Chapter Seven

The *Treaty of Lisbon: A* Federal Constitution that Dares not Speak its Name?

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The *Treaty of Lisbon* (2007) is the latest attempt by the European Union at constitutional development. The previous attempt, the *Constitutional Treaty*, failed in 2005. The rejection by Irish voters of the *Treaty of Lisbon* on 12 June, 2008 may signal its demise, though the EU has not admitted defeat yet. As of 22 August, 2008, 24 of 27 Member States have ratified it, and Ireland may be asked to try again, as it was with the *Treaty of Nice* in 2001-2. (Sweden and the Czech Republic are the other Member States who had yet to ratify). The EU is clearly in a constitutional muddle. Let us explore how it got there, then what it might do next.

The EU is an extremely complex creation. It was created by the *Treaty on European Union* (*TEU*), signed at Maastricht, the Netherlands, in February 2002. It encompassed the three European Communities: the European Coal and Steel Community, created by the *Treaty of Paris* in 1951, the European Economic Community, created by the *Treaty of Rome* in 1957, and the European Atomic Energy Community of the same year. The European Coal and Steel Community was wound up in 2002. The other two bodies are of indefinite duration.

The *TEU* changed the name of the European Economic Community to the "European Community". It is the most important Community, and the only one of which I will speak further. It is however worth mentioning that the European Coal and Steel Community had a constitutional framework largely reproduced by the other Communities: a Commission (called in the ECSC a High Authority), consisting initially of technocrats, but later increasingly politicians, to propose and implement legislation; a Council of Ministers of the Member States to approve legislation; a Court of Justice; and an Assembly, initially of delegates of Member State Parliaments, later directly elected and called the European Parliament.

The success of the ECSC inspired its architect Jean Monnet to attempt something more ambitious: a European Defence Community and a European Political Community. The latter, although sounding extremely grand, was (only!) attempting a united foreign policy rather than full political control. The EDC/EPC was ultimately defeated in the French Parliament in 1954. Monnet went behind the scenes, but others picked up the Community idea and negotiated the European Economic Community and European Atomic Energy Community treaties in 1957. The Member States were the same as for the European Coal and Steel Community: France, West Germany, Italy, Belgium, the Netherlands and Luxembourg. Britain declined to join any of the Communities at their inception.

No sooner had the *Treaty of Rome* taken effect in 1958 than the French Fourth Republic collapsed, and General de Gaulle was able to come out of retirement and create the Fifth Republic in his own image. He was distinctly skeptical about the Communities, and while he did not withdraw from them, he was far from enthusiastic. When Britain applied for membership in 1961 and 1967, de Gaulle vetoed the applications.

The *Treaty of Rome* had a twelve year implementation period. In 1966, this provided for some majority voting in the Council of Ministers, and de Gaulle withdrew the French representatives. This "Empty Chair Crisis" was resolved by the "Luxembourg Compromise", which kept the national veto intact – not the last example of diplomatic compromise overriding the words of the treaties.

What does the European Community do? Very briefly, it presides over a customs union, a single internal market with free movement of goods, services, people and capital, a single external trade policy, and a Common Agricultural Policy which heavily subsidises farmers. Monnet always intended that the Communities would expand beyond the economic to the political. Britain seems to have hoped that a single market could be created without political interference.

After the departure of de Gaulle, Britain was accepted into the Communities in 1973 along with Denmark

and the Republic of Ireland. Norway signed to join, but its voters rejected this in a referendum. Denmark and Britain have remained half-hearted members. Ireland has been an enthusiastic member (no doubt largely due to the significant funding it has received!) until recently, when its voters have rejected two proposed constitutional amendments: in 2001 (the *Treaty of Nice*, subsequently accepted in a second referendum); and now the *Treaty of Lisbon* in 2008.

