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**AFTER LISBON: INTERGOVERNMENTALISM
RESURGENT, CONSTITUTIONALISM
MORIBUND?**

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The Jean Monnet Seminars Series

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AFTER LISBON: INTERGOVERNMENTALISM RESURGENT, CONSTITUTIONALISM MORIBUND?

MICHAEL DOUGAN*

Introduction

Since the European Council's decision in June 2007 to declare the "constitutional concept" abandoned and set out the mandate for a new Reform Treaty,¹ much attention has focused on what changes - in a formal sense - from the old Constitutional Treaty² to the final Treaty of Lisbon:³ very obvious things such as amendment rather than repeal and replacement of the existing Treaties; very superficial things like the excision of the Union's flag, motto and anthem; more substantive changes such as the new rules on qualified majority voting within the Council and the transitional provisions on the legal status of pre-existing Third Pillar acts; and country-specific provisions like the UK and Poland's protocol on the Charter of Fundamental Rights, or the UK's

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¹ See Presidency Conclusions of European Council of 23 June 2007.

² [2004] OJ C 310.

³ [2007] OJ C 306. This paper will refer throughout to the revised numbering of the amended Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). Provisions of the EC and EU Treaties as they currently stand, before the entry into force of the Treaty of Lisbon, will be identified as such where necessary.

potential opt-out from its obligations under pre-existing Third Pillar acts.⁴

This paper is more speculative in nature: it attempts to explore the potential informal impact of the ratification crisis, and the transformation of the Constitutional Treaty into a Reform Treaty, for the future functioning of the Union. In particular, we will address two main features of the ratification crisis: first, the idea of intergovernmentalism resurgent, i.e. resulting from the reaffirmation of the role and potency of the Member States as “masters of the Treaties”; secondly, the risk of constitutionalism moribund, i.e. resulting from the express rejection, at the highest political level, of an expressly “constitutional basis” for the integration process.

Intergovernmentalism Resurgent?

On the surface, the Treaty of Lisbon is hardly a victory for intergovernmentalism. After all, supranationalism will assume a more prominent role in the inter-institutional balance, thanks especially to the reforms relating to the European Parliament. Through a combination of the extension of the ordinary legislative process across many more legal bases,⁵ increased budgetary influence particularly in areas currently designated as compulsory expenditure,⁶ and greater powers to control the exercise of Union executive power as regards delegated and implementing acts,⁷ the European Parliament’s position emerges stronger than ever. Indeed, in fields such as the common agricultural policy and the Area of Freedom,

⁴ See, for detailed analysis, Dougan, “The Treaty of Lisbon 2007: Winning Minds, Not Hearts” (2008) 45 CML Rev (forthcoming).

⁵ E.g. Art 43 TFEU on the common agricultural policy; Art 207 TFEU on the common commercial policy.

⁶ See Title II, Part Six TFEU.

⁷ See Arts 290 and 291 TFEU.

Security and Justice, as compared to the existing Treaties, the inter-institutional balance will be totally transformed.

Supranationalism has other trophies to brandish too, demonstrating that the spirit of “ever closer union” is indeed still alive: for example, the extension of qualified majority voting within the Council across myriad legal bases for Union action, legislative and non-legislative alike;⁸ the total transformation of police and judicial criminal cooperation from a distinct area of Union activity under the Third Pillar to a fully integrated element of the Area of Freedom, Security and Justice (albeit with certain special features);⁹ and a range of new Union powers in fields of shared competence such as services of general economic interest and energy,¹⁰ and of complementary competence such as space, tourism and sport.¹¹

However, it is unsurprising to find that the Treaty of Lisbon continues a trend evident in all its predecessor treaties: each step towards greater supranational governance is counter-weighted by more effective checks and balances to protect Member State prerogatives and ensure that the Union remains responsive to domestic concerns. Despite the apparent contradiction, greater supranationalism and greater intergovernmentalism in fact go hand-in-hand; indeed, it is the constant cycle of confrontation and accommodation between these two great forces that drives much of the EU’s institutional and constitutional development.

