Slovenia

V. Conclusion

In short, we could conclude that Slovenia is considerably pro-EU oriented and that the high support for the TECE and, after that, the Reform Treaty, was the result of the general favourable attitude of Slovenia toward the EU. It also is important to state that the public debate in civil society on the reforms of primary law of the EU were scarce and lacked the necessary criticism throughout the negotiations on TECE and the Reform Treaty. Given the fact that in Slovenia, the Reform Treaty will be ratified by way of parliamentary ratification and that there will be no referendum before its ratification, such a debate also is not likely to arise. The media in Slovenia pay quite close attention to developments concerning the reforms of primary law of the EU, but the writings are rather declarative and mostly do not critically express their opinion. It is, of course, positive that the Slovenian government acted as a constructive actor throughout the negotiations concerning the reforms of primary law. However, it is somehow sad to see that countries with more political leverage can achieve their unilateral goals in political negotiations. In any event, political reality cannot be escaped, nor can the fact that Slovenia belongs to the group of smaller EU Member States. In any event, Slovenia will benefit from the reforms of primary law and has played a positive role in these reforms.

Preparation of the European Union for the Future?
Necessary Revisions of Primary Law after the non-ratification of the Treaty Establishing a Constitution for Europe

José Martín y Pérez de Nanclares*1

Introduction

In order for the European Union to be fully prepared for the challenges of globalisation after the Treaty of Nice, the constitutional treaties required radical reform. This was expressly recognised in Declaration 23 of the said Treaty, and then later in the Laeken Declaration. To this end, the European Convention was set up in Laeken and, in July 2003, presented a proposal for the European Constitution that, with some changes, was approved by the Intergovernmental Conference of 2004 and signed by all Member States in Rome on 29 October 2004.

With the Treaty establishing a Constitution for Europe (hereinafter, the Constitutional Treaty) recently signed, it seemed that after five decades of effective economic integration, the European Union was ready to strengthen its political dimension. It seemed that the use of the Convention in the Treaty’s preparation had also given this new constitutional process greater legitimacy, transparency and visibility. In short, it seemed that the integration process had taken a giant step forward on the road towards political integration. But it was not long before this proved to be nothing more than an illusion. Within a few months, we were rudely awoken from our European dream and placed in the uncomfortable position of having to find a legal and, above all, political solution to the political and constitutional mess created by the referendums in France (29 May 2007) and the Netherlands (1 June 2005). The “no” of these two Member States – both founder members, and not close to those considered to have eurosceptic leanings – left the EU in a political daze which not only paralysed the ratification process but also left the Constitutional Treaty and the very development of the Union in a cul-de-sac, with no clear way out. In addition, some Member States took advantage of the situation to try to reopen negotiations on certain key institutional and substantive aspects of the Constitutional Treaty that had been accepted and signed by all in Rome in October 2004. In fact, during the interminable “reflection period” a wide range of proposals were made, some of which cast serious doubt on the idea that some Member States have of the very process of European integration.

Nevertheless, after a long period of uncertainty, a way out of the constitutional impasse was found. The European Council which ended the German Presidency

* Professor for International Public Law, Jean Mouret Chair, University of La Roja (Spain).
1 This study forms part of a wider research Project funded by the Spanish Gouvernment (SEJ 2006-15523).
managed in extremis in the early morning of 23 June to extract a valuable agreement establishing a precise route map that enabled the Treaty of Lisbon to be signed in the Jerónimos Monastery of the Portuguese capital in December 2007. Once again, therefore, we are in a ratification process and if all Member States ratify, the new treaty will come into force in 2009.²

However, the solution to the constitutional impasse which the EU found itself in between the summer of 2005 and the autumn of 2007 in the form of the Treaty of Lisbon does not mean that the questions that the General Rapporteur addressed to the national members at a time when the Constitutional Treaty’s fate was far from sure are no longer of interest. Quite the reverse is true; having found a way out of the constitutional labyrinth of recent years it is more important than ever to look back in order to analyse with detachment the positions of the different Member States during this period. The objective of this paper, then, is to attempt to answer succinctly some of the main political and legal questions that this complicated process has given rise to in Spain. Special attention will be paid to the official position of the Spanish Government, although the views of other political and social actors will also be examined, as will the opinions of Community law academics in Spain.

Adopting as far as possible the order established by the General Rapporteur in his questionnaire, we will start by analysing the general issues that ratification of the Constitutional Treaty gave rise to in Spain (II), particularly the holding of a referendum prior to ratification (I), the declaration of the Constitutional Court regarding the compatibility of the Constitutional Treaty with the Spanish Constitution (2), the existence of a broad national political consensus in favour of the Constitutional Treaty (3) and the debate created as to the convenience of reforming the Spanish Constitution to adapt it to the new European Union (4). After that, we will look in some detail at the position taken by Spain during the constitutional crisis existing between the summer of 2005 and the autumn of 2007 (III), focusing on the study of the uncertainties to which the “reflection period” gave rise, (1) particularly the specific position taken by the Spanish government (2), which partly led to the holding in Madrid of the meeting of the “Friends of the European Constitution” (3). We will then analyse the reaction in Spain to the new Constitutional Treaty (IV) and the position of Spanish academics in this regard (V), and finally some brief conclusions will be given (VI).


¹ The exact wording of this constitutional provision is: “international treaties which attribute to an international organisation or institution the exercise of competences derived from the Constitution may be entered into by organic law”.

² In this regard, article 81 of the Spanish Constitution of 1978 regulates this type of legislation which, in addition to the case in hand of authorising the entering into of such international treaties, is reserved for matters of greater constitutional relevance e.g. fundamental rights, the Statute of the Autonomous Regions or the general electoral system.


