Hermann-Josef Blanke
Stelio Mangiameli *Editors*

The European Union after Lisbon

Constitutional Basis, Economic Order and External Action

Springer

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Foreword

This volume aims to analyse the constitutional basis of the European Union and the normative orientation of the Common Foreign and Security Policy (TEU) as well as the central economic and monetary provisions (TFEU) after the Reform Treaty of Lisbon. Its development was accompanied by two Conferences in Erfurt (2008) and Rome (2010) which the editors have organised in preparation for the project of a European Commentary on the Treaty of Lisbon. As an outcome of a European research compound, which is composed of authors from eight Member States, the publication underlines the aspiration of the editors to thoroughly analyse the constitutional law of the European Union currently in force.

The editors are grateful to all the authors for their contributions. A special word of thanks is due to the Fritz Thyssen Foundation for its funding of both international Conferences. For her constant patience and editorial support our thanks and appreciation also go to Dr. Brigitte Reschke from Springer Publishing. Special thanks are due to Robert Böttner, assistant at the Chair for Public Law, International Public Law and European Integration, who has put a lot of effort into the careful editing, the revision of the manuscripts and the translation of some of the contributions.

Erfurt and Rome in September 2011

Herm.-J. Blanke
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Abbreviations

AC	Appeal Court (Court of Appeal)
AFSJ	Area of Freedom, Security and Justice Block Exemption Regulation
AJIL	American Journal of International Law
All ER	All England Law Reports
AöR	Archiv für Öffentliches Recht
Art.	Article(s)
BGBl.	Bundesgesetzblatt
Br.-Drs.	Bundesratsdrucksache
Bt.-Drs.	Bundestagsdrucksache
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidung des Bundesverfassungsgerichts (Decision of the German Federal Constitutional Court)
CAP	Common Agricultural Policy
cf.	confer
CFI	Court of First Instance
CFR	Council on Foreign Relations
CFSP	Common Foreign and Security Policy
cit.	cited
CJEL	The Columbia Journal of European Law
CJEU	Court of Justice of the European Union
CMLR (CMLRev.)	Common Market Law Review
CoE	Council of Europe
COR	Committee of the Regions
COREPER	Committee of Permanent Representatives
CSDP	Common Security and Defence Policy
DDA	Disability Discrimination Act
Dem. e dir.	Democrazia e Diritto
Der. const.	Derecho constitucional

DG	Directorate-General
Dir. intern.	Diritto internazionale
Dir. Lav. Rel. Ind.	Diritto del lavoro e delle Relazioni industriali
Dir. pubbl.	Diritto pubblico
Dir. soc.	Diritto e società
Dir. Un. Eur.	Diritto dell'Unione Europea
DÖV	Die Öffentliche Verwaltung
DPCE	Diritto pubblico comparato ed europeo
DVBl.	Deutsches Verwaltungsblatt
e.g.	exempli gratia (for example)
EAT	Employment Appeal Tribunal
EC	Treaty establishing the European Community/European Community/European Communities
ECB	European Central Bank
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice (Luxembourg Court – meanwhile the acronym CJEU is recognised)
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights ("Strasbourg Court")
ed.	editor
EDA	European Defence Agency
EDC	European Defence Community
edn.	edition
eds.	editors
edt. by	edited by
EEA	European Economic Area European Electoral Act
EEAS	European External Action Service
EEC	European Economic Community
EFA Rev.	European Foreign Affairs Review
EHRR	European Human Rights Reports
EIB	European Investment Bank
ELJ	European Law Journal
ELRev.	European Law Review
EMI	European Monetary Institute
EMS	European Monetary System
EMU	Economic and Monetary union
Enc. dir.	Enciclopedia del diritto
EO	European Ombudsman
EP	European Parliament
EPL	European Public Law
EPU	European Parliamentary Union
ERDF	European Regional Development Fund

