

THE CONSTITUTIONAL CONCEPTS OF THE REFORM TREATY (THE LISBON TREATY)

Associate professor **Emilian CIONGARU**¹

Abstract

The Lisbon Treaty also known as the Reform Treaty provides only an amendment of the treaties considered as fundamental, namely the Treaty on the European Union and the Treaty on the functioning of the European Union and is the result of the constitutional process triggered by the Laeken Declaration adopted by the European Council. The Lisbon Treaty is still built on the content of the European Constitution from which they eliminated the most controversial provisions, first of all the title of Constitution that might produce concern and panic among the European Union population through the symbolic power it contained, and for Romania this new treaty was the first it signed in quality of a Union member state. Even if does not bear the name of European Constitution, the Lisbon Treaty is a European Constitution for the following reasons: first it is a Constitution because it gathers together most of the fundamental elements of the Constitutional Treaty, even if it does not have the structure or the name thereof, and second the treaties after the Lisbon reform have become small constitutions from the operational viewpoint, they develop the functions of a constitution, limit power and organize the operation of the organization.

Keywords: constitutional concept; Lisbon Treaty; European Constitution; fundamental elements of Constitutional Treaty.

JEL Classification: K10, K33.

1. The historical evolution of the Lisbon Treaty-the Reform Treaty

The Lisbon Treaty², provides only an amendment of the treaties considered as fundamental, namely the Treaty on the European Union and the Treaty on the functioning of the European Union as the Treaties of Amsterdam and Nice did at their time. *The Union is founded based on this Treaty* - in accordance with the principles of Treaty on the European Union and the *Treaty on the functioning of the Union*. These two treaties together become then the de facto *Constitution* of the post-Lisbon European Union.

A new Union is in fact *set up* although the word *constitution* is not used. The Lisbon Treaty is the result of the constitutional process triggered by the Laeken Declaration adopted by the European Council³ in 15 December 2001 - *The Laeken Declaration on the future of the United Europe* - and this declaration became an ad-hoc agenda of the European Union reform by identifying the challenges the European Union was going to answer as they were seen at the beginning of 2001 and whose answer was going to be obtained through treaty revision. That is why the most adequate evaluation of the reforms introduced by the Lisbon Treaty is the one obtained from the comparison thereof with the Laeken Declaration.

The chronology of events that led to the emergence of Lisbon Treaty starts in fact at Nice in December 2000 when we may say that the process of constitutionalization of the European Union began, when in the European Council they decided to carry out the general revision of all institutive treaties having the adaptation of the European Union institutions to the already planned expansion thereof as their main objective, and also expressing the need for a much more elaborate general debate regarding the future of the Union.

In the period February 2002 - July 2003, the Convention chaired by Valéry Giscard d'Estaing formulates the Draft Treaty instituting a Constitution for Europe, a treaty that was signed on October

¹ Emilian Ciongaru - Bioterra University – Bucharest; Associate researcher, Romanian Academy – Institute of Legal Research “Acad. Andrei Radulescu”, emil_ciongaru@yahoo.com.

² The treaty was signed on December 13, 2007 by the representatives of the 27 member states of the European Union and entered into on December 1 2009. Romania ratified the Treaty of Lisbon by the Law no. 13/2008 (Official Gazette of Romania no.107 on February 12, 2008).

³ G. Isaac and M. Blanquet. *Droit communautaire général*, 8-édition, Armand Colin, Dalloz, Paris, 2001 pp. 50 and next.

29th 2004 at the Rome ceremony and it went through a ratification process by the member states. Symbolically, the constitutional Treaty was voted in the European Parliament as well and after several European Union member states ratified the treaty, France on May 29th 2005, and Denmark on June 1st 2005 rejected the proposal for a European Constitution. In addition, other member states postponed or interrupted the ratification procedures, therefore the future Treaty instituting a Constitution for Europe scheduled to come into effect on November 1st 2006 became highly uncertain given the condition of unanimity of ratifications necessary and mandatory for the coming into effect thereof - in accordance with the Treaty on European Union, any new amending treaty subsequent to the institutional treaties must be ratified by all Member States.