The 1973 enlargement was followed by the oil shock of that year which hit the Member States hard. A period of "Eurosclerosis" followed. Significant events were election of the Thatcher government in 1979, the accession of Greece in 1981, and the arrival of Jacques Delors as Commission President in 1985. It was a Conservative government under Edward Heath that had brought Britain into the "Common Market" in 1973, only to lose office in 1974. The incoming Labour government held a referendum on continued British membership in 1975. This was passed, but it is the only referendum the British people have ever had on European issues! Margaret Thatcher was pretty skeptical about the EEC, but the part she liked best was the single market, and she was a key supporter of the Single European Act, a treaty which tried to speed up the completion of a single market by the end of 1992 (this should have been achieved by 1970!).

Meanwhile, as the EEC was getting its internal market in order, the "iron curtain" collapsed. The countries of Central and Eastern Europe, which the EEC had always called to join them, were now free to do so and very willing. West Germany was able to swallow East Germany whole (though it has taken some time to digest!), but the other states were made to wait. They were slung some money and plenty of advice, but they were basically told to get up to European speed before they would be admitted. This was in contrast to the treatment of Ireland and Greece, and of Spain and Portugal, which were admitted in 1986. They were all given substantial periods to adjust to the rigours of membership, and considerable funds to assist the process.

As the completion of "1992" approached, the politicians and Eurocrats looked for the Next Big Thing (the EU is rather like a bicycle – it must keep moving or it will fall!). They decided this would be a single currency. They also decided to create a European Union, which sounded better than a Community, and would be grander. Thus, in February, 1992 came the *Treaty on European Union*, which can be seen as the start of the constitutional muddle. But before we look at it, let us take a quick look at some other constitutional developments.

The European Court of Justice had, as part of its role, a commission to ensure that "the law is observed".[1] A supranational court with compulsory jurisdiction is revolutionary. The ECJ has made the most of its opportunity, rather like the Australian High Court. Its first revolutionary case was *Van Gend & Loos*[2] in 1963, which held that private parties could invoke rights under the treaties against Member States. This doctrine of "direct effect" was significant as, before then, international law had been the sole province of states. Community law was proclaimed to be a "new legal order" between international law and domestic law, with the ECJ its supreme arbiter.

The second revolutionary case was *Costa v. ENEL*,[3] in which the Court held that Community law was supreme over Member State law. This was gradually accepted by Member State constitutional courts, though they have tended to express reservations. One of their main reservations, particularly of the German Constitutional Court, has been the lack of Community protection of rights. The ECJ took the hint, and in 1974 began to discover rights embedded in Community law. This too may sound familiar to Australians! The ECJ was able to draw on the *European Convention on Human Rights and Fundamental Freedoms* of 1950, to which all Member States are signatories, and on "the constitutional traditions common to the Member States" to create a new human rights jurisprudence.

The European constitutional muddle began with the *Treaty on European Union* because the Union is such a nebulous concept. It may be objected that the Communities are nebulous too, but at least they have clear international legal personality and lawmaking power. The Union, in contrast, has neither.

The Netherlands had wanted the *TEU* to state that the EU had a "federal goal". Britain insisted that the "f-word" be removed, and it was. This triumph of British diplomacy has helped to ensure that the federal entity that is the EC cannot be intelligently discussed. The *TEU* also introduced "subsidiarity" – "the word that saved Maastricht".[4] This concept, drawn from a papal encyclical of 1931, states that decisions should be made as close as possible to the citizen. As used in the *TEU*, it means that the EC will only legislate when it is the more appropriate legislator than the Member States, whenever that is! Subsidiarity is in the eye of the beholder.

The *TEU* was almost immediately in trouble when it was rejected by Danish voters. Initially, this caused anger in the EC establishment and muttering of expulsion, but when perusal of the treaties revealed no

mechanism for expulsion, and there was no stomach to reopen the treaty negotiations, a compromise was reached whereby some of the contentious articles were given an official interpretation. This was then able to be put to the Danish people as a concession and they ratified the treaty the second time around in 1993. The treaty also survived a referendum in France very narrowly. This had become a referendum on the ageing President Mitterrand, and attested to his sagging popularity. The treaty also had to survive a constitutional challenge in Germany by a Herr Brunner, a former Commission official. The challenge failed, but it gave the German Constitutional Court another opportunity to remind Europeanists that there were possible limits to German accommodation.