⁸ E.g. Art 53 TFEU on facilitating self-employed activities; Art 167 TFEU on promoting culture.

⁹ See Title V, Part Three TFEU. Those special features include, e.g. a shared power between the Commission and at least one-quarter of the Member States to initiate the Union’s legislative procedures, specifically as regards police and judicial cooperation in criminal matters.

¹⁰ Art 14 and Title XXI TFEU (respectively).

¹¹ Art 189, Title XXII and Title XII TFEU (respectively).

Thus, there are a whole series of reforms that demonstrate the Member States' exercise of greater control over the Union's institutions and competences: for example, the increased emphasis placed on the principle that the Union exercises only attributed powers, while all other competences remain with the Member States;¹² the new "yellow card" system whereby national parliaments participate in *ex ante* monitoring of the principle of subsidiarity;¹³ and indeed the generally more prominent role offered to the national parliaments within the functioning of the Union on issues such as evaluating executive activities within the Area of Freedom, Security and Justice,¹⁴ or amending the Treaties through one of the new simplified revision procedures.¹⁵ Another series of reforms illustrate that the Member States' control extends also to the degree of their very participation in the integration process itself: for example, liberalisation of the conditions for engaging in enhanced cooperation;¹⁶ the retrenchment of variable geometry in fields such as economic and monetary union,¹⁷ and justice and home affairs;¹⁸ and ultimately, the possibility for an entirely unilateral (if hopefully orderly) withdrawal from the Union *tout court*.¹⁹

This balance between supranationalism and intergovernmentalism is perhaps at its most interesting when the legal provisions hint only at certain *potential* futures,

¹² Arts 4 and 5 TEU.

¹³ Art 5 TEU and the Protocol on the application of the principles of subsidiarity and proportionality.

¹⁴ Arts 70, 71, 85 and 88 TFEU.

¹⁵ Art 48 TEU.

¹⁶ See Title IV TEU and Title III, Part Six TFEU.

¹⁷ In particular, the provisions on closer integration between members of the Euro-group: see Chapter 4, Title VIII, Part Three TFEU.

¹⁸ In particular, the amendments to the three protocols concerning integration of the Schengen *acquis* into Union law, participation of the UK and Ireland in justice and home affairs matters, and participation of Denmark in justice and affairs matters.

¹⁹ Art 50 TEU.

whose actual realisation will depend ultimately upon political action. For that purpose, one of the most important variables concerns the degree to which the ratification crisis and the 2007 IGC will galvanise the Member States to reaffirm their role and potency as “masters of the Treaties”, and ultimately signal a resurgence of the intergovernmental element within the daily functioning of the Union.

Consider, for example, the relative standing of the Commission and the European Council, particularly in exercising responsibility for the Union’s strategic interests and future direction.

The Commission hardly jumps out of the Treaty of Lisbon as the main loser in the programme of institutional reform. After all, its chief prerogative - the near monopoly over initiating the Union’s legislative processes - has survived unscathed (and indeed, been enshrined expressly in the Treaties for the first time).²⁰ Moreover, certain amendments are intended to strengthen the basis for the Commission’s claim to power and its capacity for effective action: consider, for example, the expectation that the character of future Commissions should reflect the results of the elections to the European Parliament;²¹ the fact that the Commission will eventually reduce in size to a more compact College, comprising Commissioners from only two-thirds of the Member States, capable of more cohesive decision-making;²² and the prospect that the new High Representative for Foreign Affairs, a vice-president of the Commission, will perform a central role in the Union’s external policies in general and the CFSP in particular.²³

²⁰ Art 17(2) TEU.

²¹ Art 17(7) TEU.

²² Arts 17(4)-(5) TEU.

²³ Art 18 TEU.