Thus, for many reasons and in this context, the European Parliament proposed a new action plan that may be carried out by phases as follows: the first phase provided that until the end of 2006 they would have to draft a treaty in a shorter form that might contain only the aspects without controversies that were stipulated in the initial constitutional treaty; the second phase provided that until the end of 2009 a new constitutional convention would decide in relation to a new European Union Constitution; and the third phase provided that simultaneously with the 2009 Parliamentary elections they would organize a referendum in which the European Union citizens may decide on the new constitutional treaty. The European Parliament document reproducing the details of this plan was adopted on January 19th 2006. In this context, the Laeken Declaration identifies four fundamental issues: the division of competences between the Union and the Member States; how to define the tasks of the European institutions; ensuring the coherence and efficiency of European institutions; enhancing the legitimacy of the Union.

In the second half of 2007 they came to a compromise solution that the European Union decision-makers considered as viable being materialized in the issue of a new document of the Union called the Reform Treaty or the Lisbon Treaty taking its name from the place where it was officially signed by the heads of states and governments on December 13th 2007.

Therefore, the new Treaty is still discreet built⁴ on the content of the European Constitution from which they eliminated the most controversial provisions, first of all the title of *Constitution* that might produce concern and panic among the European Union population through the symbolic power it contained, and for Romania this new treaty was the first it signed in quality of a Union member state.

After all the amendments brought to the old treaty, the new treaty contains the following objectives: the setting up of a more democratic and transparent European Union; the creation of a more efficient Union with simplified work methods and voting rules, modern institutions for a European union with 27 members capable to act better in the major fields of a future Union; the building of a European union of rights, human rights⁵, values, solidarity and safety that promotes Union's values, introduces the Charter of fundamental rights in the European primary law, provides new solidarity mechanisms and a better protection of the European citizens; Europe's promotion as an actor on the international stage - external politics instruments Europe has right now will be regrouped in terms of elaboration and adoption of new policies; European Union's acquiring a legal personality that will give it the right to be a subject of international law.

Consequently, the Lisbon Treaty represents a treaty amending the existing treaties. On the date of coming into effect of the Lisbon Treaty, it modified the two major treaties of the European Union, namely the Treaty on the European Union - TEU, Maastricht, 1992, and the Treaty on the Functioning of the European Union (TFEU) - Rome, 1957. Several Protocols and Declarations coming with a series of necessary observations and supplementations were annexed to the treaty.

The Treaty on the European Atomic Energy Community - Euratom, EAEC was maintained separately and the Treaty on the European Union - TEU, as it has been amended by the Lisbon Treaty,

⁴ Ch. Pennera, *Les enjeux du Traité modificatif*, in *Legal issues of the Reform Treaty*. Publication ERA-Forum: scripta iuris europaei, 2008, v. 9, n. 1, April.

⁵ M. Tutunaru and B.D. Dascalu. *The edification of the state of law*. Volume of Conference Proceedings – Galati, 29– 30 of April 2011 Year III, No. 3, Vol. I - 2011, Galati University Press, p.77.

reflects the general framework of the Union and its principles also including the specific provisions in terms of the common external and security politics of the European Union.

2. Concepts of constitutional nature of the Lisbon Treaty

Amendments to the Treaty on European Union and to the Treaty establishing the European Community:

Article 1 - The Treaty on European Union shall be amended in accordance with the provisions of this

Preamble

1) The preamble shall be amended as follows:

(a) the following text shall be inserted as the second recital:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable right of the human person, freedom, democracy, equality and the rule of law, ';

(b) In the seventh, which shall become the eighth, recital, the words of this Treaty' shall be replaced by of this Treaty and of the Treaty on the Functioning of the European Union, ';

(c) In the eleventh, which shall become the twelfth, recital, the words of this Treaty shall be replaced by of this Treaty and of the Treaty on the Functioning of the European Union.⁶

Even if it does not bear the name of European Constitution, the Lisbon Treaty is a European Constitution for the following reasons: first it is a Constitution because it gathers together most of the fundamental elements of the Constitutional Treaty, even if it does not have the structure or the name thereof, and second the treaties after the Lisbon reform have become small constitutions from the operational viewpoint, they develop the functions of a *constitution*, limit power and organize the operation of the organization.⁷

By activating the procedures and processes of constitutional nature through the adoption of the Laeken Declaration in December 2001, the Lisbon Treaty acquires the character of constitutionality being the result of the will of the states involved in this process. The Laeken Declaration adopted by the European Council became an ad-hoc agenda of the Union reform through the identification of the major challenges that the European Union was going to answer, as they were at the beginning of 2001, and whose answer was going to be given by treaty revision. That is why the most adequate evaluation of the reforms introduced by the Lisbon Treaty is the one obtained through the comparison of it to the Laeken Declaration.