ESC	Economic and Social Committee
ESCB	European System of Central Banks
ESCB	European System of Central Banks
ESDP	European/Common Security and Defence Policy
ESF	European Social Fund
Est. Pol.	Estudios Políticos
et al.	et alii (and others)
et seq(q)	et sequential, et sequentes
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
EuGRZ	Europäische Grundrechte Zeitschrift
EuR	Europarecht
EURATOM	European Atomic Energy Community
EUROPOL	European Police Office
EUSR	EU Special Representative
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
ex p.	ex parte
FAZ	Frankfurter Allgemeine Zeitung
FCC	Federal Constitutional Court
Fil.	Il Filangieri
fn.	Footnote
Foro it.	Foro italiano
GC	General Court (as a body of the Court of Justice of the EU)
GEDP	General Economic Policy Guidelines
GG	Grundgesetz
Giur. cost.	Giurisprudenza costituzionale
GNI	Gross National Income
GNP	Gross National Product
GVBl.	Gesetz- und Verordnungsblatt
HL	House of Lords
HQ	Head Quarters
HRA	Human Rights Act
i.d.	idem
i.e.	id est
ibid.	ibidem
IC	Constitution of the Italian Republic
ICJ	International Court of Justice
ICR	International Court Reports
IGC	Intergovernmental Conference
INAP	Instituto Nacional de Administración Pública
Integration	Jahrbuch der europäischen Integration
JöR	Jahrbuch des Öffentlichen Rechts
JZ	Juristen Zeitung
KB	King's Bench (for older cases pre-1953)

loc. cit.	locus citatus
MEP	Member of the European Parliament
MP	Member of Parliament
NATO	North Atlantic Treaty Organisation
NJW	Neue Juristische Wochenschrift
No.	Number
NVwZ	Neue Zeitschrift für Verwaltungsrecht
nyr	Not yet reported
OJ	Official Journal
OJC	Official Journal (Communications)
OJL	Official Journal (Legislation)
op.cit.	opere citato
OSCE	Organisation for Security and Cooperation in Europe
OUP	Oxford University Press
ÖZöR	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (Austrian journal of public and international law)
p.	Page
para.	Paragraph
passim	Frequently mentioned
PJCC	Police and judicial cooperation in criminal matters
Pol. Dir.	Politica del diritto
pp.	Pages
PSC	Permanent structured cooperation
QB	Queen's Bench
QC	Queen's Counsel
QMV	Qualified majority voting
Quad. cost.	Quaderni costituzionali
Quad. fior.	Quaderni fiorentini
Quad. rass. sind.	Quaderni Rassegna Sindacale
Racc.	Raccolta della giurisprudenza della Corte di giustizia e del Tribunale di primo grado
Rass. parl.	Rassegna parlamentare
RDCE	Revista de Derecho Constitucional Europeo
RDE	Rivista di diritto europeo
RDILC	Revue de droit international et de législation comparée
RDPE	Rassegna di diritto pubblico europeo
RDSS	Rivista del Diritto della Sicurezza sociale
RDUE	Revue de droit de l'Union européenne
REDC	Revista Española de Derecho Constitucional
REP	Revista de Estudios Políticos
Riv. dir. intern.	Rivista di diritto internazionale
Riv. it. dir. pubbl. com.	Rivista italiana di diritto pubblico comunitario
Riv. stor. it.	Rivista storica italiana

Riv. trim. dir. pubbl.	Rivista trimestrale di diritto pubblico
RMC	Revue du Marché Commun
RRA	Race Relations Act
RTDeur/RTDE	Revue trimestrielle de Droit européen
RV	Reichsverfassung
s	Section
S&P	Scienza & Politica
scil.	scilicet
SDA	Sex Discrimination Act
SEA	Single European Act
ser.	Series
SIS	Schengen Information System
SpC	Spanish Constitution
SSTC	Judgments of the Spanish Constitutional Tribunal
STC	Sentencia del Tribunal Constitucional (judgment of the Spanish Constitutional Tribunal)
TCE	Treaty establishing a Constitution for Europe
TDS	Teoria del diritto e dello Stato
TEU	Treaty on European Union as amended by the Lisbon Treaty
TEU-Amsterdam	Treaty on European Union as amended by the Amsterdam Treaty
TEU-Maastricht	Treaty on European Union as amended by the Maastricht Treaty
TEU-Nice	Treaty on European Union as amended by the Nice Treaty
TFEU	Treaty on the Functioning of the European Union
ThürVerwBl.	Thüringer Verwaltungsblätter
UEF	Union Européenne des Féderalistes
UK	United Kingdom
US	United States
USA	United States of America
v/v.	versus
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
VerwArch	Verwaltungsarchiv
Vol.	Volume
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
WD	Working Document
WRV	Weimarer Reichsverfassung
WTO	World Trade Organisation
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZevKR	Zeitschrift für evangelisches Kirchenrecht