Further reflection, however, suggests that such reforms may prove in certain respects to be a poisoned chalice for the Commission. For example, making the Commission ever more responsive to and indeed reflective of the political complexion of the European Parliament might risk undermining one of the Commission's traditional institutional strengths: its relative independence from the rough-and-tumble of the ordinary left-right politics that still dominate public life within and across the Member States. Of course, the inseparability of the technical aspects of integration from broader choices of economic and social policy, combined with the Union's ever expanding competences, have inevitably led to a raising of the Commission's profile within the political arena, at both the Union and domestic levels. One need only recall the debate surrounding the Services Directive to appreciate that the Commission's institutional neutrality has inherent limits.²⁴

But any overt step towards politicising the Commission carries the danger not of bolstering its democratic legitimacy, but actually of undermining it, i.e. by drawing attention away from the intrinsic merits of the Commission's unique institutional position, and inviting observers to judge the Commission instead by the standards of democratic representation and accountability which with the average citizen might feel more familiar, but which the Commission itself could never (and should not) hope to satisfy. The problem may well be exacerbated if one considers that, in this conscious effort to make the Commission appear more democratically responsive, the Treaties have chosen as the relevant barometer of public opinion a body which, although directly elected, is not necessarily very representative of the population as a whole, thanks to factors such as the consistently low turnout at European Parliament elections and

²⁴ Directive 2006/123 [2004] OJ L376/36.

their tendency to be treated as protest votes against the domestic policies of the incumbent national governments.²⁵ With not only its traditional independence undermined, but also its newfound democratic credentials built on shaky foundations, will the Commission end up being doubly disadvantaged?

Reservations can also be expressed about the impact of reforms to the Commission's size on its standing within the institutional balance. Even though totally independent of the national governments, Commissioners are nevertheless seen as an important element in maintaining the credibility of the College within their country of origin, particularly among the smaller Member States. The Commission's authority to order Germany to repay state aid unlawfully granted to a failing national industry is bolstered by the presence of a German commissioner on the College; or at least, the authority of that order could be undermined by the absence of a German commissioner. The price of a more cohesive Commission is greater vulnerability to the charge among certain Member States - cheap and effective, however unjust - that power in "Brussels" grows ever more remote from or even alien to the interests of the citizen.

Nor, from the Commission's perspective, is the High Representative an unreservedly positive asset. After all, the Treaties have chosen to resolve any potential conflict of institutional interest by making clear that the High Representative's loyalties lie ultimately with the Council,²⁶

²⁵ See further, e.g. Blondel, Sinnott & Svensson (eds), *People and Parliament in the European Union: Participation, Democracy and Legitimacy* (Clarendon Press, 1998); Schmitt & Thomassen (eds), *Political Representation and Legitimacy in the European Union* (OUP, 1999); Steunenberg & Thomassen (eds), *The European Parliament: Moving Toward Democracy in the EU* (Rowan & Littlefield Publishers, 2002).

²⁶ Art 18(4) TEU.

while the new European External Action Service offers him/her the prospect of an effective power base independent of the Commission itself.²⁷ There is thus a genuine risk of the High Representative being viewed with suspicion as something approaching a “fifth column”, souring working relations with his/her fellow members of the College, and hampering the ability of the Commission as a whole to act coherently and effectively.

The threat to the Commission’s position which emanates from reforms to its own internal functioning is magnified when one then considers its standing relative to that of the European Council, whose profile and power increase significantly under the revised Treaties. Indeed, the European Council perhaps rivals the European Parliament in its debt to the Treaty of Lisbon. Not only is it given formal institutional status for the first time, but also a range of quasi-constitutional decision-making powers on issues such as the future allocation of seats in the European Parliament,²⁸ the future rotation of Commissionerships between Member States and the size of the Commission,²⁹ and appointment of the High Representative.³⁰ The European Council is also confirmed in its responsibility for the Union’s overall strategic interests,³¹ with particular powers in the fields of external action and the Area of Freedom, Security and Justice.³²

Perhaps most importantly, there are the reforms to the Presidency of the European Council. In particular, the Treaty

²⁷ On the European External Action Service, see Art 27 TEU. Note, in particular, that the EEAS will be composed of officials from the General Secretariat of the Council, as well as from the Commission, and of staff seconded from the national diplomatic services.

²⁸ Art 14(2) TEU.

²⁹ Art 17(5) TEU and Art 244 TFEU.

³⁰ Art 18(1) TEU.

³¹ Art 15 TEU.

