

Lisbon Treaty in Focus: A Poorer Substitute for the Former Constitutional Treaty?

Written by Elijah Bossa

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ELIJAH BOSSA, AUG 15 2012

The ratification of the Lisbon Treaty in 2009 marked a new chapter in the process of European integration. Following the political failure of the draft Constitutional Treaty 2004 upon referendum with the rejection by Netherlands and France[1], the Lisbon Treaty immediately envisioned a different ethos through its creation of two new treaties: the Treaty on the European Union and Treaty on the Functioning of the European Union. This essay will argue that far from being a poorer substitute, the Lisbon Treaty is ideologically a significant improvement from the Constitutional Treaty. This argument will begin with an analysis of the constitutional and institutional architecture of both treaties. An assessment of the fusion of social and economic modes of integration under the Lisbon Treaty will be analysed within the context of supra-nationalism and constitutionalism. It will be summarized that the Lisbon Treaty is fundamentally distinguishable from the Constitutional Treaty insofar as it seeks to re-constitute policy debate on Europe towards a more politically sustainable constitutional order.

The Constitutional Treaty advanced two constitutional shifts which would further define the academic gulf between Euro sceptics and Europhiles: deeper European federalisation and the establishment of an autonomous European constitutional democracy[2]. The latter constitutional change – causing the political storm – which led to the Treaty's slump into oblivion deserves critical mention.

Popular opinion was critical of the extent to which the notion of a Pan-European constitution perpetuated the schism between the 'ruling elite' in Brussels and citizens of member states who were largely side-lined from the political process integrating these changes[3]. However, Gibbs argues that the particular form of constitutionalism instituted by the Constitutional Treaty strengthens the legitimacy of the European legal order. Unlike the Lisbon Treaty which abandoned the 'constitutional conceit', the Constitutional Treaty re-enforced the progressive constitutional scope of the European Union[4].

Gibbs' central premise is the notion of cognitive constitutionalism which refers to the way in which constitutionalism responds to the EU's legitimacy problems by engaging the affective/'aesthetic' faculties of European citizens[5]. He argues that "rather than as an attempt to kindle public sentiment behind the European project", constitutionalism seeks to civilise the disagreements over the future of the European polity[6]. This view acknowledges that the Constitutional treaty carries out a distinctive function in the EU's response to the legitimacy problem. In similar ideological fashion, Habermas asserts that the Constitutional Treaty responds to the 21st Century need of modernising the concept of 'post-national democracy'[7].

In hindsight, both these views are based on a misreading of the evolution of supra-nationalism and democracy in Europe. Firstly, it is impossible to discuss the modernising of post-national democracy without analysing how legitimacy will be re-produced at this level. Habermas fails to comprehensively assess how the Constitutional Treaty would help in the creation of proper legitimacy at the post-national level. Secondly, the Constitutional Treaty has been conceptually interpreted as promoting 'democratic regeneration'. Gibbs highlighted that this kind of regeneration was not concerned with re-kindling European public sentiment. However, Bartolini[8] and Schmitter[9] posit that this kind of democratic regeneration required an affinity emanating from member states. The idea of socio-economic and political systems generating common identities in a modern state was markedly absent in the EU context. Therefore

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the assumption within the Constitutional Treaty that democratic affinity could be generated through a highly bureaucratic political process was undoubtedly simplistic.

Comparatively, the Lisbon Treaty not only introduced substantially different changes to those of the Constitutional Treaty but provided an arguably better response to the question of democratic regeneration in Europe. Of key importance in distinguishing between both treaties is the impact of the Lisbon Treaty's creation of two new treaties (TEU and TFEU). The institutional re-balancing act effected through these two treaties significantly altered the scope of European integration and provided the platform for a re-framing of the question of constitutional reform within a supra-national context.

The Lisbon Treaty's restatement of the EU's objectives through Articles 2 and 3(TEU) was more than just an attempt at aesthetically differentiating itself from the Constitutional Treaty. Despite continuing the path of Constitutional Treaty reforms by expanding community competences in the field of economic integration, the Lisbon Treaty reframes EU objectives in a way which seeks to bridge the gap between economic and social dimensions of European integration.

This complex picture in which integration amalgamates alternating social and economic foundations is absent within the architecture of the Constitutional Treaty. In light of this, the evolving status of the EU's legal personality under the Lisbon Treaty is of significance. Piris[10] states that although the Lisbon Treaty theoretically replaces the supra national concept of 'Community' with the inter-governmental notion of 'European Union', it continues the supranational tradition of a community but not that of the "inter- governmental union pillars"[11].

This analysis underscores two critical points about the state of European integration and the intersection between supra national constitutionalism and democracy in Europe. Firstly, the abandonment of inter-governmental union pillars under the Lisbon Treaty re-enforces the notion of neo-functionalism as the acceptable mode of integration within Europe. Neo-functionalism emphasises collective regional integration, economic interdependence between nation states and the pre-eminence of supra national norms and rules[12]. The Lisbon Treaty's insistence on systematically conflating social and economic modes of integration by virtue of Articles 2 and 3(TEU) plus Article 9(TFEU) emphasises the pre-eminence of the neo-functionalist approach to European integration. Secondly, the resultant positive spill over effect helps to provide a legal premise for the growing scope of the European Union's competencies. It also changes conventional arguments concerning the EU's developing jurisprudence and the 'democratic deficit' to member states.