ZfV	Zeitschrift für Verwaltung
ZG	Zeitschrift für Gesetzgebung
ZÖR	Zeitschrift für öffentliches Recht (Austrian journal of Public and International Law)
ZRP	Zeitschrift für Rechtspolitik
ZSR	Zeitschrift für Schweizerisches Recht

Selected National and International Courts

National

Austria	http://www.vfgh.gv.at/
Czech Republic	http://www.concourt.cz/
France	http://www.conseil-constitutionnel.fr/
	http://www.conseil-etat.fr/
Germany	http://www.bundesverfassungsgericht.de/
Greece	http://www.ste.gr/
Hungary	http://www.mkab.hu/
Italy	http://www.cortecostituzionale.it/
Poland	http://www.trybunal.gov.pl/
Portugal	http://www.tribunalconstitucional.pt/tc/home.html
Spain	http://www.tribunalconstitucional.es/
United Kingdom	http://www.parliament.uk/business/lords/
	http://www.supremecourt.gov.uk/
United States of America	http://www.supremecourt.gov

International

Court of Justice of the European Union	http://curia.europa.eu/
European Court of Human Rights	http://www.echr.coe.int/
International Court of Justice	http://www.icj-cij.org/

Part I
Constitutional Basis

The European Constitution's Prospects

Antonio D'Atena

1 Two Apparently Contradictory Statements

I would like to begin my paper by making two apparently contradictory statements.

The first is that the Lisbon Treaty clearly reverses the trend reflected in the Rome Treaty of 2004 and resolutely shelves any prospect of a European Constitution. Indeed, in line with both the German Presidency's report dated June 2007[1] and the conclusions reached by the European Council in Brussels shortly afterwards,[2] the Treaty deliberately abandons the term "constitution". This therefore marks a sharp U-turn after the Rome Treaty, since the latter had constructed all its institutional and presentational strategy around that term.

The second statement is that the U-turn is nevertheless more apparent than real.

English translation by Catharine Rose de Rienzo (née Everett-Heath).

[1]Report from the Presidency to the European Council pursuing the Treaty reform process (14 June 2007): "A certain number of Member States underlined the importance of avoiding the impression which might be given by the symbolism and the title 'Constitution' that the nature of the Union is undergoing radical change. For them this also implies a return to the traditional method of treaty change through an amending treaty, as well as a number of changes of terminology, not least the dropping of the title 'Constitution'". From the Treaty of Rome onwards, legal scholars had expressed a similar point of view; see Caruso (2005).

[2]Presidency Conclusions – Brussels 21/22 June 2007 (11177/1/07), pp. 15 et seq.: "The IGC is asked to draw up a Treaty (hereinafter called the 'Reform Treaty') amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. *The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned*" (my italics).

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2 A Treaty, Not a Constitution

The U-turn is more apparent than real because, despite its title "Treaty establishing a Constitution for Europe", the Rome Treaty could not be considered a genuine constitution.[3]

From a formal point of view, first of all, it was not a constitution. In saying this, I am referring to the process followed for its creation. Such a process was the one typical of international treaties, not constitutions. As is well known, treaties obey the logic of contracts. Like contracts, they become legally binding only if all the parties involved agree on the treaty's text.[4] This has the consequence that, should a state dissent, there is no treaty. The impact on the Rome Treaty of the "No" resulting from the referenda in France and the Netherlands demonstrates this quite clearly.

The logic inspiring constitutions is totally different. It is not the logic of unanimity but rather that of the majority.[5] In order to create or change a constitution, a majority vote is required. Usually this is a qualified majority: often a two thirds majority is necessary.