³² Art 22(1) TEU and Art 68 TFEU (respectively).

of Lisbon follows the approach of the Constitutional Treaty in bringing to an end the current system of rotating the Presidency of the European Council among the Member States. That system was deemed to create problems of consistency and continuity in defining the Union's political agenda; the tasks associated with the Presidency had become too demanding to be discharged effectively by a person who acts at the same time as his / her Head of Government; certain concerns were voiced about the potential for conflicts of interest between the President's role as impartial chair of the European Council and his / her duty to protect the national interests of the relevant Member State; moreover, the benefits of rotation in encouraging a sense of "ownership" by all Member States over the European Council had become tenuous in a Union of 27 countries. The European Council therefore acquires a more stable Presidency. Article 15(5) TEU provides that the President is to be elected by the European Council for a term of two and a half years (renewable once). He/she will be responsible for chairing European Council meetings, ensuring the preparation and continuity of the European Council's work, facilitating cohesion and consensus within the European Council, presenting reports to the European Parliament after European Council meetings, and representing the EU externally at his/her level as regards the common foreign and security policy.

One assumes that this new office will be occupied by an experienced politician who has previously attained high office in his/her country of origin. In the hands of such a figure, the European Council Presidency could become a formidable new fulcrum of power - less in a formal sense, since the revised Treaties give the Presidency itself no real decision-making powers independent of the other members of the European Council, but rather in the sense of providing a strong and focused nucleus at the very centre of Union policy-making

with the opportunity to harness the European Council's strategic influence, and thereby channel the activities of the Union's other main political institutions too.

Of course, much will depend not only on the ambitions and the abilities of the individual office-holder, but also on the precise latitude (and degree of administrative support) offered to the Presidency itself by the European Council under its own internal institutional arrangements, as well as the attitudes of the Heads of State or Government, many of whom may not take well to the idea of replacing a system based on the principle of *primus inter pares* with the conferral of significant imperative powers upon a figure lacking any direct electoral mandate and largely unaccountable short of impediment or serious misconduct. Nevertheless, the potential exists for the emergence of a new and potentially influential power centre within the institutional framework - as well as a focus capable of rivalling the Commission President as the "public face" of the Union. The revised Treaties may therefore facilitate a further shift in the strategic balance of power away from the Commission and back towards the Member States, a trend which began with the fall of Santer, so that even the Commission's formal prerogative of legislative initiative may increasingly be exercised in practice under the constraints imposed by an invigorated European Council.

It is therefore quite possible that, under the revised Treaties, the Commission will emerge with a more modest role in the inter-institutional balance - less the motor of integration than a specialised bureaucracy; while the European Council seems poised to consolidate and expand its already considerable influence - provided that the Member States are willing to capitalise on the intergovernmental momentum already generated through the ratification crisis and the 2007 IGC.

Another situation where the reassertion of Member State authority at a fundamental constitutional level might translate into a more prominent role for intergovernmentalism within the daily functioning of the Union after the Treaty of Lisbon comes into effect, concerns the relationship between drafting Conventions and intergovernmental conferences in the ordinary revision procedure for future amendment of the Treaties as provided for under Article 48 TEU.

Under that ordinary revision procedure, any Member State, the European Parliament or the Commission may submit amendment proposals to the Council; those proposals shall be forwarded to the European Council and notified to the national parliaments. If the European Council, having consulted the European Parliament and the Commission, decides in favour of examining the proposals, it may convene a Convention charged with drawing up recommendations for consideration by an IGC. However, the European Council may decide, with the consent of the European Parliament, that the scale of the proposals does not warrant a Convention, and proceed to define for itself the terms of reference for the IGC. In either event, the IGC shall determine the amendments by common accord, and those will enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

The ordinary amendment procedure is clearly based on the model of the Convention on the Future of Europe, established by the Laeken Declaration, which was responsible for drafting the original Constitutional Treaty. However, there are interesting questions about how the experience of the ratification crisis might end up affecting the balance of power within this amendment model. In particular, the Member States at the 2003/2004 IGC seemed to accept the Convention proposals as the starting point for their own deliberations, and did not stray too far from the draft text presented by the

Convention when finalising their own version of the Constitutional Treaty. That could have been interpreted as indicative of a new constitutional convention for the Union, i.e. that Treaty amendments drafted by a Convention, comprising representatives from the Member State governments, national parliaments, European Parliament and the Commission, and operating in a relatively transparent manner with the engagement of civil society, enjoy a significant degree of legitimacy, and should only be tinkered with at the subsequent IGC, and even then, only for very good reasons.