Neo-functionalism begins from the assumption that pluralistic societies exist within nation states[13]. As integration gradually gathers pace, constituents within these societies will transfer their domestic allegiance to supra national institutions which will be seen as a better conduit through which material interests will be addressed. This argument partly puts to rest the question over the continued 'democratic deficit' to nation states. The notion of a transfer of domestic allegiances speaks of a change in the affective interests/loyalties of the constituents.

Contrastingly, the Constitutional Treaty fell short of implementing a normatively justified system of regional governance. Even though both treaties do place a great emphasis on the strengthening of the European polity, the Constitutional treaty failed to make the link between the pluralistic social structures of the European Union and the democratic requirement of connecting with the affective interests/loyalties of the constituents. This is the aspect of 'democratic regeneration' that was largely missing in the Constitutional Treaty.

Moreover, the architecture of the Lisbon Treaty does not escape scrutiny on two fronts. First is the hollowness of Article 50(TEU) which gives member states the right to withdraw from the EU. This new provision is at odds with the jurisprudence of Articles 53(TEU) and 356(TFEU) which provide that the Treaty is for an unlimited period. Even though a right to withdrawal might not mean derogating from core European values, the Article fails to clarify what would happen if, hypothetically, all member states decided to withdraw from the Union at once. The Treaty also leaves a vacuum with respect to partial membership and reconciling this back to integration. For example, if a state withdraws from the EU but still participates in EU politics by way of association, this might lead to a cherry picking approach where states pick and choose their duties thus further fragmenting the broader cause for closer integration.

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In that sense, the reasoning behind the entrenchment of Article 50 appears to be anaemic at best. Second is the reception of the Lisbon Treaty by national courts with particular reference to the German Constitutional Court's judgement concerning the Treaty[14]. The German Court had ruled that not only does the EU suffer from 'excessive federalisation'[15] but that the Lisbon Treaty was incapable of ever moving the Union closer to a constitutional democracy[16].

However, there is an irony in the Constitutional Court's ruling on the Lisbon Treaty. It purports to expose the democratic deficiencies inherent within the Lisbon Treaty and yet still fails to declare the Treaty as being unconstitutional. It must be remembered that the evolution of institutions such as the ECJ and the widening of the scope of the EU legal order has been down mainly not to the corporation of member states, but the corporation of national courts. Given the fact that it is a matter of domestic constitutional arrangements under which conditions a national government may commit the member state in the Council[17], it is clear that the German Court's derisory tone towards the constitutional character of the Lisbon Treaty betrays a certain intellectual dishonesty.

Furthermore, the linkage between the EU's constitutional order and the balance of power between EU institutions cannot be ignored in the analysis of the two treaties. In that sense, the Lisbon Treaty fared better than the Constitutional Treaty by closely linking moderate constitutional changes to the wider institutional functioning of the EU. Craig acknowledges that the Lisbon Treaty substantively changed the "architecture of the now TFEU" and that it changed the "legislative process" in both primary and delegated matters[18]. S Dagmar makes a similar analysis highlighting that the Lisbon Treaty struck a balance between an economic and social form of constitutionalism and in turn "re-designing the vertical and horizontal inter-institutional relations"[19] between EU and member state institutions.

These combined analyses emphasise two critical points about the prominence of the Lisbon Treaty's changes as compared to those under the Constitutional Treaty. Firstly, the re-designing of inter-institutional relations between EU institutions emphasises what Dagmar refers to as a 'socially re-embedded' form of governance where there is a more closely knit administrative operation between the different EU institutions[20]. This has led to a greater form of decentralisation within the EU's system of governance and thus helped to re-calibrate the asymmetrical balance of power between EU institutions. Secondly, in line with the changes to the primary and legislative process, Craig shows that the Lisbon Treaty contains a provision on participatory democracy which alters the jurisprudential scope of the EU. This further dispels the stance of the German Constitutional Court by evidencing how legally enshrined participatory rights are not alien to European jurisprudence[21].

In conclusion, it is clear that a marked ideological gulf exists between the Lisbon Treaty and the Constitutional Treaty. The Lisbon Treaty's symbiotic merging of moderate constitutional reform to the inter-institutional operation of the EU better serves the broader purpose of closer integration as compared to the Constitutional Treaty. Crucially, this symbiotic merge seeks to remedy the ideological defect within the Constitutional Treaty by promoting Pan Europeanism without necessarily pandering towards a Pan European super-structure. In hindsight, the Lisbon Treaty is an optimum substitute for the Constitutional Treaty in as far as it endeavours to combine closer integration with a sophistication of the EU's supra-national order.

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Treaty on the European Union(Article 3)

Treaty on the Functioning of the European Union(Article 9)

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[5] Ibid

[6] Ibid

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