In order to appreciate the significance of this fact, we can recall the constituent processes presenting the greatest number of similarities with the one developed in Europe, namely, those processes occurring in federal states. What happens in such a process is that several sovereign states decide to become one single state, ceding their sovereignty but maintaining their individual identity. This process culminates in the federal constitution's entry into force. The constitution must be approved by the Member States but it is not necessary that they do so unanimously. If the number of approving states reaches the critical mass required by the constitution, the latter normally binds those states that voted against it.[6]

[3]See Schmitz (2007), for the contrary opinion that the Treaty did possess the basic prerequisites of a Constitution.

[4]This is the general rule, as is well known. Derogations from it must be agreed by the parties (see Art. 24 VCLT 1969). Under Romano Prodi's presidency, a solution derogating from the general rule was studied for the Rome Treaty of 2004 but it did not meet with the Member States' favour. Known as the Penelope project and inspired by the federal techniques that will be considered below, it proposed subordinating the treaty's entry into force to ratification by a qualified majority of the Member States. See Prodi (2004) and Ziller (2003), p. 191, on this subject.

[5]On such a difference and its significance, see, for example, Ipsen (1987), pp. 203 et seq. and Grimm (1995), p. 586. Of the most recent publications in Italian, Carnevale (2005), pp. 1101 et seq. and Gabriele (2008), pp. 135 et seq., should also be noted.

[6]This is what happened both in the case of the Swiss Federal Constitution of 1848 and in that of the German Basic Law of 1949. Indeed, although neither was approved unanimously, they both also became legally binding upon the sub-national entities that had voted against them. A different solution, on the other hand, was adopted under Art. VII of the Constitution of the United States of America, which provides as follows: "The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

The reason for the difference between the process provided for the European Treaties and the one provided for federal constitutions is clear. Indeed, the federative processes give birth to a state: *e pluribus unum* (according to the motto which appears on the Great Seal of the United States). The body that emerges from the process of European integration, on the other hand, is not a state. In this latter case, the EU Member States not only maintain their individual identity (as in the case of a federation) but they also (unlike the case of a federation) preserve a good part of their sovereignty.

The point is precisely that: sovereignty. I would like to state that the issue is an extremely complex one and would therefore require an ad hoc meeting. For our purposes, it is sufficient to note that, up until now, the states have, to a large extent, preserved their sovereignty. Hence the preservation of the international treaty mechanism (and the unanimity rule tied to it).

3 The "Convention" Method

Without prejudice to the premise that what we are talking about is an international treaty, it must be stressed that the manner in which the text was achieved was not the one typical of treaties, namely, the method of intergovernmental negotiation.

A different method was followed: the "Convention" method.[7] This is not to say that intergovernmental negotiations were eliminated. On the contrary, the final text was adopted by an Intergovernmental Conference. Nevertheless, it was a Convention that was appointed to draw up the text, i.e. a body composed of national parliamentarians, national government representatives, European Parliamentarians and representatives from the European Union's (EU) Commission.[8]

The importance of this fact cannot escape us. It is indeed true that the Convention did not have to take any decisions but simply carried out work of a preparatory nature. Its composition nevertheless presented characteristics of great interest from a constitutional point of view, since it had the effect of introducing the

[7]As regards the "Convention" method, see Atripaldi (2003), pp. 213 et seq., writing with reference to the Nice Charter but in terms that lend themselves to wider contexts.

[8]The Convention provided for by the Laeken Declaration of 15 December 2001 was composed of a Chairman and two Vice-Chairmen (appointed directly by the European Council), 15 representatives of the Heads of State or Government of the Member States (one from each Member State), 13 government representatives from the accession candidate countries, 30 members of the national parliaments (two from each Member State), 26 representatives from the national parliaments of the candidate countries (two for each State), 16 members of the European Parliament and two Commission representatives. In addition, observers representing the Economic and Social Committee, the Committee of the Regions and the European Ombudsman, respectively, also participated without voting rights.

parliamentary element (i.e. both the European Parliament and national parliaments) into the decision-making process.[9]

As we know, a specific precedent in this field may be found in the Nice Charter. The Charter's text had been prepared by a Convention convened by the European Council of Tampere in October 1999.[10] However (and this is of greater interest to us here), there existed an older precedent, one tied to the history of constitutionalism and a real milestone. I am referring, of course, to the Constitutional Convention of 1787 that drew up the Constitution of the United States of America in Philadelphia. It was composed of delegates from the United States such as George Washington, Benjamin Franklin, Alexander Hamilton and James Madison, whose names remain permanently linked to the history of constitutionalism.[11]

It is true that, unlike the Philadelphia Convention, the European Convention did not have the task of drawing up the text to submit for ratification by the States. Its task was, rather, to draw up a preparatory document to submit to the Intergovernmental Conference.[12] Two not unimportant aspects should be considered, however.