But it is arguable that the ratification crisis and the functioning of the 2007 IGC have blown apart any such emergent constitutional convention. At a superficial level, one can find bemusement in the idea that the revised Treaties envisage an amendment process which actually failed in practice, and that the TL itself was drafted by a procedure which would not have complied with its very own proposals - one which has certainly been accused of amply displaying all an IGC's worst characteristics of exclusionary, opaque and unaccountable decision-making.³³ More fundamentally, the ratification crisis and the 2007 IGC point to a very different power balance between a future Convention's proposals and the IGC convened to consider them, than might otherwise have emerged had the Constitutional Treaty entered smoothly into force. In particular, perhaps the Member States will feel that they should learn the following lesson: it should not be taken for granted that supposedly more representative and transparent Conventions will produce drafts amendments actually capable of commanding popular support.

³³ See, e.g. House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference* (35th Report of Session 2006-2007, published in October 2007).

One could speculate about other situations where the ratification crisis might have an informal impact upon the Union's institutional relations: for example, whether the Union institutions' increased sensitivity towards national prerogatives might convert what is meant to be a "yellow card" into a de facto "red card" for monitoring compliance with the principle of subsidiarity; or whether the sense of intergovernmental power that imbued the 2007 IGC will dissolve any remaining inhibitions about putting enhanced cooperation into practice, and indeed transform it into a commonplace mechanism for accommodating diverse Member State regulatory preferences. The underlying point, however, remains the same: if the Member States feel that the tectonic plates have indeed shifted, then our understanding of the Union's inter-institutional balance, which derives not only from the primary law contained in the Treaties, but also from the conventions which emerge from institutional practice, might have to accommodate a shift away from the supranational and towards the intergovernmental.

Constitutionalism moribund?

Aspects of the TL therefore point towards a resurgence in intergovernmental influence within the functioning of the Union. A related though still distinct question concerns the potential implications for the Union's legal discourse of the express rejection, at the highest political level, of an expressly constitutional basis for the integration process - or, to be more precise, the European Council's explicit statement, in the mandate for the 2007 IGC, that the "constitutional concept" is abandoned.

The careful wording of the European Council conclusions suggest that abandonment of the "constitutional concept" was meant only in a relatively narrow and technical sense, i.e. abandonment of the repeal-and-replace approach to the

existing Treaties, the title “Constitution”, and the various unnecessary trimmings and inappropriate terminologies contained in the old Constitutional Treaty.³⁴ There is no indication that the Member States implied any more fundamental rejection of the idea of the Union as an organisation based on the rule of law. Indeed, the continued emphasis of the Treaties on the proper functioning of the inter-institutional balance, reinforcement of the provisions governing the existence and exercise of Union competences, and the strengthening of the Union’s commitment to fundamental rights, all suggest that the “constitutional concept” - now used in its broader sense - which underlies the European integration project should emerge from this reform process all the stronger.

Nevertheless, the “constitutional wobble” produced by the ratification crisis and rejection of the Constitutional Treaty still pose interesting questions about the political consensus underpinning and informing the continuing evolution of EU constitutional law. Such questions will reverberate across the revised Treaties for the foreseeable future, and if indeed the “tone” of the Union’s constitutional discourse has changed since the 2007 mandate, that has the potential to exercise an important if more subtle influence over issues that the Treaty of Lisbon does not directly and / or definitively resolve.