³ In fact, Art 6(2) of the Treaty provides that it “shall enter into force on 1 January 2009, provided that all the instruments of ratification have been deposited, or failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.”
new Member States in 1995, 2004 and 2007. As a result, to ratify the Constitutional Treaty in Spain, simple parliamentary authorisation through the constitutional channel provided for in article 93 of the Spanish Constitution would have been sufficient.

This time, however, there was a new feature compared to previous reforms of the constitutional treaties. Given the political importance of the Constitutional Treaty, the Spanish Government decided to avail itself of the constitutional option of making ratification subject to a prior consultative referendum.14

Thus, on 20 February 2005, such a referendum was held which produced a massive vote in favour of ratifying the Constitutional Treaty (76.73% in favour and 17.24% against). Subsequently, on 20 May 2005 the Organic Law authorising the Treaty was passed by Parliament.15

Nevertheless, the clear support expressed by Spaniards at the ballot box could not hide the low turnout (42.32%).16 Further, actual awareness of the content of the European Constitution was limited. In short, some authors take the view that the pro-European debate continues to take place solely at an “élite” level, which explains why the referendum campaign was not particularly successful in explaining to Spanish citizens the specific content of the Constitutional Treaty.17 In our view, the reason the “yes” vote won was more because of a general sentiment in favour of EU integration rather than a reasoned understanding of the precise content of the European Constitution. It cannot be ignored that during the forty long years of the Franco dictatorship (1939-1975) in Spain, the process of European integration was associated with the desire for democracy and freedom. It is also clear that, from a pragmatic socio-economic perspective, belonging to the European Union has brought Spain unprecedented economic development which in large part owes its existence to aid coming from European structural funds and monetary stability derived from Spain’s membership of the Economic and Monetary Union. As a result, for most Spaniards the European Union continues to be associated with freedom, democracy and economic progress. Whatever the situation, the fact is that Spain was the first Member State to ratify the Constitutional Treaty by prior referendum.

2. The declarations of the Consejo de Estado and the Constitutional Court regarding the Constitutional Treaty

Apart from the possibility of holding a consultative referendum prior to the ratification of this type of international treaty, the Spanish Constitution of 1978 also provides that the Government or either chamber – Congress or Senate – may require the Constitutional Court to make a declaration as to whether or not an international treaty conflicts with any of the provisions contained in the Spanish Constitution (art. 95.2). In other words, where there are doubts about the constitutionality of an international treaty, the Constitutional Court may be consulted before ratification. Article 95.2 is of relevance in conjunction with the constitutional requirement that “the ratification of an international treaty that contains stipulations that conflict with the constitution shall require the prior amendment of the constitution” (art. 95.1).

In this regard, it is worth recalling that the Spanish Government had used this procedure with respect to a possible conflict with the Maastricht Treaty of 1992. In that case, the Constitutional Court declared that there was a contradiction between the right to stand for election and to vote in local council and European Parliament elections introduced by the Maastricht Treaty (Art. 88 ECT) and former article 13.2 of the Spanish Constitution, which prevented those who did not hold Spanish nationality from voting in local elections.18 This declaration was widely criticised in academic circles,19 yet it obliged this provision of the Spanish Constitution to be reformed before the ratification of the Maastricht Treaty.20 To date, this is the only reform of the Spanish Constitution since 1978.

With respect to the Constitutional Treaty, the Government also considered it to be appropriate to consult the Spanish Constitutional Court as to whether or not the Constitutional Treaty conflicted with the Spanish Constitution. In fact, before the Court made its declaration, serious doubts had been expressed by some academics and political sectors as to whether Article 1-6 of the Constitutional Treaty, which laid down

---

14 Organic Law 12/2003, of 24 October, authorising the ratification of the Treaty of Accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic; Boletín Oficial del Estado no. 257 of 27.10.2003.
16 In relation to referendums, art 92.1 of the Spanish Constitution provides that “political decisions of particular importance may be subject to a consultative referendum of all citizens.” Art 92.2 provides that the King is responsible for calling this type of referendum “following a proposal of the President of the Government, previously authorised by the Congress”. It should be stressed that it is a consultative, optional and non-binding referendum.
18 It was the referendum held in Spain with the highest level of abstention (57.68%). Participation in previous referendums was notably higher: on NATO in 1986 (59.4%) and on the Spanish Constitution in 1978 (67.1%). However, the level of participation is fairly similar to that for elections to the European Parliament in Spain (45.1% in the 2004 elections).
22 The constitutional reform was approved by the Spanish Congress on 22 July 1992 and by the Senate on 30 July of the same year. It was sanctioned by the King on 27 August 1992 and published officially in the Boletín Oficial del Estado on 28 August.
the principle of the primacy of Community law,21 was compatible with article 9 of the Spanish Constitution which, inter alia, sets out the normative hierarchy.22

In this regard, the existence of two different opinions prior to the Constitutional Court’s declaration should be highlighted. First, in September 2004 the Foreign Ministry issued a report in which it considered that under no circumstances was there a contradiction between Article 1-6 of the Constitutional Treaty and the Spanish Constitution. The basic argument used was that there was nothing new about Article I-6, since it “already formed a traditional part of the Community legal order, being accepted as such by the European Court of Justice and the national courts of the Member States and all other legal operators.” The report also insisted that the primacy principle had been accepted by Spain without difficulties since joining the European Communities in 1986.23

