

Lisbon and the Quest for the European Public: Let Elections do some of the Work

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‘What a difference a day makes...’
(Grever/Adams)

‘But the need which calls forth the organizations of the public by means of rulers and agencies of government persists and to some extent is incarnated in political fact. ... The new public which is generated remains long inchoate, unorganized, because it cannot use inherited political agencies. ... To form itself, the public has to break existing political forms. This is hard to do because these forms are themselves the regular means of instituting change.’
(John Dewey, *The Public and its Problems*)

‘... that in every republic there are two different dispositions, that of the populace and that of the upper class and that all legislation favourable to liberty is brought about by the clash between them.’
(Niccolò Machiavelli, *The Discourses*)

I. Introduction. Presenting the European public

When in 2003 the forum of European constitutional academics, convened in the framework of the European Convention, met with one of the Convention’s vice-presidents, Giulio Amato told us that there was one great problem for which the Convention had no answer and in which academia might help: how to secure popular support for the venture. Many proposals have since then circulated, many involving some form of popular consultation or Europe-wide referendum, but none was retained and Amato’s intimation has painfully proved correct. Popular support was not secured and it was the public, which turned down the Rome Treaty.

The question of how to involve the public is as alive today as it was five years ago, with the difference that the succession of events from Laeken to Lisbon has

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provided us with an experience from which, apart from sadness and wisdom, it is possible to draw some hope.

In spite of the Rome Treaty's defeat, its constitutional ambitions are still realistic. Apart from the more business-like objectives such as 'enhancing the efficiency and adapting the Union to the future', these constitutional ambitions are: a) to give foundation and expression to the political autonomy of the Union; b) to establish a relationship between the Union's government and its public or constituency. The last ambition is the hardest one. It is the subject of this paper.

The Union is not a fully-fledged polity. On the other hand, one cannot deny that it has acquired some real autonomy from and over the member states, that it features a government structure, a measure of political life and a development of its own. Now on top of the government structure and institutional plurality and dynamics, some substantial relationship to the public needs to be established. This is what constitutions are ultimately about. The public does not need to be fully involved in the creation of autonomous government, but no modern government will survive very long without it.

The 'public' is a problematic category. To see it appear most clearly we need to understand what happened between Laeken and Lisbon and, especially, between Rome and Lisbon. The difference between these two treaties, which is substantial, is not one to be found between their respective texts, but it is related to the public. And as in the famous lyric of the song above ('what a difference a day makes'), it is one of time rather than text.

I shall take three steps. First let me explain why it is constitutionally significant what happened between Rome and Lisbon. Second, let me discuss the problem of the European Public. Ultimately, allow me to suggest some ways, among others, to make the best of the new situation.

II. The difference: a matter of time

Why is it important to know what happened between Rome and Lisbon? Because the weight of these events, notably those following the Constitutional Treaty of Rome, the No-referendums and their political acknowledgement, has somehow become part of the Lisbon Treaty's normative albeit non textual substance.

To see what happened in between should allow to understand the difference between the two Treaties. The Rome Constitutional Treaty was confident, maybe overconfident. The Lisbon Treaty in contrast is written in a minor key. In its bosom it carries the defeat of its predecessor.

In Holland as in other countries, we tried to pin down that difference. Most lawyers held and hold that there was little difference of substance, so the difference of form (flag, anthem), was a matter of cosmetics. The government, however, to justify

its refusal of a second referendum, held that the Rome and Lisbon treaties were essentially different. It found the difference to be that the latter treaty could not be read so as to lead to a superstate.

This was unfortunate and inaccurate. No one apart from its critics ever held that the Constitutional Treaty was meant to lead to a superstate. On the other hand, no one can be fully certain that the *Lisbon* Treaty will not be a step on the way to a superstate.

But the government was right in stressing that there is a big difference between the two treaties. The problem for legal minds is that the difference between Rome and Lisbon, that we are so fervently seeking to define, is not a matter of law in the textual sense. A treaty is more than black letter. It is also a fact of history and it feeds on events. It has, in the terms of the ECJ in *Van Gend & Loos*, its own 'spirit'.

The Rome Constitutional Treaty's spirit was optimistic, confident, as to the participation of the Public. That Treaty was in its own terms 'inspired by the will of the citizens and the states of Europe'. It tended to replace the member states' peoples, as the traditional constituents of the Union, by the EU citizens. This should not be taken lightly. It distantly compared to the way the American Constitution of 1787 replaced the peoples of the several American states by a single *We the people*.