Consider, for example, the standing of natural and legal persons to bring actions for annulment against allegedly invalid Community acts. As is well known, the Court of Justice currently adopts a very strict approach to the *locus standi* of non-privileged applicants under Article 230(4) EC, in particular, as regards the definition of “individual

³⁴ See the Presidency Conclusions of the European Council of 23 June 2007, especially paras 1-4 of Annex I.

concern”.³⁵ In most cases, applicants will be expected to bring an action before their national courts; the latter will make a preliminary reference under Article 234 EC where they harbour serious doubts as to the validity of the disputed Community act.³⁶ This creates a problem of access to justice particularly as regards so-called “self-executing” Community acts, whose full legal effects do not depend upon the adoption of national implementing measures; in the absence of such a measure, the national courts of various Member States may refuse to consider the applicant’s request for a preliminary reference to Luxembourg.

In cases such as *UPA* and *Jégo-Quééré*, the Court of Justice was asked, but refused, to reconsider its position; and indeed, suggested that the proper solution lay with a revision of the Treaty itself.³⁷ That invitation was accepted by the Convention which drafted the Constitutional Treaty, and its proposals are now finally embodied in Article 263(4) TFEU: any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, *and against a regulatory act which is of direct concern to them and does not entail implementing measures*.

On any reading, this is a minimalist solution to the problem of access to justice for natural and legal persons: the individual concern requirement is retained for all cases *except* self-executing regulatory acts. Yet despite its crucial importance in

³⁵ E.g. Case 25/62 *Plaumann* [1963] ECR 95; Case C-10/95P *Asocarne* [1995] ECR I-4149; Case C-209/94 *Buralux* [1996] ECR I-615; Case C-321/95P *Greenpeace* [1998] ECR I-1651; Case C-451/98 *Antillean Rice* [2001] ECR I-8949.

³⁶ E.g. Cases 133-136/85 *Rau* [1987] ECR 2289; Case 314/85 *Firma Foto-Frost* [1987] ECR 4199; Case C-143/88 *Zuckerfabrik* [1991] ECR I-415; Case C-465/93 *Atlanta* [1995] ECR I-3761.

³⁷ Case C-50/00, *Unión de Pequeños Agricultores*, [2002] ECR I-6677; Case C-263/02P, *Jégo-Quééré*, [2004] ECR I-3425.

delimiting the extent to which direct access to judicial review has been liberalised under Article 263(4) TFEU, the concept of a “regulatory act” is not defined anywhere in the revised Treaties. The ordinary, natural meaning of that phrase would be any binding act of general application, whether legislative or non-legislative in nature, and regardless of its classification as a regulation, directive or decision. However, it seems that the Convention which originally drafted these reforms intended the phrase “regulatory act” to refer only to non-legislative measures; Union legislative acts, even if self-executing, would remain subject to the individual concern requirement.³⁸ That would be a minimalist solution indeed: after all, the disputed measure in *UPA* itself would be classified under the revised Treaties as a legislative regulation; the fact that that regulation was self-executing, and that the national court refused to recognise standing to seek a preliminary reference, implies that the claimant in *UPA* would have been no better off post-Lisbon than it was before.³⁹

The rationale behind the Convention’s restrictive understanding of its own phrase “regulatory acts” appears to have been the idea that measures adopted by the Union legislature, which stand at the summit of the Union’s new hierarchy of secondary norms, should be relatively more cushioned against the possibility of challenge by natural and legal persons. That understanding borrows from an approach developed in the national constitutional systems: there, it is true that access to the courts often becomes more restrictive as one moves up through the hierarchy of norms; thus, in many jurisdictions, the ability to challenge the legality of primary legislation is relatively limited or even non-existent.

³⁸ See CONV 636/03, p 8; CONV 734/03, p 20.

³⁹ Cp. Usher, “Direct and Individual Concern: An Effective Remedy or a Conventional Solution?” (2003) 28 EL Rev 575; Koch, “*Locus standi* of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ right to an effective remedy” (2005) 30 EL Rev 511.