At the same time, however, the opinion of the Consejo de Estado painted a different picture. Four weeks prior to the signing of the Constitutional Treaty in Rome, the Spanish Government asked the Consejo de Estado for an opinion on whether the Treaty was compatible with the Spanish Constitution.24 The Consejo de Estado published its report a few days before the signature in Rome of the Constitutional Treaty25 and was much more cautious in its conclusions than the Foreign Ministry had been. It concluded that a “potential conflict that cannot be avoided” existed between Article I-6 of the Constitutional Treaty and article 9 of the Spanish Constitution, and recommended that the Spanish Government ask the Constitutional Council for a declaratory opinion on the matter. This opinion also contained certain reflections that also cast doubt on the compatibility of the Charter of Fundamental Rights, contained in part II of the Constitutional Treaty, with the Spanish Constitution.26 As a result, on 5 November 2004 the Spanish Cabinet

21 Art I-6 of the Constitutional Treaty states as follows: “[t]he Constitution and the law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”

22 Art 9.1 provides that “citizens and public powers are subject to the Constitution and the rest of the legal system”. And Art 9.3 goes on: “the Constitution guarantees the principle of legality, the normative hierarchy...”.

23 Opinion of the Legal Advisors to the Foreign Ministry dated 27 Sept. 2004 (no official publication). However, it is important to point out that this report considered, in addition, that the wording of Art I-6 was somewhat unfortunate.

24 This opinion is required by art. 22.1 of Organic Law 3/1980, of 22 April, of the Consejo de Estado: such an opinion must be requested “in all of the treaties and international agreements regarding the need for authorisation of the parliament before the State gives its consent.”


26 In particular, the doubt was whether the horizontal provisions of the Charter of Fundamental Rights that regulated its application (Art. II-111) and the scope and interpretation of the rights and principles (Art. II-112) did not also contradict the basic principles of the Spanish Constitution.

agreed to request the Constitutional Court to make a declaration on the compatibility of both (i) Article I-6 and (ii) Articles II-111 and 112 of the Constitutional Treaty with the Spanish Constitution. At the same time, the Government asked the Court whether article 93 of the Spanish Constitution was a sufficient mechanism for authorising ratification of the Constitutional Treaty or whether, by contrast, the Spanish Constitution needed to be amended first.

The Constitutional Court resolved the question in a very clear manner in its declaration of 13 December 2004,27 in which it stated that there was no contradiction at all between the Constitutional Treaty and the Spanish Constitution. In the Court’s view, article 93 was sufficient to authorise ratification of the Constitutional Treaty and, as a result, no prior amendment of the Spanish Constitution was needed.28

The Constitutional Court’s declaration also put to rest another legal debate, since, after years of criticism from academics, it substantially amended the Court’s conception of article 93.29 Until this declaration, the Court was probably bound by its short-sighted approach to article 93 given in its unfortunate judgment 28/1991 of 14 February. Until this case, it had been unable to completely disown this judgment, although it is fair to say that in its rulings it had progressively distanced itself from its outdated initial position laid down in 1991.30 Thus, while in the Declaration on the Maastricht Treaty

27 Declaration 1/2004 of 13 December 2004. Nevertheless, a minority of those was against the declaration, bringing highly critical of the majority position of the Court.


the Constitutional Court continued to consider article 93 as a mere “organic-procedural” rule, it has now done a complete U-turn and declared robustly that “article 93 has a substantive or material dimension that cannot be ignored” (Legal Ground 2). In this way, article 93 “operates as a gate through which the Constitution itself allows other legal systems into our constitutional system by transferring the exercise of competences.”

The Constitutional Court also made some interesting points on two very interesting legal issues. First, it includes a clause that to some extent resembles the well-known Solange II clause of the German Constitutional Court.30 This provides that “in the unlikely event that EU law subsequently came into conflict with the Spanish Constitution, without the theoretical excesses of EU law with respect to the European Constitution itself being remedied by the mechanisms contained in the latter, in the last instance the conservation of the Spanish people’s sovereignty and the supremacy of the Constitution which the latter has given could lead this Court to deal with those problems that might arise” (Legal Ground 4 in fine).

Secondly, the Constitutional Court also took the opportunity to tackle the delicate question of the substantive limits of article 93. These limits, that operate in the Spanish context as its own Identidad der Verfassung, “translate into respect for sovereignty of the State, of our basic constitutional structures and the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights have their own substance” (Legal Grounds 5 and 6).

In conclusion, in the opinion of the former President of the European Court of Justice, both the Declaration of the Spanish Constitutional Court and the decision of the French Conseil d’Etat on the same subject “make it possible to predict a greater convergence in the decisions of those bodies entrusted with ensuring that their national constitutions are respected and of the Court of Justice, whose role is to ensure respect for the European Constitution and EU law.”

3. The existence of a general political consensus in favour of the Constitutional Treaty: the critical voices of the nationalist parties and left-wing movements

Beyond the formal procedures for the ratification of the Constitutional Treaty and the legal opinions existing in this regard, the fact is that the Constitutional Treaty was generally well received in Spain. The main political parties, both the Socialist Party (PSOE) in government and the Popular Party (PP) in opposition, backed it, although it is fair to say that the PP did not carry out a particular active campaign for the “yes” vote. Certain sectors of the PP arc critical of the Constitutional Treaty, basically as regards the new mechanism for calculating the qualified majority in the Council and also partly because of the lack of an express reference in the Constitutional Treaty to “Spain’s Christian roots”.31

In addition, some nationalist parties also criticised the Constitutional Treaty for not going far enough in recognising the role of regions in the process of European integration. For some time certain Spanish Autonomous Regions have complained about an unsatisfactory level of participation in Community matters.32 In the first place, these criticisms are aimed at the internal situation, despite the fact that in recent years important steps have been taken to allow, inter alia, representatives of Autonomous Regions to participate in Council sessions, as occurs in other Member States such as Germany, Belgium or even the United Kingdom.33 In the second place, at the European Community level they have also called for the EU to include in its legal and organisational system mechanisms to allow the Autonomous Regions to participate directly in certain Community areas. For example, there is a long-standing demand to expressly recognise the locus standi of regions that have their own legislative competences, sufficient to bring annulment actions before the Court of Justice regarding Community acts that affect competences enjoyed by these regions.34 Another example is that regional parliaments come within the (political) control mechanism of the subsidiarity principle.