First of all, there is a symbolic aspect. Indeed, it is not without significance that, during the process of creating a document entitled "Constitution for Europe", there was agreement about introducing a body named after the historic Convention that drew up the oldest federal constitution in the world.

The second aspect is institutional. As I have said, it was through this choice that the democratic/representational element was introduced into the decision-making process (and, with it, an element of democratic legitimation). It may be added, incidentally, that the method followed ought to have contributed to this same function, being as it was a method that was open to the contributions made by civil society. One can think of the hearings and the great public debate made possible by the Internet *forum*.[13]

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[9]The importance of this aspect is emphasised by Napolitano (2004), p. 139.

[10]On the basis of the Annex to the Presidency Conclusions of the Tampere European Council (15 and 16 October 1999), its composition was as follows: 15 representatives of the Heads of State or Government of the Member States, a representative of the President of the European Commission, 16 members of the European Parliament designated by the latter and 30 members of the national parliaments (two from each national parliament).

[11]The Convention's work lasted from 25 May to 17 September 1787. As is known, it was composed of 55 delegates from all the ex-colonies except Rhode Island, the latter preferring not to be represented.

[12]As regards the mandate given to the Convention tasked with drawing up the draft Constitutional Treaty, see for example: Ferrara (2002), pp. 177 et seq. As regards the "constitutional" problems the Convention was called to face, the account given by the Vice-Chairman is significant: see Amato (2003). As regards the work's organisation, discussions and progress, see Floridia and Sciannella (2003); Ziller (2003), pp. 91 et seq. and Gabriele (2008), pp. 35 et seq. As regards the tension, in that particular case, between the Convention method and intergovernmental negotiations, see Amato (2004).

[13]The significance of this procedure is considered in Cerulli Irelli (2006), pp. 60 et seq.

But that is not all. It is true that the Treaty provided that it could only be amended by way of a new international treaty. However, this was not to be a normal international treaty (to be worked out according to the method of diplomatic negotiation). Indeed, Art. IV-443 TCE provided that the text had to be drafted by a Convention representing Parliaments, Governments and the Commission.[14]

On this occasion I shall not dwell on the simplified revision procedures, even though the Treaty provides for them (under Art. IV-444 and 445 TCE). What I am interested in emphasising is that, in this way, a dose of constitutionalism (or a principle containing constitutional DNA, if you like) was introduced into an international procedure.

Well then, as is known, the Lisbon Treaty did not follow the road paved by the Rome Treaty as regards the creation process. Indeed, it was a normal intergovernmental conference that had the task of reviving the process of reforming the Treaties and was appointed to draft the text for ratification by the Member States.[15]

Such a fact has not meant, however, that the constitutional DNA to which I have just referred was lost. Indeed, in confirming the principle introduced by Art. IV-443 TCE, Art. 48 TEU has revived the Convention method for Treaty amendment.

If one considers the formal aspects (i.e. those governing the creation and amendment process), one may conclude that the transition from Rome to Lisbon has not had particularly important consequences. In both cases, the product is an international treaty and not a constitution (as we have seen).

In both cases, nevertheless, the amendment procedure contains a constitutional type of contamination (through application of the Convention method).

4 Content

We now come to the substantive aspects or, in other words, the content of the Treaty documents.[16] From this point of view, too, it was difficult to maintain that the so-called constitutional treaty had the characteristics of a constitution.