So the *TEU* entered into force in November, 1993. One of its main innovations was to set a path to a single European currency. This was achieved in 1999 after much austerity and some creative accounting. Britain had opted out of the single currency from the start, and Denmark obtained confirmation that it too could stay out, and it has.

So while the Member States were working on a single currency, the Central and East European states were banging on the door. They were told to enact some 80,000 pages of legislation, known as the "*acquis communautaire*", and to await the EU's pleasure. Yugoslavia collapsed into civil war and secession. Slovenia made a relatively clean break. Croatia's break was more messy, and divided Germany and France in a reminder of conflicts past. Macedonia had to call itself the "Former Yugoslav Republic of Macedonia" ("FYROM") to assuage Greek sensitivities. Bosnia-Herzegovina became a war zone. The EU tried to negotiate a solution, but only NATO bombing of Serbia finally forced agreement to a grudging federation. The EU remains in occupation as a peace keeper. The collapse of Yugoslavia demonstrated the foreign policy impotence of the EU.

Austria, Sweden and Finland joined the EU in 1995. As prosperous, neutral countries, they were comparatively easy to assimilate. As in 1973, the Norwegian government negotiated accession but the Norwegian people again rejected it in a referendum. Negotiations in 1997 were meant to enable institutional reforms allowing for admission of the Central and East Europeans, but the *Treaty of Amsterdam* was preoccupied with attempting to obtain a common approach to asylum seekers and failed to make the necessary reforms. The main effect of Amsterdam was to bring the "Schengen *acquis*" into the EC. The Schengen Agreement was an agreement on border controls by some of the Member States.

The reforms to enable enlargement remained to be achieved. They were achieved by the *Treaty of Nice* of 2001, but *Nice* was a rushed job and grudging compromise. By then, the idea of a constitution was firmly on the agenda, and some of the hard questions could be deferred to that. At Nice, a *Charter of Rights and Freedoms* was adopted, but not with legally binding force. It was basically a piece of window-dressing.

As mentioned, the *Treaty of Nice* struck trouble when rejected by Irish voters. It too required some "clarifications" so it could be offered to Irish voters again. They were kind enough to accept it the second time around, in 2002. This enabled enlargement negotiations to proceed, and ten countries were able to join on 1 May, 2004. Eight of these were Central and East European states: Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia and Lithuania. Two were the Mediterranean microstates, Cyprus and Malta. Bulgaria and Romania, more backward than their Central and East European brothers, were deferred to 2007, when they did indeed join.

Meanwhile, a Convention had been convened to draft a Constitution for Europe. Somewhat like the Australian Constitutional Convention of 1998, the Convention was carefully constructed so as not to be too radical. Under the presidency of the former French President Giscard D'Estaing, it produced a draft Constitution that stuck pretty closely to the existing script. Indeed, it ran to several hundred pages, as it reproduced almost all of the Treaties of Rome and Maastricht. It incorporated the *Charter of Rights and Freedoms* and was styled as a *Treaty Creating a Constitution for Europe*. This was a deepening of the muddle. Was it a Constitution? Was it a treaty? Could you have a Constitution made by a treaty? The draft was pored over by the Member States and not signed until late 2004.

Both France and the Netherlands announced that they would hold referenda on the treaty. Neither had to do so. Spain held a referendum early in 2005 which endorsed the treaty. Several states ratified it by parliamentary means. Then in late May, 2005 France held its referendum and the treaty was rejected. A few days later, on 1 June, the Dutch voters rejected it too. This effectively killed the *Constitutional Treaty*, but the leaders were thoroughly committed to its main reforms. They were willing to drop the "c-word" *Constitution*, and revert to a treaty. Hence the *Treaty of Lisbon*, a federal constitution that dares not speak its name.

The treaty itself would not be the constitution. Rather, it is the amendments that it would make to the existing treaties. These would fold the EC into the EU, making it the sole entity. The *Treaty of Rome* would become the *Treaty on the Functioning of the European Union*. There would be clarification of the powers of the Union. Instead of the six-month rotating presidency of the European Council, a person would be appointed as President for a two and a half year term. The Commission would be restricted to 27, meaning that in the event of further enlargement, not every Member State would be guaranteed a Commissioner. *The Treaty of Lisbon* was signed in late 2007. As noted earlier, many states have ratified it. Only Ireland held a referendum, on 12 June, 2008. This rejected the Treaty. Now the question remains: will this kill the Treaty, or will Ireland be asked to try again?

