Justice and Home Affairs in the Lisbon Treaty: A Constitutionalising Clarification?

By **Brendan Donnelly***

The Lisbon Treaty represents a major milestone in the evolution of the European Union's legal order. Even if the Common Foreign and Security Policy (CFSP) will remain largely intergovernmental in nature, almost all policy areas of Justice and Home Affairs (JHA) will come under the "Community method", forming a single Area of Freedom, Security and Justice in which qualified-majority voting and codecision, as 'the ordinary legislative procedure", will be the general rule. This contrast in the respective developments of the two "pillars" erected at Maastricht reflects their different relationship with the bulk of the Union's policies. JHA is the obverse side of the coin which is the internal market: the disappearance of national barriers between the Member States constitutes an inexorable drive to adopt measures under JHA on the same legal foundations. Such considerations do not apply, in the case of CFSP, the impact of which is mainly felt outside the European Union.

Introduction

The use of the term "constitution" in connection with the document adopted by the Convention on the Future of Europe in 2003 was from the beginning a controversial one. Critics argued that the sprawling and heterogeneous text of the "European Constitutional Treaty" lacked the coherence and concision normally associated with national constitutional documents. Above all, the Treaty failed in the traditional central ambition of constitutional texts, that of placing beyond day-to-day controversy the major goals, institutions and working methods of the political entity being described. Deep-rooted differences of analysis and aspiration between the members of the Convention and the Member States themselves had inevitably led, in the view of these critics, to a document of systematic vagueness and ambiguity, which advanced the "constitutionalisation" of the European Union not at all.

If there is some general validity to this criticism, it is not a reproach which can properly be levelled at one important aspect of the Constitutional Treaty and the Treaty of Lisbon which succeeds it. Whatever its other ambiguities and evasions, the Treaty of Lisbon has achieved a very substantial new measure of clarity on the future decision-making procedures of one central area of the Union's decision-making, namely Justice and Home Affairs (JHA).

This significant new clarity can properly be described as "constitutional" or at least "constitutionalising" in nature. JHA matters are currently divided between the Community (mainly asylum, immigration, visas, and judicial cooperation in civil matters) and the so-called "Third Pillar" (Police and Judicial Cooperation in Criminal Matters), in which decisions are taken on a more intergovernmental basis. If and when the Treaty of Lisbon is ratified, all JHA matters will fall under the institutional decision-making procedures familiar to scholars and commentators under the rubric of the "Community method", which will be the general rule in a single Area of Freedom, Security and Justice. All but a limited number of JHA policy areas will be subject to qualified-majority voting in the Council. The European Parliament will play a full, parallel legislative role through the codecision procedure (to be known as the "ordinary legislative procedure") in almost all cases. The European Court of Justice (ECJ) will in time have jurisdiction to enforce all JHA decisions: those provisions adopted under the previous, intergovernmental framework of the "third pillar"

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will be subject to a limited jurisdiction of the ECJ for a transitional period of five years, after which the ECJ's normal jurisdiction will be extended to cover all prior legislation in policing and criminal matters. Moreover,, with the exception of police and judicial cooperation in criminal matters and administrative cooperation in JHA, where it will share this right with one-quarter of the Member States, the Commission will enjoy the exclusive right of legislative initiative.

These changes mark a major milestone in the evolution of the European Union's legal order. More precisely, they are the culmination of an institutional journey which has lasted fifteen years, the decade and a half since the signing of the Treaty of Maastricht.

Some recent history

The Maastricht Treaty of 1992 systematised and extended the scope of the then European Community's activities to two major new policy areas, Justice and Home Affairs (essentially questions of internal security and civil liberties) and the Common Foreign and Security Policy (CFSP), including the "eventual framing of a common defence policy." Because a number of European governments were at the time hesitant to share their national and executive sovereignty in these sensitive areas with the central European institutions, a specific decision-making procedure was adopted for these two new areas of European activity. This procedure involved unanimous decision-making in the Council of Ministers; a limited role in the procedure for the European Commission and the European Parliament; and no role for the European Court of Justice. This arrangement was not far removed from the interaction of independent national governments, and hence widely and accurately described as "intergovernmentalism." Although this system of decision-making applied originally equally to both the Common Foreign and Security Policy and to Justice and Home Affairs, the years since the signing of the Maastricht Treaty have witnessed its progressive dismantlement in the field of Justice and Home Affairs, but its substantial maintenance in the field of the Common Foreign and Security Policy. Whether or not the Lisbon Treaty comes into force, CFSP will continue to be an area of policy dominated by "intergovernmentalism." Even before the Lisbon Treaty on the other hand, substantial inroads had already been made into the intergovernmental nature of decision-making in the field of JHA.