Europe's 'We the citizens', however, has not survived the witch-hunt for symbols, which was instigated by the Dutch government. Its scrapping, even if it has no legal significance, well expresses the spirit of the Lisbon Treaty, including the defeat of the Constitutional Treaty at the hands of the public, and the acknowledgement of despair by the member states' governments. These events are painful and instructive. Even if not directly expressed in legal terms, nevertheless they stick like a wound, or a scar, a trauma, to the new Treaties. And in due course they will find their way to the law and the constitution. The Lisbon Treaty is a gesture of deference on the part of the governments towards their peoples, a deference verging on fear. And that fear is carried along into the Union constitutional structure.

Now most constitutions are in part expressions of fear. It may be fear from the past, if the constitution was born from civil war - as in Spain; fear from the enemy if it was born as a result of interstate war - as in Germany. So this fear need not be seen as a congenital flaw. The very Union's founding Treaties were based on fear from war between the constituent states. But this fear has worn off as a founding element. One doesn't even find its rudiment, expressed still very clearly in the European Coal and Steel preamble, in the two remaining preambles of EU and TFEU. So it need not be bad that some fresh apprehension should be instilled. But the fear needs to be overcome.

As constitutionalists we should not only accept the situation but help to find ways for the parliaments and especially the peoples, the public, to take their places fully inside the Constitutional structure, next to the European Parliament and its EU citizens, to turn fear into favour.

This is how I see what happened, in other words what difference was made, in the period between Rome and Lisbon, and what may happen next.

To sum up: Lisbon is a Treaty spirited by fear from the Public. This fear may be redeemed or overcome by the full acknowledgement of the European Public as part of Europe's constitutional structure.

III. The *constitutional* difference: a matter of structure

How may a difference of fact, or of weight or 'spirit' translate into a difference of law? And how, from there into a difference of structure? Let me begin by explaining that for facts or events or other differences to turn into law generally is a matter of everyday experience. A political showdown between antagonists in parliament will lead to a political settlement, a fact, which is laid down in statutory law. Likewise, the outcome of a war or a conflict, a crude fact, leads to a peace treaty: a form of law. Here we see two of our present day most familiar sources of public law in action: the sources of statutory and of treaty law respectively. It helps to know that part of the significance and even part of the legal force of a legal act lies outside of the legal sphere, in the *origin* of the act.

This is so not for law only. Human relationships generally (of which the law is but a species), and social structure even more generally, will find their lasting force not only in their inside logic and substance, but at least partly in their origins. This is why a statute, a contract and a treaty, and a legal verdict, are given a date and place of origin.

How will the Lisbon Treaty of 13 December 2007, a winter day's treaty, carry its origin into normative relevance? Let me distinguish three levels of relevance, concerning the reading of the Union's structure, of the nature of the Lisbon Treaty, and of its wording. This triad is reminiscent of, but not identical to, the *Van Gend & Loos* triad of 'spirit, economy (or general scheme), wording', and its several varieties. Let us deal with them in inversed order.

The first extra-textual normative relevance of a Treaty's origin concerns the legal reading of not the treaty as a whole, but of its individual provisions. How can the reading of a treaty's origin, including not only the intentions of the 'founders' but also of messages intimated on them, impact on the judicial interpretation of individual provisions? I think we can simply wait for the verdicts of not only the European Court of Justice, but also the national courts.

Second, such normative relevance may concern the Lisbon Treaty as a whole, and the two key Treaties which it amends, the EU and EC Treaties.

The Court of Justice in its early days proclaimed that the EC Treaty was a very extraordinary treaty. The Lisbon Treaty makes it very clear that however extraordinary this EC Treaty, it shall not in the foreseeable future be different from an ordinary treaty in its formal amendment procedure. Quite to the contrary, the two EU treaties will remain bound to the most restrictive amendment procedure known under international law, that requiring 'double unanimity'.

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This can only rub in the remaining importance of national parliaments and their electorates, to begin with their role in Treaty amendment and accession. In fact, the Treaty of Lisbon carries the hidden message that majority-ratification for entry into force of a new founding treaty (amendment or accession) short of unanimity is moved to a very distant future.

Last and not least there is relevance for understanding the structure not of the treaties, but of the Union as a body politic. Lisbon, as has been explained, carries the acknowledgement that European Union will never be able to do without its member states and their institutions. This is not entirely new. We have come to understand for a while that the member states *governments* have won a seat of honour in many of the Union institutions, first of all in its core governing body the European Council. The national *parliaments* have been fighting their way to a place at the table for years. The domestic *courts* are part of the Union governing structure. A similar acknowledgement of the enduring importance for the EU of the member states' *peoples* is now likewise a matter both of understanding and of necessity.

The electoral basis of the European Parliament, interestingly, has kept its crucial redefinition, as introduced by the Constitutional Treaty. Whereas in the EC Treaty so far, the European Parliament represented 'the member state's peoples', Article 14.2 TEU reads: 'The European Parliament shall be composed of representatives of the Union's citizens...'