The first factor for consideration is an extrinsic one, namely, length. It is well known that contemporary constitutions are not as straightforward as the constitution of the United States of America. Contemporary constitutions are, generally speaking, long constitutions. The Italian Constitution, for example, had 139 articles and 18 transitional and final provisions. I use the past tense because the number of articles has decreased, following the constitutional reform of 2001, even though the number of words has increased. Such a fact is not necessarily a sign of good

[14]As regards such procedure and other procedures for amending the Treaty, see Gabriele (2008), pp. 181 et seq. and Busia (2003), pp. 65 et seq.

[15]Brussels European Council, 21/22 June 2007, Presidency Conclusions, paragraph No. 10.

[16]As regards the need to go beyond a strictly formal perspective, see Walker (1996), pp. 270 et seq.

drafting. There are, moreover, constitutions that are particularly long. The Portuguese Constitution of 1976 is an emblematic example of this, with its 295 articles.

Well, the so-called European Constitution beats all the records. It actually comprised 448 articles, to which the 36 protocols were to be annexed.[17] The anomaly was not limited to such an extrinsic fact, however. It was also manifest at the level of content in the strict sense and by this I mean the kind of rules the treaty expressed.

To borrow an untranslatable German word, it may be said that, if considered in terms of the rules it contained, the Treaty was a *Sammelsurium*: that is, a collection of heterogeneous rules very many of which were totally out of place in a constitutional document.[18]

It was possible to identify a body of substantively constitutional rules within this *corpus*, nonetheless – a sort of constitution within the Constitution, as it were. These were rules that could be traced to the two basic ingredients of constitutional documents: those governing fundamental rights and those governing the organisation of the Union's institutions, their competences and the relations between them. To these two parts common to most constitutions, a third was added. This third part was common only to the constitutions of federal and regional states. It was the law governing the division of competences between the EU and the Member States.

As regards the law governing fundamental rights, the Treaty's incorporation of the Nice Charter (i.e. the European Union Charter of Fundamental Right (EUCFR), thereby conferring on such a document the formal value it had formerly lacked and still lacks[19]) should be remembered.

On this level, too, the Lisbon Treaty does not mark a retreat, however. On the contrary, it may be said that it presents a more marked "constitutional" character than the constitutional Treaty of Rome.

Such a fact is a consequence of abandoning the *Sammelsurium* model. Indeed, whilst maintaining the existing systemic structure, the Lisbon Treaty distinguishes the Treaty on European Union (TEU) from the Treaty on the Functioning of the European Union (TFEU) (which replaces the Treaty establishing the European Community) and introduces a great part of the substantively constitutional rules into the former.

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[17]As regards this aspect see, for example, Draetta (2004), p. 528 and Gabriele (2008), pp. 139 et seq.

[18]This view is very widely held [see, from amongst the many who share it, Tizzano (2004), p. 19]. As regards the incompatibility of this content with the essence of a constitution, see Anzon (2003), pp. 330 et seq.

[19]Publications on the Charter's legal enforceability are endless. From amongst the most significant contributions, see Weber (2000); Pace (2001); Diez Picazo (2001); Bifulco et al. (2001); Braibant (2001); Ruggeri (2001); Carrillo Salcedo (2001); Weber (2002); Matia Portilla (2002); Rubio Llorente (2002); Jacqué (2002); Tomuschat (2002); Dutheil de la Rochère (2002); Toniatti (2002); Pagano (2003); Siclari (2003); Balduzzi (2003); Villani (2004); Skouris (2004); Stern (2006) and Pollicino and Sciarabba (2008).

In this respect, some specific details really should be noted. The first is with regard to the law governing fundamental rights. Indeed, unlike the Rome Treaty, the Lisbon Treaty does not incorporate the Nice Charter but provides that it shall have "the same legal value as the Treaties" (Art. 6 TEU). It therefore distributes its "constitutional" content between various documents and thus does not present the "one-document" format that is normally characteristic of constitutions.

Similar considerations may also apply to the distribution of content between the TEU and the TFEU. Indeed, the second contains a great number of rules of a substantively constitutional character. One may think, in particular, of Part I, containing principles, and Title I of Part VI, containing the institutional provisions.