These nationalist parties were not completely happy with the Constitutional Treaty, although they recognised that some advances had been made. These were the reference both to regional autonomy in the provision regulating EU and Member State relations

30 It should be recalled that during the previous Government formed by the PP (2000-2004), President Aznar vetoed, with Poland, the agreement on the Constitutional Treaty that was put forward for adoption during the European Council of December 2003.
32 This is fundamentally the case of the resolutions of 9 December 2004 within the Commission EU-Related Affairs (Comisión para Asuntos Relacionados con las Comunidades Europeas (CARCE)). An interesting commentary on these resolutions can be found in M. URREA CORRES: “La participación directa de las Comunidades Autónomas en la Unión Europea: un importante paso adelante (Comentario a los acuerdos de 9 de diciembre de 2004 de la CARCE)”, Revista General de Derecho Europeo 2005, no. 8, www.iustel.com. See also J. MARTÍN Y PÉREZ DE NACLA ERES: “Comunidades Autónomas y Unión Europea: hacia una mejora de la participación directa de las Comunidades Autónomas en el proceso decisorio comunitario”, Revista de Derecho Comunitario Europeo 2005, pp. 759-805.
33 As is well known, until now the regions have been able to bring annulment actions (Art. 230 TCE) due to the fact that the Court of Justice has recognised their legal standing as legal persons, i.e. it has required that the legal act in dispute affects them “directly and individually”; See La posición de las Comunidades Autónomas ante el Tribunal de Justicia de las Comunidades Europeas - Propuestas para una reforma, IVAP, Ollere, 1996. More recently, M. SOBREDO PRIETO: Las Comunidades Autónomas ante el Tribunal de Justicia y el Tribunal de Primera Instancia de las Comunidades Europeas, Valencia, 2003.
Spain

(art. 1-5) and to the regional level when regulating the subsidiarity principle (art. 11.3), and the possibility of regional parliaments participating in the subsidiarity monitoring process through the early warning mechanism (Protocol no. 2 on the principles of proportionality and subsidiarity), despite its organisation being left to Member States. Even the recognition of the Committee of the Regions’ legal standing in the new action for breach of the subsidiarity principle as well as in the ordinary annulment action was seen as an advance of sorts.

Without doubt however, Izquierda Unida (IU) – a coalition which covets the Spanish Communist Party and other left-wing parties – was the most critical of the Constitutional Treaty. In fact, it actively campaigned for the “no” vote, arguing that the Constitutional Treaty contained provisions that, from a social point of view, were clearly unsatisfactory. Curiously, however, the main trade unions (Unión General de Trabajadores and Comisiones Obreras) did not support them. Despite criticising certain social aspects of the Constitutional Treaty, particularly the Charter of Fundamental Rights, in general terms they came down in favour of the “yes” vote.33

4. Debate about the convenience of reforming the European clause of the Spanish Constitution

Having analysed the Spanish process for the ratification of the Constitutional Treaty, it is finally worth noting here that, regardless of this specific ratification process, both academics and the Government have considered the general need to reform article 93 of the Constitution to adapt it to the new European reality. It should be recalled that this important provision was drafted in 1978 before Spain became a member of the EU and while those drafting the constitution obviously had in mind at all times including this article to facilitate the future accession of Spain to the European Communities, it does not even make express reference to the European Union. It is true that the question of the relationship between Community and national law has, after more than twenty years’ membership, been covered in detail by Spanish jurists and is no longer a live issue.34 Further, as noted above, even the Constitutional Court, after an initial more critical phase, has moved closer to the positions of other European constitutional courts, such as Germany. And the ordinary courts also interpret and apply Community law without difficulty.35

At present, then, the debate is about the convenience of amending this provision so as to refer, inter alia, to aspects such as the possible limits on constitutional competences

33 See, for example, the document of the European Trade Union Confederation in which, after evaluating the context and considering certain criticisms, it gives a favourable assessment of the results of the Constitutional Treaty: The European Constitution, Working Paper, 14 January 2005; available at www.etuc.org.


35 To monitor the judicial application of Community law in Spain, see the complete report regularly published by the Revista de Derecho Comunitario Europeo.
French and Dutch referendums led to the European Council agreeing to open a "period of reflection" in June 2005 on the future of the Union. Time passed and the positions and interests of the different Member States were radically different, which made finding a way out of the constitutional labyrinth no easy feat. Finally, on 1 January 2007 the German Presidency was faced with 18 Member States which had ratified the Treaty and were, in general, in favour of leaving it exactly as it was when signed by all Member States in Rome in October 2004. And, on the other hand, 9 Member States which had not ratified it, and were unlikely to ever do so.

Further, the problem was compounded by the fact that the positions and interests within these two groups were very different. Thus, within the group of those which had already ratified, some Member States such as Belgium – and to a lesser extent Germany or Italy – were strongly in favour of giving a major boost to the process of European integration with those who were in favour of doing so, even at the price of creating a "hard core" in which not all Member States would participate. Other Member States, such as Austria, Greece or Luxembourg, also defended the Constitutional Treaty but were in favour of taking a more prudent line, and were not convinced by the idea of joining a hard core. And finally, there was the group of new Member States (Cyprus, Slovakia, Slovenia, Hungary, Latvia, Lithuania and Malta) who viewed with concern the future of the Union which they had just joined; to some extent, they were also irritated by the fact that enlargement was quite often cited as one of the reasons for the success of the "no" vote in France and the Netherlands.