The fundamental elements⁸ identified in the Laeken Declaration the Union must find solutions to at the beginning of the third millennium are: the democratic provocation or how to get the European institutions closer to citizens; the new role of Europe in a globalized international environment; what answer we must give citizens in terms of their expectations regarding the daily needs, unemployment, life standard, delinquency, health or education.

Formulated with a constitutional meaning, the challenges identified by the European Council to which the reform must find an answer were as follows: how can citizens, especially young people, become closer to the European project and institutions?; how should political life and the European political environment be structured within an expanded Union?; what should we do so that the European union might turn into a factor of stability and a model in the new multipolar world?

Another topical challenge which the Union must cope with refers to its existence in an expanded formula. However, the problem that emerged in the sense that a new fundamental reform of the institutional system might be necessary to cope with flexible and efficient position papers in a

⁶ Article 1. Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C306/01). Official Journal of the European Union. 17.12.2007.

⁷ M. Voicu, *Uniunea Europeană înainte și după Tratatul de la Lisabona*, Universul Juridic Publishing House, Bucharest, 2009.

⁸ M. Guinea Llorente and F. Aldecoa Luzarraga. Translator: Iordan-Gheorghe Barbulescu. *Europa Viitorului. Tratatul de la Lisabona*, Iasi, Polirom Publishing House, 2011, p. 248.

Union that might soon have thirty states, five times more than the initial six states for which the well-known institutional and decisional system had been designed, was inevitable.

The treaty also established the fulfilment of European Union efficacy which was going to be approached from two directions: the institutional organization and the decisional process.

Therefore, the institutional system has been deeply reformed to cope with these efficacy requirements by the following mechanisms of constitutional nature: permanent or coordinated presidencies, as the case may be, have been provided for the European Council and councils; the structure of the Committee has been reduced; the EP structure has been adapted; and the setting up of the High Representative for the entire common external policy has been provided.

Many years ago, the European Union Court of Justice⁹ affirmed that the European treaties represent the *Constitutional Charter* of the European community by underlining their constitutive and fundamental character in their political organization. The fact that the Union already had a material constitution did not contradict or prevent the attempt for *new-constitutionalization* of treaties on which the Union was founded. The Lisbon Treaty does exactly that by continuing this process of *new-constitutionalization* that consist in the incorporation and adoption of elements with the aim to consolidate the guarantee of rights and freedoms¹⁰, may define and organize more efficiently the relations among all the parties composing the Union and which ultimately aim to democratize and distribute the power between the European Union institutions.

By explaining the function of protection of the fundamental rights, they are also guaranteed in front of the European public power. The existence of some instruments such as the delimitation of competences, the creation of the double political and juridical procedure for the control of subsidiarity exercise or the increase of the power of supervision of the national parliaments aim to guarantee that the abuses of the common institutions will be avoided and that national or, if necessary, the regional competences will be protected in context of the lack of any coherent strategy for the state's reform at the level of the decision makers.

When carefully examining the Constitutional Treaty, we may notice that this has consolidated the idea of its constitutional value based not so much on the name but on the fulfilment of the functions specific to a constitution. The reasons that were valid at that time are still valid now in case of the Lisbon Treaty since the content of the Constitutional has been kept unaltered just like the functions it carried out.

One of the constitutional experts¹¹ who examined the Lisbon Treaty considers that this treaty continues the tradition of the social contract and fulfils all the functions specific to constitutions ever since the 18th century: it recognizes citizens' rights, organizes the relationships between the government and the governed ones and establishes a system of power control via measures and countermeasures.