However, the rationale for such restrictive standing rules does not derive from the hierarchy of norms *per se*, but rather from the system of democratic accountability that is assumed to underpin it: the citizen finds it more difficult to challenge rules adopted by the democratically elected legislature, as compared to measures adopted by the unelected executive authorities. When that argument is transplanted into the particular constitutional context of European integration, it probably begins to run *against* recognising any special treatment as regards access to justice for acts of the Union legislature, whose institutions clearly do not enjoy the same degree of democratic legitimacy as their domestic counterparts. If anything, one might argue that the rule of law - through the medium of effective judicial review, directly at the behest of the citizen, in respect of all Union measures, legislative as well as non-legislative - plays an even more important role in legitimising the existence and exercise of Union power than it does within the ordinary national legal systems.

One hopes that the combined effects of the ratification crisis and the 2007 IGC will create enough distance for the Court of Justice to feel free from any sense of obligation to follow the Convention's narrow but flawed understanding of "regulatory acts". Would it be hoping too much to argue that the Treaty of Lisbon's strengthening of the concept of the Union as an organisation of limited competences, against the background of obviously conditional and even sometimes quite tenuous popular support for the integration process, should persuade the Court to go even further, i.e. to broaden as far as possible access to judicial review, simply by rewriting its own restrictive case law on individual concern?

Another interesting arena for exploring the impact of the ratification crisis and the 2007 IGC on the Union's constitutional underpinnings is the debate over the principle of

supremacy. As is well known, there has been a long-running tension between Luxembourg's assertion of the unconditional supremacy of Community over national law (save where Community law itself admits otherwise),⁴⁰ and the refusal by many domestic courts to accept any such conception of supremacy within their own legal systems.⁴¹ Against that background, the Constitutional Treaty had proposed introducing an express clause whereby "[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".⁴² That provision was widely criticised on the grounds that, compared to the myriad nuances which embellish the Court's case law, the Constitutional Treaty offered a simplistic and potentially misleading statement of the relationship between Community and national law. Nevertheless, the Constitutional Treaty's primacy clause offered clear political endorsement to the Court's case law and could have increased the pressure on national courts to offer fuller obedience to the supremacy of Union law.⁴³

However, the European Council's mandate for the 2007 IGC agreed that the idea of an express primacy clause should be dropped. Instead, the Member States adopted a simple declaration recalling the existing jurisprudence of the Court of Justice on the principle of supremacy of Union over national law "under the conditions laid down by the said case law", and referring to an opinion of the Council Legal Service delivered on 22 June 2007, according to which "[t]he fact that

⁴⁰ E.g. Case 6/64 *Costa v Enel* [1964] ECR 585; Case 106/77 *Simmenthal* [1978] ECR 629; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case C-108/01 *Asda Stores* [2003] ECR I-5121; Case C-234/04 *Kapferer* [2006] ECR I-2585; Cases C-392 & 422/04 *i-21 Germany* [2006] ECR I-8559.

⁴¹ See further, e.g. Arnall, Dashwood, Dougan, Ross, Spaventa and Wyatt, *Wyatt and Dashwood's EU Law* (Sweet & Maxwell, 5th ed, 2006) Ch 5.

⁴² Art I-6 CT.

⁴³ See further, e.g. Cramér, "Does the Codification of the Principle of Supremacy Matter?" (2004-2005) 7 *CYELS* 57.

the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice”.⁴⁴ That approach is arguably preferable from the perspective of capturing better the subtlety of the Court’s own case law, but the question nevertheless arises: will removal of the express primacy clause, combined with the general strengthening of the principle that the Union is an organisation of limited powers, encourage certain national courts to continue their previous approach of accepting the principle of supremacy only under the conditions deemed acceptable within their own domestic legal order?

Again, it is possible to identify other issues where the abandonment of the “constitutional concept” may influence the Court of Justice - one way or another - in its interpretation of the revised Treaties. Consider, for example, the Protocol on the application of the Charter of Fundamental Rights to Poland and the UK, which was apparently intended to limit the justifiability of the Charter’s economic and social rights within those two Member States, but whose legal effects are far from clear thanks to its almost wilfully incomprehensible drafting. Will the Court treat this Protocol as some sort of opt-out from the full legal effects of the incorporated Charter, in keeping with the apparent political intentions of the relevant Member States at the 2007 IGC? Or will the Court instead decide that it would be constitutionally unacceptable for certain supposedly fundamental rights to apply only to 25 of the 27 Member States, and therefore seek to neutralise the legal effects of the Protocol by other means (such as recourse to the general principles of Union law)?⁴⁵ More broadly, even though the Charter of Fundamental Rights will become

⁴⁴ Declaration No 17 annexed to the Final Act.