The positions inside the group which had not ratified were also far from homogeneous. First, it was difficult for France and the Netherlands to put forward specific solutions to the constitutional impasse until after their respective general elections, although Sarkozy’s idea of a mini-Treaty and the Dutch demand for a greater role for national parliaments suggested a possible way out, one which would involve giving up certain aspects of the Constitutional Treaty. Secondly, a large group of Member States took a "wait and see" approach, and decided to paralyse their ratification processes, whether by referendum (Portugal, Ireland and Denmark, and perhaps also the Czech Republic) or by parliament (Sweden). And thirdly, other Member States (particularly the UK and Poland) maintained a very critical approach to the Constitutional Treaty.

In short, at the beginning of 2007, a complicated puzzle was on the table with an array of different pieces that did not seem to fit together, within which Spain’s position remained clear. Spain can be clearly included within the group of Member States wholly in favour of leaving the Constitutional Treaty as originally signed, although it was prepared, to some extent at least, to negotiate to reach an agreement that involved all the Member States and avoided the risk of creating a "hard core" within the EU which would exclude one or more Member States. That said, it may be useful to look at the position, strategy and interests of the Spanish Government in a little more depth.

2. The position of Spain: support for the Constitutional Treaty while being prepared to negotiate

The constitutional crisis which hit the European Union after the French and Dutch referendums obviously had affected Spain too. As already mentioned above, Spain had ratified the Constitutional Treaty and was aligned with the Member States in favour of keeping, as far as possible, the Treaty as originally signed in Rome. The situation created by the rejection in France and the Netherlands caused concern. Accordingly, about four months after the ratification process of the Constitutional Treaty was interrupted, the Mixed Congress-Senate Commission for the European Union (Comisión Mixta Congreso-Senado para la Unión Europea) approved in its session of 27 September 2005 a non-legislative proposal in which it urged the Spanish Government to produce an urgent report on the consequences of this situation for the Spanish state. After this request was made on 30 November 2005, the Spanish Government presented the report in question to the Congress. And since the constitutional impasse continued unabated, in September 2006 the Mixed Commission requested the Government to


This Commission is made up of members of both chambers of Parliament (Congress and Senate) and its task is to ensure that "Parliament participates in an adequate fashion in the legislative proposals prepared by the European Commission and have available, in general, the widest possible information on the activities of the European Union" (arts. 1 and 3 of the Organic Law 8/1994 of 19 May, regulating the Mixed Commission for the European Union).

Specifically, the non-legislative proposal provides as follows: "The Mixed Commission for the European Union urges the Government to present to the Congress in plenary session, before 1 December 2005, a report on the consequences for the Spanish state of the situation of paralysis in the process of ratifying the Treaty establishing a Constitution for Europe, after the negative vote in France and the Netherlands, and the Declaration in this regard of the Heads of State and Government of the Member States of the Union. This proposal stated with precision that the report should include, inter alia, the following issues: an exhaustive analysis of the reasons that had led the EU into the crisis; an in-depth analysis of Spain’s role throughout the process and of its short and medium-term consequences; a clear assessment of the situation as a whole; and a proposal as to how, in the Government’s opinion, the EU should tackle the reflection period and how, in turn, the Spanish State should participate in it."
update the information supplied, so that in December 2006 the Government presented a fresh report. These two reports are therefore the best source of information about the official Spanish position during this crisis.

The position of the Spanish government in both reports is crystal clear. After an exhaustive analysis of the existing scenario and the different possible ways out of the crisis, it supported the position expressed by the Luxembourg Prime Minister, namely that "the eighteen countries that have ratified have the almost moral duty to demand that the essential substantive elements are safeguarded". The Spanish Government argued in favour of keeping the Constitutional Treaty, considering that "the best way of ensuring the continuity of the integration process at this time is to continue to support the new Treaty". At the same time, however, it showed that it was open to trying to negotiate an agreement of all twenty-seven Member States and it did so from a position of strength which, as it made clear, certain important factors gave it. First, the basic internal consensus, which has existed in Spain during the 20 years in which it has been a member of the EU based on the main European subjects. Secondly, the fact that ratification of the Constitutional Treaty was made with the majority support of the parliamentary forces represented in the Congress and with the added backing derived from a referendum in favour of ratification. And thirdly, the fact that most of the Spanish public supported initiatives taking European integration further and, by the same token, rejected the proposals existing in other Member States in favour of "renationalising" certain EU policies. As a result, the Spanish Government left the door open to giving support to "proposals aimed at complementing the Treaty with new provisions (e.g. in social policy, in relation to climate change, immigration etc.)".

In the same way, the Spanish Government also reflected in the reports presented to the Mixed Commission two national positions concerned with the renegotiation that was expected to take place. First, there was a general approach in favour of "prudence" and of "playing our trump cards at the right time"; in other words, wait for others to make specific proposals first. Secondly, there was a specific position, namely the firm conviction that the institutional provisions of the Constitutional Treaty had been accepted within the general package that had included certain institutional concessions especially in relation to the new mechanism for calculating the qualified majority within the Council contained in the Constitutional Treaty — on condition that the text included the phrase "specific progress in European integration". On this basis, "it should be pointed out that any backward steps in relation to Part III could lead us to reconsider matters such as the population threshold needed to achieve the qualified majority or even the question of the composition of the Commission".