Simplifying to a certain extent, it may therefore be said that the constitutional Treaty of Rome, albeit presenting the characteristics of a *Sammelsurium*, contained the "constitution". The Lisbon version of the TEU, on the other hand, contains only a part of the "constitution", whilst the remaining parts need to be sought in separate documents, i.e. the EUCFR (enjoying the same legal value as the Treaties, as we have seen) and some parts of the TFEU. To complete the framework, one may add that, on the level of contents, the innovations of the Lisbon Treaty cannot be considered insignificant.

5 In What Sense Could the Existence of a European Constitution Affirm Itself Even Before Lisbon

Despite the entry into force of the Lisbon Treaty on 1 December 2009 a question becomes unavoidable. In what sense may it be said that Europe had a constitution even before the Lisbon Treaty? I shall seek to answer this question through a series of increasingly precise observations.

The first observation I would like to make is that the act of asserting the existence of a European Constitution is not limited to observing that the European legal order (like every complex legal order) is based on a body of rules that regulates its basic structure.[20] For example, the term "constitution" (linked to the advent of the modern state) is used in this sense with reference to legal orders to which the historical and ideological concept of constitution was and is alien. One may think, for example, of Francesco De Martino's study on the constitution under the Roman legal order[21] or the works by Alfred Verdross and Piero Ziccardi on the

[20]For example, the existence of a European Constitution in this very general sense is recognised in Cassese (1991), p. 447. For a critical approach, however, see Anzon (2003), pp. 303 et seq., emphasising that it is not to such a concept of "constitution" that reference should be made when attempting to answer the question as to whether, today, Europe has a Constitution. See, also Walker (1996), p. 269.

[21]De Martino (1951, 1954, 1955).

constitution of the international legal order .[22] It is well known that the concept of a constitution in the substantive sense is applied in these cases.

When speaking of a European Constitution, something more is meant. What is meant, in particular, is that whilst the formal characteristics normally present in state constitutions are missing, there nevertheless existed and exists within the European legal order a body of rules presenting marked similarities with many of the rules contained in such state constitutions.

To what am I referring? To the rules outlining the Union's basic organisation, first of all – those rules that identify its bodies (including the institutions), establish their spheres of competence and govern decision-making.

In order to avoid misunderstanding, it should be noted that such rules do not correspond in every respect to those to be found in state constitutions. Indeed, the EU is not a state and this fact is reflected in the characteristics of its constitutional organisation (and, therefore, in those of the rules governing it).[23] Suffice it to think of the importance of the intergovernmental component in the European order, the fact that such an order does not apply the principle of the separation of powers,[24] the lack of a system of sources of law structured according to form[25] and the absence of any decentralised administration and so on. The list could continue.

In my opinion, however, one cannot deduce from such facts that the Union does not have "constitutional" rules. One should be inferring something different, namely, that the said rules differ at a substantive level (i.e. in content) from the corresponding rules to be found in the majority of national constitutions.

The differences are not radical, however.[26] One may think, for example, of the influence that the intergovernmental component enjoys in the German federal order. Here, I am referring to the *Bundesrat*, which presents not negligible similarities with the Council.[27]

One may also think of the widespread model of *Vollzugsföderalismus* (i.e. executive federalism) commonly applied in the Middle European federal systems,

[22]Verdross (1926) and Ziccardi (1943).

[23]A different reasoning would apply were it to be held that the term "constitution" is only appropriate in the context of a state (as does Grimm (1995), p. 590). This perspective is increasingly contested, however, since the tendency nowadays is to recognise that constitutions may exist beyond the state. Indeed, see Weiler (1999); Pernice (1999); Walker (2004) and Poiares Maduro (2004). See, also, Luciani (2001); Pinelli (2002); pp. 183 et seq. and Ruggeri (2008), on this issue.

[24]Walker (1996), pp. 269 et seq., emphasises that, as a consequence of the specific characteristics both of the EU legal order and of the role of its executive (which cannot be compared to that of national executives), the principle of the separation of powers as we know it would not be indispensable at a European level.

[25]As regards this characteristic which distinguishes European sources from national sources on structural grounds, see D'Atena (2001).

[26]Violini (1998), pp. 1251 et seq., highlights the substantive similarities between the European Constitution (in the sense it is given here) and the Member States' Constitutions.

[27]For this opinion see Fromont (1998), p. 132.