⁴⁵ Consider the rulings in Case C-438/05 *Viking Line* (Judgment of 11 December 2007) and Case C-341/05 *Laval un Partneri* (Judgment of 18 December 2007).

binding and of equal status to the Treaties themselves,⁴⁶ it would be most unfortunate if the decision by the European Council, in its 2007 IGC mandate, to remove the full text of the Charter from the Union's primary law, in favour of incorporation by simple cross-reference, were to make the Union or national courts more hesitant about using the Charter in a creative and ambitious fashion, i.e. not because they cannot rely on the Charter as an entirely valid source of law, but because the political sensitivities surrounding the Charter, evidenced by the 2007 IGC mandate, argue for greater judicial restraint.

Conclusions

Such questions again point to an underlying problem for Union constitutional law after the traumas of the ratification crisis and the experience of the 2007 IGC.

The Laeken Declaration of 2001 that launched the process of constitutional reform with such optimism highlighted the need to "bring Europe closer to its citizens" through a combination of greater effectiveness and greater accountability.⁴⁷ If either the Constitutional Treaty had been ratified successfully by all the Member States, or if a text such as the Treaty of Lisbon had emerged directly from the Convention on the Future of Europe, it is quite likely that we would now be celebrating a major achievement in the history of European integration and a complete vindication of the optimism on display back in Laeken.

But events proved to be more tumultuous, and hindsight can be an unforgiving judge. After the hubris of the proposals for a European Constitution came the nemesis of the ratification

⁴⁶ See Art 6 TEU.

⁴⁷ See Presidency Conclusions of European Council of 14 December 2001.

crisis initiated by France and the Netherlands. An idealist might question the wisdom of how that crisis was resolved: instead of a serious attempt to overcome misunderstanding and misinformation about European integration, and make positive arguments in favour of substantive reform of the Union, the Member States chose to repackage the dead Constitutional Treaty into a new Reform Treaty. A pragmatist might grudgingly accept that that was the only realistic way for the European Council to reconcile the wishes of the many Member States who had ratified the Constitutional Treaty with those who had already rejected it or were no longer committed to its success. In either case, the impact on public perceptions of the EU can hardly be called surprising - and not just in traditionally Eurosceptic countries such as the UK, but among many well meaning citizens in all Member States concerned about a *modus operandi* that can too easily be portrayed as an attempt to subvert full and proper democratic debate.

So, while it is tempting to anticipate that the Treaty of Lisbon will finally rekindle the Union's institutional strength and its capacity to deliver, there is also the fear that these long years of wrangling and indecision have revealed patent differences between political vision and public opinion within and across the Member States, and been resolved only at the cost of a widespread perception that the "future of Europe" in reality means "Brussels knows best". It therefore seems appropriate to ask: will the post-Laeken constitutional reform process have ended up creating a more effective and accountable Union, but also a less legitimate one? Or at least, has the Laeken process proved a lost opportunity to win over an entire generation of citizens not just to the idea of a "Europe of results", but also to an ingrained acceptance of the Union's underlying constitutional framework? And might the resulting sense of public disenchantment and mistrust sap the strength and dampen the imagination of the Union's constitutional

interlocutors, so that, even without anything so dramatic as the abandonment of a “constitutional concept” for the Union, we shall nevertheless enter a period of more insidious, more pervasive hesitance or (worst of all) decay?

One can only hope that the whole experience has extinguished for the foreseeable future any further appetite for major constitutional upheaval.⁴⁸ Perhaps the Union’s best bet is now to get down to the business of delivering on policy, taking full advantage of the greater effectiveness and accountability promised by the Treaty of Lisbon, in the hope that time coupled with success will eventually heal all wounds.

⁴⁸ That certainly seems to have been the view of the European Council at its meeting in December 2007: see Presidency Conclusions of 14 December 2007, para 6.