However, from the beginning the Spanish government showed its willingness to combine prudence with the desire to play an active role within the EU in favour of the Constitutional Treaty. This was well illustrated by the interesting joint initiative of Spain and Luxembourg to call a meeting in Madrid of all the Member States which had ratified the Treaty.

3. The meeting of the "Friends of the European Constitution": setting out the position of those defending the Constitutional Treaty and putting political pressure on their detractors

On 26 January 2007 a meeting of the eighteen Member States that had already ratified the Constitutional Treaty was called by Spain and Luxembourg, the two countries that had done so by referendum. Portugal and Ireland also attended this meeting as observers.

This meeting had two objectives. First, to set out the position of those in favour of the Constitutional Treaty in the context of a debate in which the public was almost exclusively exposed to the opinions of those against. And, secondly, to achieve a common position that made it possible to defend the essence of the Constitutional Treaty in the upcoming negotiations and exert some political pressure. In our opinion, both objectives were fully achieved.

52 See Jean Claude Juncker's speech on 30 October 2006 in the opening ceremony of the academic year of the College of Europe, Bruges (http://gouvernement.lu/smile_presvo/discours/prenoir/ministre/2006/10/30/juncker_bruges/index.html).
54 The Government felt that Spain was in a reasonably comfortable position: "we have complied with our political and legal commitments and we have no interest in opening negotiations in which, in principle, there would be nothing to win but there could be something to lose'. Our initial position must be that whoever casts doubt on the Constitutional Treaty and reopen it will have to explain, especially to those who have already ratified it, why they are doing so, what they want and why. Despite this, we must be fully aware of the need to be ready for the possibility that a renegotiation of the Constitutional Treaty might go further than is desirable". Working Paper 2007, cit., p. 13.
55 Ibid., p. 13.
56 Ibid., p. 13.
58 The Spanish Government stressed "the need, in any case, for an agreement on the new distribution of seats in the European Parliament as an essential condition for the application of a new voting system [in the Council], as agreed at the time in the Constitutional Treaty (see Article 2(1) of Protocol 34 on the transitional provisions relating to the institutions and bodies of the Union and Article 1-20(2) of the Constitutional Treaty)".
59 Ibid., p. 13, footnote 19.
60 As early as the first report sent to the Mixed Commission of the Spanish Parliament, the Spanish Government had expressed its intention to act as a promoter (but not as a "leader") of a series of initiatives to prevent the reflection period from becoming one of inactivity which finally becomes apathy, increasing the alienation of citizens in the process of integration of Europe." Working Paper 2/2006, cit., p. 30.
61 The Spanish Government itself laid down the objectives of this meeting in the document that it presented to the Mixed Commission of the Spanish Parliament: "The objective of this meeting is to record the state of the constitutional debate in the Union and its Member States and reach agreement on the best way of helping the German Presidency to achieve an agreement that makes it possible to relaunch the process of reform of the Union at the same time as preserving the substantive content of the text in hand". Working Paper 2007, cit., p. 14.
Spain

In the first place, it was made clear that two-thirds of the Member States (eighteen out of twenty-seven) representing the majority of the population (56%) of the EU had already ratified the Constitutional Treaty. This had a clear political weight, although it meant little from a strictly legal perspective, since of course the Constitutional Treaty required ratification by all Member States (Art. IV-447).62

The second achievement was to set out a position in favour of the Treaty at a particularly delicate moment in which there were at least two additional worries. The first of these was the risk of the growing number of “red lines” put forward by Member States other than France and the Netherlands, and which threatened to bury definitively the Constitutional Treaty. And, on the other hand, there was perhaps some concern that during the German Presidency in the first six months of 2007 there would be excessive emphasis on the Franco-German axis which would leave other Member States in favour of the Treaty, such as Spain, out in the cold.

It is not therefore surprising that this meeting of the so-called Friends of the European Constitution gave rise to criticisms and suspicion. Some considered that it interfered in the German Presidency’s plans, which required a high level of discretion. It was also felt that it could put the candidates in the French Presidential election in a difficult position, because in the midst of an election campaign they may have been tempted to adopt positions that, once having won the elections, they would have had to regret. There was also a real risk of splitting the Member States into two irreconcilable blocks – for and against European integration – or even the risk of internal divisions within the group of eighteen States that had already ratified the Treaty.63

Time has shown, however, these criticisms to be without substance. The Spanish Government (as the host) and the countries attending showed enormous prudence in their declarations, in terms of both substance and form. They limited themselves to expressing their position in favour of the Constitutional Treaty and at no time took an intransigent line. In fact, they expressed their willingness to negotiate to reach an agreement of all 27 Member States that retained the essence of the Constitutional Treaty.

III. THE WAY OUT OF THE CONSTITUTIONAL IMPASSE: SPAIN AND THE TREATY OF LISBON

1. The Treaty of Lisbon: satisfactory in terms of content, deficient in terms of form

This negotiation took place and the European Council of 21 and 22 June 2007 was able to square the circle and retain the essential parts of the Constitutional Treaty while accepting the various red lines presented by different Member States. This European Council effectively approved a mandate to convene a new intergovernmental conference (IGC).64 This was extremely precise in its content and constituted the basis and exclusive framework of the work of the IGC, which was immediately convened.65 Thus, the new IGC produced in the most typical Community style a new reform treaty – the Treaty of Lisbon, signed on 13 December 2007 in the Jeronimos Monastery in the Portuguese capital – that will amend the current TEU and EC Treaty.