It should not be forgotten that at the time of the Maastricht Treaty's signature there were already governments which saw the new decision-making procedures as simply temporary expedients, which could be expected to wither away with the passage of time. This view was in sharp contrast to that of the British Government, which saw in the arrangements of the Maastricht Treaty for JHA and CFSP (known as the JHA and CFSP "pillars" respectively) a long-term "bulwark against federalism". In the sphere of JHA at least, this British analysis rapidly came to need revision, when the Amsterdam Treaty of 1997 partially transferred the policy areas of "visas, asylum and immigration" to the traditional "Community method" of decision-making, thereby pruning back the area of intergovernmental decision-making to only the most sensitive areas of JHA – "Police and Judicial Cooperation in Criminal Matters". Future decisions in the policy areas transferred by the Amsterdam Treaty to the "Community method" were in some cases still to be decided by unanimity rather than qualified-majority voting, but the enhanced involvement in the newly transferred policy areas of the European Commission and the European Court of Justice marked an important break with the intergovernmentalist philosophy of JHA contained in the Maastricht Treaty. The British Prime Minister who signed the Maastricht Treaty, John Major, had set himself and his government against any such dilution of "intergovernmentalism" in the field of JHA. One of the first actions of his successor as Prime Minister, Tony Blair, was to accept this envisaged change and sign the Amsterdam Treaty, although he demanded and obtained a specific British provision in the Treaty, allowing the United Kingdom to opt in, or to opt out of new JHA legislation adopted by the "Community method."

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The Amsterdam Treaty not only limited the policy areas to which the intergovernmentalism of the Third Pillar would in future apply. It also provided for a process of regular review of those JHA elements newly transferred to the "Community method" but retaining to various degrees aspects of intergovernmental decision-making, notably the unanimity principle. In 2004 this process of review saw Member States agreeing to extend the scope of codecision with the European Parliament and qualified-majority voting in the Council of Ministers to all areas of "visas, asylum and immigration", with the exception of legal migration and family law. 2004 in addition saw the end of Member States' right of initiative for the JHA measures subject to the "Community method" of decision-making.

Some more recent history

The year 2004 also, and even more importantly, saw the agreement among Member States of the European Constitutional Treaty, which proposed the wholesale transfer of all remaining JHA matters to the "Community method" of decision-making. Codecision and qualified-majority voting would apply to most of these newly-communitarised JHA areas, as they had come by 2004 to apply to nearly all JHA areas previously communitarised by the Treaty of Amsterdam. The right of initiative on JHA matters, until recently shared with the Council, would be exclusively the Commission's. The ECJ would eventually enjoy normal jurisdiction over what had come by now to be described as the European "Area of Freedom, Security and Justice".

Commentators on the European Constitutional Treaty were unanimous in regarding its provisions on JHA as

being among the most significant provisions of the Treaty. The "no" votes of France and the Netherlands in the referendums of 2005 appeared however to forestall for the foreseeable future further movement towards the complete communitarisation of JHA. Indeed, efforts made during the Finnish Presidency in 2006 to implement some of the Constitutional Treaty's JHA-communitarising provisions were not supported by even a bare majority of Member States. It came as a surprise to many that under the German Presidency of 2007, such rapid progress could be made towards agreeing a successor document to the Constitutional Treaty, and that this successor document should contain all the major provisions on JHA which figured in the Constitutional Treaty. Indeed, EU Member States voted in June 2007 to go in an important respect further than the Constitutional Treaty, incorporating into the acquis of the European Union the Prüm data-sharing initiative, which facilitates cooperation between national police services.