A similar opinion¹² is that the Treaty reunites three elements specific to a Constitution – a contractual guarantee by the fact it creates an organization to protect citizens' rights; an organizational guarantee by the fact it establishes the institutional organization and the separation of powers, and a representational guarantee by the fact that it ensures the equal representation of all citizens in the legal body.

The Lisbon Treaty is a *constitution* without a name, but the fact that the intention to formalize this material concept was rejected means that somebody did not want to equip the Union with a *constitution* in the formal or solemn sense, namely in the most frequently encountered political sense. If the choice of the word Constitution for the Convention contained in itself the wish to explain the political and also constitutional nature of the European political project and of the European Union, the return to the format of treaties may be motivated by the failure to explain this political nature.

⁹ *Sentencia del Tribunal de Justicia de las Comunidades Europeas* de 23 de abril de 1986, as. 294/3, Les Verts, R. 1986-4, p. 1365 y Dictamen 1/91, R. 1-6079.

¹⁰ A. Fuerea, *Drept comunitar european. Partea generala*, All Beck Publishing House, Bucharest, 2004, pp. 106 and next.

¹¹ J. Ziller, *The European Constitution*, Kluwer Law International, Wolters Kluwer Law & Business, 2004, p. 2.

¹² S. Puntcher Riekmann (coord.), *Constitutionalism and Democratic Representation in the European Union*, Viena-Bruxelles, Austrian Academy of Sciences, Trans European Policy Studies Association, 2003, pp. 16-17.

To answer the objections coming from those European Union member states that are concerned by the federal advance of the Union, all the indications that might lead to the idea that the European Union might turn into such a federal state have been removed from the new Treaty¹³. Thus, for instance the word *constitution* and the section dedicated to the European Union symbols have been eliminated, but in spite of all that, the new Treaty has taken over the largest part of the innovations included in the Constitutional Treaty by adopting the so-called *veil strategy*, an approach that has been considered rather as an *example of supranational hypocrisy*.

As for its institutional nature, the Treaty keeps the five community institutions existing up to that point: European Parliament, the European Council, the Court of Justice and the Court of Audit by also elaborating major structural-operational regulations.

The European Parliament has evolved in the following directions: the expansion of competences, the simplification of the voting system that has been already used in 2014, the involvement of the national element into the system and the correlation of the European Parliament's activity to the activity of the national parliaments. The system of parties has been institutionalized. The role of the European Parliament in electing the European Committee President and indirectly in proposing candidates for the positions of commissaries has been emphasized. The European Parliament may also involve in the issues of external politics by means of the High Representative for foreign affairs and security policy.

The voting system has been simplified, and the national parliaments receive a more important role while the European Union becomes a more prominent global actor. All these attributes of the European Parliament mean, besides a stronger power, a higher and better defined responsibility.

The European Council acquires a clear statute by the Lisbon Treaty which stipulates that this European Council defines the general orientations and policies, but it does not have legislative functions. Its structure remains the same with the observation that the High Representative for foreign affairs and security policy takes part to its meetings. The European Council plays an important role in the hypothesis a member state wishes to withdraw from the Union, which is a right guaranteed by the Lisbon Treaty. Rotating presidency has been given up and the position of European Council President has been set up.

The European Union Council, also called the Council of Ministers or simply the Council, is made up of the ministers of the member states, one from each state, according to the targeted domains, and it has legislative attributes performed together with the European Parliament and the Committee.

The Committee is made up of commissaries, each member state having its own commissary. The Committee has the right of legislative initiative so that the power balance characteristic to the community institutional system, though inclined towards the Committee since the setting up of the European Communities through the monopolist power it has over the political agenda, continues to favour it by giving it the role of a dominating institution from this viewpoint. This role consolidates following the Lisbon Treaty by the diminution of the force to block the specific legislation prior to the Council.

Other connotations of constitutional nature are also noticed in the mechanism of control of the acts of community institutions that is carried out by the European Union Court of Justice¹⁴ which, besides the fact that interprets treaties and rules over the validity of the acts adopted by the Union institutions, offices or agencies, it may also control the legality of the acts, including the legislative ones, of the Council, Committee, the European Parliament and the Central European Bank if they are meant to produce legal effects towards third parties.