The nature of this reform treaty produced by the 2007 IGC marks a return to the traditional method of reforming constitutional treaties. The TEU will retain its current name, while the EC Treaty will change its name to the Treaty on the functioning of the European Union (hereinafter, the TFUE), although both will have the same legal value.66 The return to the traditional method is, therefore, even reflected in the name. It would be hard to have come up with a name that was more removed from the constitutional language and more in tune with the old functional postulates than the Treaty on the functioning of the European Union. And obviously there is no sign of a new Convention or any other participative mechanism, other than the IGC. Therefore, the reduced treaty option has been chosen, containing a minimum common denominator of the Constitutional Treaty while certain concessions necessary to achieve a text acceptable to all have been made. The process of European integration has been put back on track through a reform treaty that, as the President of the Constitutional Commission of the European Parliament has put it, will be “better than the Treaty of Nice, but worse than the Constitutional Treaty” in which “the substance of the Constitutional Treaty has been preserved”.67

The new Treaty of Lisbon has been described by the Secretary of State for the European Union as “satisfactory in terms of content and deficient in terms of

62 Annex 1 to the conclusions of the Presidency. In fact, the rules of the mandate were so precise and detailed that they amounted to an unpolished version of the final content of the draft reform treaty (IGC 1/07) and of the draft protocols and declarations (IGC 2/07) that the EU presidency put on the table on 23 July 2007. Thus, once a proposal to review the treaties was presented by the German Government to the Council (Doc. 11223/07), the European Parliament (Resolution of 11 July 2007), the Commission (COM 2007) 412 final, 10 July 2007) and the European Central Bank (Opinion of 5 July 2007 doc. 11624/07) produced the opinions required by the Council extremely quickly, despite it being an unfavourable time of year (July) for such a task. Based on these reports, the Council issued, in accordance with article 48 of the TEU, the necessary opinion favourable to the convening of a Conference of the Representatives of the Governments of the Member States, which opened on 23 July 2007. Sticking exactly to the initial calendar (IGC 6/07), various group sessions of legal experts took place and a final agreement was reached on 18 October 2007. After the revisions of the lawyer-linguists, the new Treaty was solemnly signed in Lisbon on 13 December 2007.


64 Together with Mariola URREA CORRES, we have prepared a consolidated version in Spanish of the TEU, the TFUE, the Protocols and the Declarations, published online at www.real-institutoelecano.org.

Spain

presentation. As will be seen below, most Spanish academics agree with this assessment.

2. Some matters of particular importance: subsidiarity and the area of freedom, security and justice

To conclude this section, we would like to refer very briefly to two issues that have been the subject of particular attention throughout the ratification crisis of the Constitutional Treaty: the monitoring of subsidiarity and advances with respect to the area of freedom, security and justice.

First, as regards the monitoring of subsidiarity, the Protocol for this area in the Constitutional Treaty created a great deal of interest in Spain, as in fact did everything concerning the new regulation of competences. However, putting it into practice created serious problems, such as the insufficient time period of six weeks (increased to eight in the Treaty of Lisbon), the inclusion of the regional parliaments of the Autonomous Regions, the obligatory nature or otherwise of bringing an action before the Court of Justice for breach of the subsidiarity principle if this is demanded by a parliament, and so on. To deal with these issues and look for possible means of implementing this monitoring of subsidiarity, the Spanish Parliament produced an interesting report through the Mixed Congress-Senate Commission for EU issues. As in other Member States, there was a willingness to set up internal mechanisms to monitor subsidiarity, even in the event that the Constitutional Treaty did not come into force. In the meantime, decisions were taken such as supporting the IPEX (Intergovernmental EU Information Exchange) initiative to favour the exchange of information between different Member States’ parliaments. Since the new features of the Constitutional Treaty on the monitoring of subsidiarity are essentially the same as in the Treaty of


48 These questions were analysed in more detail in "La Constitución europea y el control del principio de subsidiaridad", in C. CLOSA & N. FERNÁNDEZ SOLA (eds.), La Constitución de la Unión Europea, Madrid, 2005.

49 Its webpage – www.ipeix.eu – started operating permanently on 30 June 2006 and became open to the public on 1 January 2007. Its objective is to provide updated information on the stage of proceedings reached in each national parliament chamber of the documents coming from European institutions that may be the subject of scrutiny on subsidiarity aspects.

Lisbon, the Mixed Commission’s report on this issue retains the proposals that were fleshed out during the period of uncertainty about the future of the Treaty.

Similarly, there was also a great deal of interest in questions relating to the area of freedom, security and justice. The significant advances of the Constitutional Treaty in this area were, without doubt, among those best received in Spain. So much so that, as to some extent the experience of the Treaty of Prüm shows, Spain was probably willing to explore ways of going forward in this area even if the content of the Constitutional Treaty had never come into force.

IV. THE POSITION OF SPANISH ACADEMICS AS REGARDS THE CONSTITUTIONAL TREATY AND THE TREATY OF LISBON

From the outset, Spanish academics with an interest in European affairs have been largely in favour of the process of European integration. In fact, those who have studied the views of Spanish academics dealing with EU issues have stated that the "number of those making up the Spanish pro-Europe group is much greater than that of the euro sceptics" or even that "the federal ideal is deeply rooted in the thinking of Spaniards", something probably unthinkable in some Member States in which the anything vaguely resembling federalism is referred to as the "f-word". In fact, there are studies written by Spanish academics which, from different perspectives – particularly that of political science, but also from a legal perspective – have seen clear federal elements in the European Union as it stands now. In the same way, the Constitutional Treaty was generally given a very warm welcome by most Spanish academics, as was

71 Mixed Commission for the European Union of 17 December 2007 on the applications by Parliament of the Protocol on the application of the principles of subsidiarity and proportionality that form part of the Treaty of Lisbon signed on 13 December 2007. The report, as well as explaining the origins, nature of the monitoring of subsidiarity and experiences in other Member States, includes specific recommendations for the application of the early warning system in Spain.