From what I hear of the political mood in Ireland, asking again may lead to another rejection. This is somewhat puzzling, as Ireland has been a major beneficiary of EU membership, but it is possible that the Irish now take their prosperity for granted, are shocked by the migration they have received, and are tired of change. That is to assume that EU issues actually played a part in the vote. Often, voting on European issues is an opportunity to give the government a kick without actually voting it out.

Some had hoped that Lisbon would be the end of constitutional development. I would doubt that, given the EU's record. So regardless of whether it comes into effect, I will give my constitutional prescription. I believe that the EU does need a Constitution. I also believe that it already has a constitution, but that a group of treaties is not an adequate constitution. However, the attempts so far to create a Constitution have been doomed to failure.

There is a strong sense that the EU has got this far because it has delivered peace and prosperity. People seem to have taken it to their pockets rather than their hearts. People have not minded that they do not understand it as long as it goes on delivering results. The efforts to constitutionalise the EU in a more open way have coincided with the end of good times. If the party stopped in 1973 with the oil shock, it is noticeable that the EEC did little from 1973 to 1985. The Single European Act was able to be portrayed as enhancing prosperity. As it was nearing completion through the recession of the early 1990s, a new trick was needed, and this time it was the *Treaty of Maastricht* – the creation of the EU, whatever that is, the establishment of a timetable and pathway to a single currency, and lofty aims for a common foreign and security policy. After Maastricht, the trick was enlargement. That has been achieved, but one may doubt if it has really been absorbed. The then candidate states were able to take part in the constitutional convention, but not as equal partners. Having escaped from the Soviet yoke, they are not keen to put on a European one. They may yet be able to teach the Union some lessons about democracy and constitutionalism.

In the midst of difficult times, can a Constitution become a rallying point for a sense of common purpose among the people of the EU? Among nearly 500 million people across a diverse continent, this is a big ask. This is surely where federalism comes in. It enables decisions to be made about some matters at one level, others at another. I am far from convinced, unlike Ken Wiltshire, that the EU is destroying national identity and diversity. The EU works in over twenty official languages! It has performed the spectacular feat of uniting 27 diverse states, with plenty more knocking at the door. It cannot and must not deploy the tools of nationalism, race and religion to bolster loyalty and support. It can promise economic benefits, but these can be hard to deliver to all and all the time.

I believe that the solution lies in a more patient and realistic approach. An EU Constitution is not a panacea. The EU works. It could work better. A Constitution is part of the way to make it work better. It would enable a genuine European politics, less strained and distorted through national channels. This will require vision and leadership, but also extensive education and consultation so that, over time, a Constitution with deep public support can be created. The ten year time frame of Australia in the 1890s springs to mind. Where is Europe's Samuel Griffith?

Australia and Asia-Pacific Union

Finally, a brief aside on an Asia-Pacific Union. Just as each new Australian Prime Minister seems to need a New Federalism, each seems also to need an Asia-Pacific Union! Bob Hawke and Paul Keating had APEC. John Howard explored several possibilities. Now Kevin Rudd has his Asia-Pacific Union. Keating was insistent that APEC would be like the EU but without the bureaucracy. It is notable that without the bureaucracy, APEC is little more than an exotic photo opportunity. An Asia-Pacific Union faces formidable obstacles. Asia, let

alone the "Asia-Pacific", whatever that is, is much more diverse than Europe. It does not have the geographical contiguity and cultural similarities that make the EU cohere. It lacks so many of the conditions that made the EU possible. An Asia-Pacific Union may be of most use as a rhetorical device to demonstrate Mr Rudd's engagement with Asia.

Endnotes:

1. Article 220 of the European Community Treaty.
2. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963] European Court Reports 1.
3. Case 6/64, *Costa v. ENEL* [1964] European Court Reports 585.
4. See D Cass, *The word that saved Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community*, (1992) 29 *Common Market Law Review* 1107.