If it seems puzzling in retrospect that the European Council of June 2007 was able to take wide-ranging decisions on JHA matters, while only a year before it had seemed that the further communitarisation of JHA had reached an impasse, two factors can be mentioned as contributing to this volte-face. First, it is a well-established feature of European negotiations that it is often easier to agree a raft of measures in a Treaty affecting a whole spectrum of sectors – where the disbenefit to certain Member States of some changes will be compensated for by more agreeable changes in other areas – than to agree to specific changes in isolation. Second, political and personal factors were structured very differently in 2007 to their conjunction in 2006. By the time of the European Council in June, 2007, Tony Blair had announced his forthcoming resignation from government and probably therefore had more freedom of political manoeuvre to take decisions whose political consequences would primarily be felt by his successor. Mr Sarkozy offered in the first days of his presidency a new approach to European questions after Mr Chirac's departure, and Mrs Merkel proved herself in the German Presidency of the European Union an expert and conciliatory leader of negotiations. Circumstances and events thus combined in June 2007 to manifest and allow the implementation of an almost universal consensus within the governments of the European Union that "inter-governmentalism" in JHA had had its day.

Why JHA has worked out the way it has

Although a number of conjunctural influences came together in 2007 to allow for the important agreement on JHA contained in the Lisbon Treaty, it is clear that, within the 15 years since the coming into force of the Maastricht Treaty, the overwhelming majority of EU Member States have come to believe that their interests in the field of JHA will be best served by the use of the "Community method" in this sphere. A number of interlocking considerations seem to have led them to this conclusion, primarily considerations of efficiency, of democratic transparency and of administrative simplicity.

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Even before the terrorist attacks of 11 September 2001 in the United States of America, European states were becoming uneasily aware that the decision-making structures they had given themselves in the co-operative fight against major crime and terrorism were cumbersome and ill-adapted to the gravity of the threats posed. The attacks on the World Trade Center and other targets in 2001 encouraged European governments to seek a more flexible system of decision-making in this field, one which could not indefinitely be restrained by national vetoes, and which more fully involved the democratic and judicial elements of the Union's institutional system, namely the European Parliament and the European Court of Justice. Moreover, although the original decision-making system of the Maastricht Treaty had been a relatively simple and straightforward one, the Amsterdam Treaty of 1997 had led over time to a bewildering variety of legal and political instruments in the field of JHA. It was an undoubted attraction for many European governments of the European

Constitutional Treaty that it brought into the complicated area of JHA an accessible and familiar simplicity of legal structure. They were understandably eager to preserve this simplicity in the Lisbon Treaty.

But there is perhaps another, yet more fundamental reason why the fates of intergovernmental decision-making in the areas of JHA and of CFSP have been so disparate since the Maastricht Treaty. This reason lies deeper than the subjective analyses of individual national governments and arises from the nature of the issues involved in the two areas. It is possible to construct in retrospect an entirely plausible account of why JHA should relatively rapidly have come to be subsumed under the "Community method" of decision-making and why it will probably be a long time before such a fate overtakes CFSP, if indeed it ever does.

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The plain fact is that JHA matters stand in an altogether different relationship to the great bulk of the European Union's policies and legislation compared to that which exists between these and the CFSP. Logically and analytically, the area of policy and legislation known as JHA can appropriately be regarded as the observe side of the coin which is the European Union's well-established internal market. The pressing need for the European Union's governments to work ever more closely together to protect physical security and civil liberties derives precisely from the ceaseless deepening of the Union's internal market. The ease with which national frontiers can be crossed by individuals, goods or money is a boon to citizens, but also creates greater opportunities for trans-European crime. European citizens born in one country, educated in another, working in a third and then retiring to yet another may well, through the circumstances of their lives, create challenges and claims which purely national legal systems are ill-equipped to address in a coherent and non-discriminatory manner. Those affected, either negatively or positively, by decisions taken in the sphere of JHA will normally be citizens of the EU's Member States, or at least persons residing, temporarily or permanently, in the territory of the EU. The relentless disappearance of national barriers between the Member States of the EU sets the material stage and creates the legal imperative for most decisions taken under JHA. The EU's internal market is itself pre-eminently a product of the "Community method". It is hardly surprising that its pendant, the European "Area of Freedom, Security and Justice" should come to rest upon the same legal foundations. The aspiration of some to regard the "JHA pillar" as institutionally isolated for ever from the Union's central achievement until now, the single internal market, can be seen today as a highly implausible one.