72 These advances have already been described in detail in "El nuevo espacio de libertad, seguridad y justicia en el proyecto de Constitución europea", in Soberanía de Estado y Derecho Internacional - Libro homenaje al profesor J.A. Currillo Salcedo, Sevilla, 2005, pp. 857-877.


74 Ib. p. 170. For this author, in fact, "the importance of the federal objective for the Spanish pro-European group is worthy of note," while considering that these federalist positions "are often formulated in a simplistic manner."

75 The most important exponent of this position is probably Francisco Aldecoa. In different works, he has considered that the EU fits an Intergovernmental Federation model: P. ALDECOA LUZARRAGA: Una Europa – Su proceso constituyente, Madrid, 2003.


the work of the Convention. This is so despite the fact that, with respect to certain very specific aspects, the solutions finally adopted in the Constitutional Treaty were not considered to be the optimal ones.

In the same way, a good number of the most prestigious Spanish international law academics found in the Constitutional Treaty elements to support the view that an important constitutional advance had been made. Some authors had even tried to see in the Convention — in our view, with excessive optimism — a sort of Community constituent power. Most experts have significantly qualified this view, however. And there were also authors who, perhaps with a sense of foreboding, expressed their concern about the impossibility of achieving mechanisms allowing the entry into force of the Constitutional Treaty other than by ratification by all Member States.

However, as regards the Intergovernmental Conference 2007 and the Treaty of Lisbon, criticism has been marked. For many Community law jurists, a high price has been paid for finding a way out of the constitutional crisis triggered by the victories of the "no" votes in the French and Dutch referendum. The general view of Spanish academics who have analysed the Lisbon Treaty to date is, in short, not very optimistic.

For many authors, led by Professor Mangas Martín, the result has been to construct a Europe of an increasingly intergovernmental tendency, "from governments, for governments and as suits governments". As a result, "when Europe is constructed with main Spanish academic journals have also covered the issue extensively; e.g. Cuadernos de Derecho (vol. 30, 2004) and Revista de Derecho Comunitario Europeo (vol. 16, 2003). See also A. MANGAS MARTÍN: La Constitución europea, Madrid, 2005.


84 See, for example, P. ANDRÉS SÁENZ DE SANTA MARÍA, who considered that "the important change stems from the fact that with the Treaty that was signed on 29 October 2004, the EU started to move from having a Constitution substantively speaking to one in the formal sense" in that it included "aspects of formal constitutionalization": "Hacia una Constitución europea", Diario La Ley 2004, no. 6116 of 28.11.2004, pp. 1-5, at p. 1. See also M. C. RODRÍGUEZ IGLESIAS: "La Constitucionalización de la Unión Europea", Revista de Derecho Comunitario Europeo 2003, pp. 893-896.


V. FINAL CONSIDERATIONS: DON'T COUNT YOUR CHICKENS UNTIL THEY ARE HATCHED

In our opinion, there is good reason for arguing that the Treaty of Lisbon contains very serious problems. The format and extension of the Treaty is as far removed from minimum requirements of transparency and simplicity as it could possibly be. Illegible, opaque, incomprehensible... these are some of the descriptions frequently made of it, and rightly so. And in any event, after a close reading — at least for those with the extraordinary levels of patience capable of doing so — few texts could be further from the laudable intention accepted by all concerned in Nice and Laeken to recognise "the need to improve and monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States". Basically, as we stated when analysing at the time the mandate of the Intergovernmental
Conference, one has the feeling that there has been an attempt to make “what is seen as if it isn’t there”. There seems to be an attempt to give citizens the (false) appearance that fewer advances are being made than in fact the case, some sort of desire to cover up what has been achieved. In addition, there is a bitter-sweet feeling among Spanish academics about the large number of exceptions that have had to be accepted in such sensitive areas as the Charter of Fundamental Rights, in order for the Treaty of Lisbon to finally be accepted by all Member States, with the consequent risk of disintegration that these entail. To some extent, as the Spanish MEP Iñigo Méndez de Vigo put it, “the absolute lack of vision and ambition of national leaders in European politics has never been as obvious as it is now. This obliges us to analyse what is happening with a project that, after achieving a string of successes in the last five decades, appears to Europeans as worn out, lacking in desire, the enthusiasm for which has gone”.

Despite everything, however, in our view a pragmatic view must be taken of the Treaty of Lisbon. It is the only possibility that the European Union could aspire to at the moment; it was possibly the most that the Member States who marked their famous red lines were prepared to accept, and the least that the majority of the Member States who had already ratified the Constitutional Treaty as a whole were not prepared to give up.

Given the complicated circumstances prevailing, then, it is probably the best Treaty possible. To start with, in our view it should not be overlooked that the German Presidency did an excellent job as a catalyst, and managed to extricate the EU from the worrying constitutional impasse in which it was stuck – in truth, it would be fair to talk of a genuine crisis – and to revitalise the process of European integration, leaving sufficient grounds for moderate enthusiasm about the future of the European Union.

Above all, the Treaty of Lisbon is worthwhile because it has retained practically all of the new substantive features of the Constitutional Treaty. However, what has been jettisoned cannot be ignored. The real problem is that what has been lost (elimination of all constitutional references, elimination of the symbols, elimination of the primacy principle, renaming the foreign minister, renaming the legal acts, etc.) clearly reveals the genuine conception that some Member States have of the Union and, therefore, the framework within which the future process of European integration must take place. It seems obvious that the Union of the future will be very different than that existing until now. Reforming the treaties with 27 Member States or the possible attribution of new competences to the Union will not be easy without mechanisms allowing flexibility, differentiated integration, constitutional enhanced cooperation or whatever we choose to call it.

---