While this may be read as a step forward for the European Parliament, in view of the reassertion of national peoples as constituents of the Union, it could now also be understood as a step back, for the European Parliament from what are still its most powerful roots. It may be recalled that originally the European Parliament was based fully (albeit indirectly, via the national parliaments) in the national constituencies. From its direct election in 1979 it is gradually being uncoupled from them in favour of its representing an European electorate. This process is now being concluded in form. The substance, however, the capacity of the European Parliament *really* to express the moods, interests, ideas etc. of the Europeans as a compound, is lagging further behind.

To sum up: The European Parliament, institution, which can aggregate the national populations into a European Public, is losing this capacity.

IV. The public: a matter of history and artifice

The Convention on the Future of Europe, which drafted a first version of the European Constitutional Treaty, had two crucial objectives. Did it succeed?

The first of its aims was to rescue the amendment procedure from the grip of bureaucracy and involve a wider spectrum of participants. In this part of its mission it has succeeded almost without a doubt and allowed some of the visions of the Constitution's protagonists, notably Joschka Fischer and Valéry Giscard d'Estaing to be

materialized. The Rome Treaty was innovative in many respects and without the Convention great improvements retained in the Lisbon Treaty's substance, would have been impossible to accomplish.

The other part of its mission, however: to bring the Union closer to the citizens, has been an obvious failure. No European treaty so far was ever treated to popular scepticism like the Constitutional Treaty and even the Lisbon Treaty were.

One might consider the Constitutional Treaty, in the way of '*une constitution octroyée*', as an invitation by the authorities addressed at the public, asking this to take its part in power. This gesture was rebuked by the public in the French and Dutch referendums, which is why the word Constitution was dropped from the ensuing Lisbon Treaty.

In this respect, the fate of the Rome Treaty also reflects on its origin. Its defeat puts the preceding Convention and even the Convention method in default.

This suffices to show that the Convention method is not going to succeed in involving the public. It may not even succeed in involving all politicians, as appeared from the Dutch example. In my country the Draft treaty was defended half heartedly by the government, which made it no secret that the Dutch had been repeatedly outwitted in the Convention and in Europe generally.

The Union administration, including the member states and their governments, needs to establish a link with the public. Now what is the public? 'The public' I consider to be the generic term for the popular basis on which any constitutional government rests. This genus or generic of 'the public' has many different species, depending on language, law, and the specific constitution's history. The American species is 'the people', the French species is 'la nation'; the German species is 'das Volk'; ancient Rome's species was 'populus Romanus', or the populace, in Machiavelli's terms.

It is a mistake to try and find some natural or sociological essence among all these varieties, and test the Union against this, as happens under the so called 'no demos thesis'. This 'no demos thesis' denies the Union its public for lack of a natural, sociological or cultural homogeneity. But the public, in the context of political life, is *any* compound of humans, organized or organizing itself under autonomous political authority. The 'demos' of ancient Athens is merely one of the many species. Even if it is at the root of our word 'democracy', it is far from the arch-version of the public to which all the others should conform. Nor did this Athenian demos fit any ideal of natural and historic homogeneity or cultural unity, as it is sometimes nostalgically ascribed. For one thing, it was composed of the participants of the many demoi of Attica, which made up Athens. Athens (Athenai) denotes not a single place but a plural. The demoi were artificial units created by Cleisthenes around 500 BC in his successful attempt to break the power of the establishment.

The constitution, as its public, is not built on nature or culture but on history and human artifice. Often it breaks cultural and established divides.

This does not say anything specific about European Union's public and its specificity. As any public in a new situation, this European public is in part inchoate, unorganized, in the words of John Dewey quoted at the outset. This public is, for one thing, seeking to find the authority against which to organize itself and it is seeking ways to express itself. The only thing to say for certain is that the European public is a real subject of attention, for both politics and scholarship. Let us take a few steps at (re-)defining the European public in action.

At time of writing of these words, the European establishment is getting nervous about the Irish referendum on the Lisbon Treaty, June 12, 2008. Is it so strange that the whole of Europe should hold its breath? Maybe not. The whole of Europe has heard and heeded two popular refusals of the Constitutional Treaty and reasserted the rights of member state institutions, including their peoples.

To sum up, the quest for the public is the greatest challenge, both actual and intellectual, for the Union structure.

V. The Public, direct democracy and European elections

It is not just the 'European citizens', which speak for the European public. National voters have been acknowledged of late as expressing the mood, the interests, the perceptions, the fears, of the *European* public. Hence we should include the several member states' electorates in our definition of the European public, in the same way as we have learnt to include the member states' governments in the EU government and the member states' courts in the EU judicial system. And as we are learning just now to include the national parliaments in the EU representative system.

All of these domestic institutions: governments, administrations, courts and parliaments have found or are finding their own way to the Union; they are involved not only as part of their own constitutional compound, but also autonomously from it. This is one of the most interesting aspects of European governance. The governments do not act through and as agent of the state, but as government, aggregating with other governments; the courts, *idem* (it is called: accommodation); the parliaments, *idem* (COSAC etc). Now the domestic public of each member state needs to find its way to the Union, to reaggregate there with other electorates.

Domestic referendums are the first steps. They are a form of direct democracy, but they are primitive form and heavily inclined to a negative outcome. It is not strange for new assertions to start from a refusal, a no. Ultimately, however, the national electorate should be given an *affirmative* role in European decisions. How?

The most critical European decisions are treaty amendment. How to involve the several electorates in an affirmative way? Let me make just one possible procedural suggestion. The suggestion is based on elections as a form of direct democracy. Elections are about three things: persons, ideas and issues. In as far as they concern concrete issues, they are a form of direct democracy. Mr. Sarkozy gave the example

in France, making the coming Treaty approval an issue in his presidential election platform. If he were elected, it said, there was to be no referendum. This was a way to involve the French public in a European issue. He was elected and the approval-mode of the new treaty consequently had been agreed by the public.

The Dutch candidates for the 22 November '06 elections candidates failed to make the coming Treaty or its approval mode into an election issue. When the new treaty came and the government refused to have a referendum about it, this deepened the grudge. It was an opportunity missed to give the people their say in a European matter.

How to include the public in a systematic manner? My suggestion is to give the national peoples, or publics, a say in every Treaty reform. Every national ratification shall follow a national election, in which the Treaty amendment may be made an issue. Of course it will not be made a serious issue most of the time. But if there is a real grudge or opposition to the reform with the public and/or with some of the political parties, the elections will draw these grudges and oppositions and deal with them amid other issues.

Can Europe make national elections mandatory? Of course not, but it is not necessary. The only thing needed is to establish a period of five years between a Treaty's signature and entry into force. In the mean time there will have been elections everywhere, including those for the European Parliament. In fact, five years has been the period between the signature of the Rome Treaty and the expected entry into force.

Involving national elections, which have an element of direct democracy, will be a natural way to include the national public *and* the national parliaments in the amendment process, by allowing them to back up the process.

How then to aggregate these national elections? To have a *European* parliamentary election before every treaty amendment's entry into force is an essential part of this proposal. The amendments may thus become an issue in these European elections (which are held in each country separately also). They will draw the opponents and split them into opposite camps, taking away their negative leverage. Nationally and on a European scale the European parliament's elections can take the place of the Europe-wide referendum on a new treaty that has been advocated so often.

In fact, it is really an opportunity missed for the Lisbon Treaty to be rushed through ratification. It is as if everyone intended to avoid the matter from becoming an issue in elections anywhere, even in the European elections. While we might have wanted and obtained the exact opposite.

P.S. A note added at the review of this article's proof (August '08). The Irish No vote of June 12 now seems to restore the missed opportunity. It allows the second attempt at an Irish approval to wait until after the European elections and its results. If handled well, i.e. with the Lisbon Treaty (and its extras) made an issue in Ireland and other countries, these European elections results, with the Treaty being a key

issue, might then have a compelling (and directive) effect on the result of the subsequent referendum.

If the Treaty opponents have not mustered a majority against Lisbon in the Irish caucus of the European elections, they will not be likely to get one in the referendum. That is in the nature of the succession of events. At the very least, the European elections will provide, in Ireland, the *novum* needed to legitimize a new popular consultation.

To sum up: in terms of practice and fact, national and European elections are among the events from which a European Public may arise, or appear.

VI. Conclusion

A Constitution is many things, but it crucially is a living relationship between the authorities and the public, mediated by the intermediary institutions: parliaments, councils, courts. According to Machiavelli this living relationship, which he called *uno vivere politico*, may come into being either through a formal constitution, as in ancient Athens, or by events arising from friction, as happened in ancient Rome. In Europe, after the formal constitution was voted down, we are returning to the creation of the constitution through events, practice, case law. That is why this argument was concerned with the events between Rome and Lisbon.

The suggestion made here to involve elections as a form of direct democracy, allowing the public to speak out directly on a substantive issue, is not meant to be compelling. There are many other ways for the European public to crystallize, to define and to impose itself. This essay has not attempted to define the EU public; it has only pointed out the interest and possibility of doing so.

It is reassuring that if Machiavelli is right, nothing is lost with the burial of the Rome Constitutional Treaty. Ancient Rome's constitution itself was founded on non-legal events, on practice, not on a statutory act. Likewise the *vivere politico* of the Union, involving its public, may continue to develop on the basis of treaty text, case law and practice, as all constitutions do.