On the other hand, little, if any, of the above analysis can be applied to decisions taken under the CFSP. The impact of these decisions is largely external to the European Union, with individuals and entities outside the Union's territory being the beneficiaries or victims of these decisions. Inevitably, much decision-making involving the Union's bilateral relations with third countries will be opportunistic, urgent, discretionary or confidential. All these are conditions making less apt for law-making under the "Community method" the decisions which constitute the CFSP. Consciously or otherwise, national governments in the European Union recognise this distinction, which allows them to exert, both individually and corporately, an infinitely greater degree of executive sovereignty in external policy than they enjoy in the rules-bound legal system which will in future constitute the underlying structure of the Union's internal policies, both for the internal market and for JHA. In the negotiations which preceded the European Constitutional Treaty and the Lisbon Treaty, there was little appetite from any European governmental quarter for the substantial modification of the CFSP intergovernmental "pillar". There seems equally little reason to believe that this political reality is like to change in any immediately foreseeable future.

The British exception

In the British political debate, institutional changes which facilitate the taking of action at the European level are frequently viewed in negative rather than positive terms. The Lisbon Treaty's extension of qualified-majority voting in the area of JHA and other changes introduced by the Treaty to voting weights and voting procedures in the Council have been widely criticised in the United Kingdom as an unacceptable infringement of British national sovereignty. Such criticism sits oddly with the fact that the UK is among the Member States that are most enthusiastic to see common action in JHA, in the security sphere in particular. It does however reflect the political predicament of the British Government in the negotiations over the Constitutional and Lisbon Treaties. This political predicament has been a key factor in the British Government's pressing for and securing a number of special arrangements in the Lisbon Treaty, particularly in regard to JHA.

While the Lisbon Treaty, for the vast majority of Member States, has the effect of "homogenising" a communitarised Area of Freedom, Security and Justice, the position of the UK (and Ireland and Denmark to varying degrees) relative to other Member States, is made only *more* anomalous. In the Lisbon Treaty, the British Government has secured for itself a generalised opt-in/opt-out from all newly-communitarised areas of JHA. This change constitutes a striking and objective difference between the Constitutional and Lisbon Treaties, a difference British governmental spokesmen have been eager to underline in the domestic debate over the need or otherwise for a referendum on the Lisbon Treaty.

It is, however, extremely difficult to see what objective British interests will be better protected by the new, generalised system of JHA opt-ins/opt-outs. At the time of

the European Constitutional Treaty, the British Government had believed that its interests in the sphere of JHA were adequately protected by the "emergency brake" system contained in that document, a system which allowed Member States to "revoke" their willingness to be outvoted on JHA matters which seemed to them of exceptional national importance. The impression cannot be avoided that the change in British governmental attitudes on this subject between 2004 and 2007 was largely driven by the need to find political arguments in the Lisbon Treaty which would legitimise the Labour Government's unwillingness to hold a referendum on the new treaty. It is in any case wholly unclear what real use the British Government will make of its JHA opt-ins/opt-outs. It is entirely possible that the United Kingdom will see its interests as lying for the great majority of cases in associating itself with new JHA legislation rather than standing aside. It is instructive, and ironic, that the British Government today finds itself pleading two cases before the ECJ where it would like to participate in JHA measures, but is currently *prevented* from doing so.

Conclusion

It would be an unbalanced analysis of the provisions of the Lisbon Treaty bearing on Justice and Home Affairs if excessive attention were directed to the undoubted ambiguities and uncertainties surrounding the British, Danish and Irish positions in this field. The real effect of these ambiguities will probably be limited, and for the other 24 members of the Union the Lisbon Treaty represents an undoubted clarification and systematisation of a central area of the European Union's decision-making. A fashionable description of the European Union at the time of the Maastricht Treaty was to describe it as a pediment resting on three pillars, the internal market, CFSP and JHA. One of these pillars has now not only disappeared, but has been incorporated into another "pillar". It must seriously be asked whether the imagery of "pillars" for the European Union any longer has relevance or validity. A more accurate depiction of the Union would be of a political association that normally applies a standardised decision-making procedure, to which there are only two exceptions, the Common Foreign and Security Policy and the governance of the Eurozone, the latter of which is as yet an evolving and incomplete system. If this radically simplified analysis of the European Union comes to be generally accepted by scholars and commentators, it will be a substantial "constitutionalising" legacy from the Convention, the European Constitutional Treaty and the Treaty signed in Lisbon on 13 December 2007.

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NOTE

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