¹³ In this sens, see I. Jinga. *Treaty of Lisbon: Solution or Phase in the Institutional Reform of the European Union?* in the *Romanian Journal of Community of Law*, no. 1, 2008, p. 32.

¹⁴ C.S. Sararu. *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in C.S. Sararu (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang International Academic Publishers, Frankfurt, 2013, pp. 39-48; on the general principles of European administrative law deduced by the European Union Court of Justice, see C.S. Sararu, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 808-826.

3. Conclusions

Therefore, we may conclude that the Lisbon Treaty is a *constitution* not only in the material sense of the word but also in the operational one meaning that it has the functions of a constitution and does it better than the previous treaties, and its constitutional value is higher than that of other treaties as it has an obvious function of guarantee of the two legitimacies of the European Union, the citizens and the states. However, the abandoning of the constitutional form of the Treaty in exchange of the preservation of the contents thereof resulted in the fact that this political and constitutional character remains incomplete and unexplained for the time being which makes the European Union not to get closer to the citizen in the sense that he/she cannot recognize this Treaty as a *constitution* that may resemble their national constitution.

The full explanation of the political nature of the European Union remains to be made when the political conditions are sufficiently mature to recover the form and constitutional concept.

A continuous challenge the European Union must cope with in the future as well refers to its existence in a more expanded form. However, the problem that emerged in the sense that a new fundamental reform of the institutional system might be necessary to cope with flexible and efficient position papers in a Union that might expand relatively soon in relation to the moment when the Lisbon Treaty was adopted for which the well-known institutional and decisional system had been designed and adapted, was inevitable. If one took into account the quite sinuous path of the current Treaty and the quite tense economic and geopolitical climate, a potential renegotiation of the treaty within the coming period appears as non-plausible, but amendments or additional clarifications provided by other specific normative documents might be brought, amendments and clarifications that seem inevitable regarding the way in which the European Union will operate, especially in terms of the two newly created positions the President of the European Council and the High Representative for foreign affairs and security policy; otherwise, it is difficult to anticipate other type of amendments or supplementations of the current provisions.

Bibliography

1. A. Fuerea, *Drept comunitar european. Partea generala*, All Beck Publishing House, Bucharest, 2004.
2. C. S. Sararu. *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in C.S. Sararu (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang International Academic Publishers, Frankfurt, 2013.
3. C.S. Sararu, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016.
4. Ch. Pennera, *Les enjeux du Traité modificatif*, in *Legal issues of the Reform Treaty*. Publication ERA-Forum: scripta iuris europaei, 2008, v. 9, n. 1, April. 2011.
5. G. Isaac and M. Blanquet. *Droit communautaire général*, 8-édition, Armand Colin, Dalloz, Paris, 2001.
6. I. Jinga. *Treaty of Lisbon: Solution or Phase in the Institutional Reform of the European Union?* in the *Romanian Journal of Community of Law*, no. 1, 2008.
7. J. Ziller, *The European Constitution*, Kluwer Law International, Wolters Kluwer Law & Business, 2004.
8. M. Guinea Llorente and F. Aldecoa Luzarraga. Translator: Iordan-Gheorghe Barbulescu. *Europa Viitorului. Tratatul de la Lisabona*, Iasi, Polirom Publishing House, 2011.
9. M. Tutunaru and B.D. Dascalu. *The edification of the state of law*. Volume of Conference Proceedings – Galati, 29–30 of April 2011 Year III, No. 3, Vol. I - 2011, Galati University Press, 2011.
10. M. Voicu, *Uniunea Europeană înainte și după Tratatul de la Lisabona*, Universul Juridic Publishing House, Bucharest.
11. S. Puntischer Riekmann (coord.), *Constitutionalism and Democratic Representation in the European Union*, Viena-Bruxelles, Austrian Academy of Sciences, Trans European Policy Studies Association, 2003.
12. *Sentencia del Tribunal de Justicia de las Comunidades Europeas* de 23 de abril de 1986, as. 294/3, Les Verts, R. 1986-4, p. 1365 y Dictamen 1/91, R. 1-6079.
13. *Treaty of Lisbon* by the Law no. 13/2008, Official Gazette of Romania no.107 on February 12, 2008.