some of the fundamental questions which have persisted since the

[26] See e.g. Erik Eriksen, John E. Fossum and Augustin Menéndez (eds.), *The Chartering of Europe* (Arena Report No. 8, 2001)
[27] See the Commission's ultimate report on "European Governance: A White Paper" COM(2001)428.
[28] G. de Búrca "Post-Nice or Anti-Nice?: The debate on Europe's constitutional future after Ireland's No Vote" (2002) Hibernian Law Journal *1*

post-war movement for European integration began. The tension between a federalist approach which embraces a thick political vision of European unity and whose institutional design embodies this vision, and a functionalist approach which responds to the immediate functional needs of the states for specific forms of transnational cooperation, has evidently not dissolved, despite the enormous changes which have taken place within the EU since 1952.[29] This raises the question whether the degree of apparent public disenchantment or ambivalence about the process of European integration suggests that the strong federalist vision remains an over-ambitious and popularly unattractive one, perhaps all the more so as the EU has expanded far beyond six states to twenty-seven. Does the ongoing disconnect between elite political support for EU integration on the one hand, and public discontent or popular alienation on the other hand, suggest that the functionalist approach, which focuses pragmatically on specific concrete needs and eschews ambitious constitutional design, is the more appropriate to Europe's distinctive context?[30]

This is certainly one reading of the failure of the TECE, and indeed of the failure of the previous attempts at providing a formal constitutional foundation for the European project. On the other hand, it has equally been suggested that the absence of ideals or of an overarching vision which could mobilize voters to support an otherwise technical and narrowly focused text might jeopardize public approval of an EU treaty.[31] Further, as I have suggested in Part I of this paper, whatever about adopting a more functionally restrained approach to the tasks which the EU member states choose to pursue in common, it would seem a highly regressive response for the EU to return to the path of low-profile, executive-led inter-governmentalism, away from the path of open government involving the kind of genuine public participation and open contestation which characterizes democratic political systems, which the EU had gradually begun to take. The speedy and secretive process of drafting and adopting the Lisbon Treaty, in particular in

[29] See Renaud Dehousse "Rediscovering Functionalism" Jean Monnet Working Paper 11/2000

[30] Ralf Dahrendolf "Unified or Open: The European Alternative" in The Shape of the New Europe R. Rogowski and C. Turner (eds) 2007, p. 187 suggests a different diagnosis. In his view, the project of European unity for its own sake is not a legitimate goal for the EU. His suggestion however is not that the EU should limit itself to more functionally specific tasks as a way of reaching the same goal of European unity, but rather that the EU should represent an 'Open Europe' which seeks to spread the specific values of democracy and market freedom as widely as possible.

[31] On the forthcoming Irish referendum on the Lisbon Treaty, see Hugo Brady "Bad Omens Loom Over Irish Referendum" , Center for European Reform, 2008 http://www.cer.org.uk/articles/58_brady.html

such a popularly incomprehensible form, was far from a reassuring move in this respect. The shift from the confused constitutional aspirations of the TECE to the concealed and scrambled (but substantively similar) text of the Lisbon Treaty has been described by Joseph Weiler in biting terms as a move from "fetish to farce",[32] and other key actors who were involved in the drafting of both the TECE and the Lisbon Treaty have suggested that the unintelligibility of the latter was deliberate.[33]

Perhaps in view of the intensity of the processes of the last few years, and the institutional-reform fatigue which is bound to accompany it, the political assumption (if indeed the Lisbon Treaty is ratified) that there will be no further significant EU treaty reform for quite some time may be welcome to many.[34] There were many worthwhile and positive features of the constitutional process which surrounded the drafting, adoption and even the rejection of the TECE, and there were many worthwhile initiatives contained within the constitutional treaty itself. And despite the hurried IGC which followed the failure of the TECE and the adoption of its successor, there are also many positive reforms contained in the Lisbon Treaty. Nonetheless, it leaves open many questions not only over the merits of the various reforms and the overall nature of the new set of bargains struck in the Lisbon Treaty, but more fundamentally over whether the EU is capable of successfully pursuing the challenging path of gradual transformation from a technocratic, elite-led international organization premised on a foreign-affairs model, to a democratic and politically engaged community based on constitutional premises.

---

[32] J. Weiler "A Rapid Snapshot of Constitution and Constitutionalism in the EU: Between Farce and Fetish", Temple Law School Symposium on *Ruling the World,* Constitutionalism, International Law and Global Governance, December 2007.

[33] Giuliano Amato, speaking at the Center for European Reform, July 12 2007, suggested that the political leaders decided that the text should be unreadable so as to avoid calls for a referendum "if it is unreadable, then it is not constitutional. That was the sort of perception."

[34] This was made explicit by the heads of state in their communiqué in December 2007 after the signing of the Treaty in declaring that „The Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead"