

# The Treaty of Lisbon: An Analysis

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NICOLA-ANN HARDWICK, FEB 22 2011

After more than 50 years of European integration, the Treaty of Lisbon is a new step forward but also a deeply contested concept. This essay begins with an overview of how the new Treaty came about and why it was seen as necessary, followed by an analysis of its new developments structured into four parts. Firstly, it considers how the LT is supposed to increase the EU's effectiveness through more qualified majority voting, the co-decision procedure and through institutional changes including the creation of new leading positions. Secondly, democratic values are more clearly defined and roles of the European and national parliaments are reinforced. Thirdly, the LT has attempted to improve citizen's rights, for example by the new citizens' initiatives, as well as by making the Charter of Fundamental Rights legally binding. Fourthly, the LT has introduced several political changes, including more cooperation on the common foreign and security policy and how to combat external threats as a global actor with a single voice. Moreover, this essay considers how the LT differs from the Constitutional Treaty, arguing that although no longer a formal constitution, it does maintain constitutional elements. It then looks at some specific issues; in particular, whether legitimacy, transparency and accountability have been improved, and takes the view that while this is the case to some extent, there remains much room to further improve. Finally, it also focuses on the EU's future outlook in the light of the Lisbon Treaty's amendments, arguing from an intergovernmentalist standpoint, as Member States seek EU cooperation in their own national interests.

After the much criticized Treaty of Nice, the Convention on the "Future of Europe" held in March 2001, followed by the Laeken Declaration in December 2001 marked the beginning of the big debate on European constitutionalism (Church, Phinnemore, 2010: 49). The process of treaty amendment had often caused political difficulties and many enthusiastic European politicians believed that change was necessary in order to improve the EU's efficiency and its political institutions in the face of the enlargement process, while at the same time making the EU's role easier to understand for its citizens (see speeches of Fischer, Chirac, Blair, Lipponen, 2003: 70-88). The Convention produced a "Draft treaty establishing a Constitution for Europe" which was to replace all previous treaties (Bale, 2008: 65). It was further revised by an intergovernmental conference (IGC) and signed in Rome in October 2004 (Kesselman, Krieger, 2009: 28). Eurosceptics criticized this development as an elitist lust for power in order to create a centralized, probably neo-liberal, superstate, replacing popular and national sovereignty (Church, Phinnemore, 2010: 49). It is, however, often overlooked that these reforms were more democratically devised than previous treaty reforms (*ibid.*). Perhaps, however, the EU's decision-makers wanted to achieve too much in too little time. While transparency had been improved slightly through the Convention method (Risse, Kleine: 2007: 70), there was still too little thereof and many were afraid of new developments and argued that the Treaty method, though complicated, still seemed to work fairly well. The referenda in France and the Netherlands rejecting the CT were a huge setback for those who had so deeply endorsed it. During the so-called "period of reflection", the German presidency strongly pushed for a plan that would preserve many of the CT's innovations in the form of a traditional Treaty seeming less "constitutional" and so less alarming. The new Treaty was signed in Lisbon, December 2007. The Irish rejection of the Lisbon Treaty in June 2008 plunged the EU into a new crisis, but there was no reflection period this time and instead Ireland was asked to hold a second referendum. Though many doubted this would happen (The Economist [online], 2008, 19 June), the Lisbon Treaty was eventually ratified by all Member States and came into force December 1<sup>st</sup>, 2009. Intergovernmentalism is a useful line of thought in order to help understand why the EU ultimately returned to its orthodox treaty method (Dinan, 2007: 84). In short, it perceives European integration as an outcome of international bargaining, in which the main actors are national governments striving to accomplish their national preferences through cooperation (Cini, 2010: 87).

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How does the Lisbon Treaty aim to increase the Union's effectiveness in a world characterized by constant change? Firstly, in order to enhance its ability to act, especially in the view of enlargement, and make decisions more legitimate, the decision-making procedure is simplified and democratized (Europaforum.lu [online]: 10f.). Thus, qualified majority voting (QMV) has been extended to around 40 new policy fields in the Council of the EU, based on the principle of dual majority (ibid.). Decisions must be supported by 55% of the Member States representing 65% of the EU's population, which is supposed to create more equality between countries with smaller and larger populations (Articles 9c(4) TEU & 205 TFEU). A blocking minority must consist of at least four states. Certain decisions will still be made unanimously (Europaforum.lu [online]: 10f.). The co-decision procedure allegedly puts the European Parliament on an equal footing with the Council, based on double legitimacy between EU citizens and Member States (Article 251 TFEU). Secondly, the EU is given a single legal status (Article 47, TEU). Article 1 amends the Treaty on European Union (TEU) and Article 2 deals with the Treaty establishing the European Community (TEC), which it renames the Treaty on the Functioning of the EU (TFEU) (Church, Phinnemore, 2010: 56). The European Community and its pillar system disappear and so does the Lisbon Treaty itself, leaving behind an EU with a strengthened potential for effective, credible and coherent external activity (Reh, 2009: 635). Thirdly, the LT defines the EU's exclusive competences such as the customs union; its shared competences like the area of freedom, security and justice; as well as the competence to take supporting, coordinating or complementary action, as for example, in tourism and education (Europaforum.lu [online]: 12). A certain degree of flexibility of the Union is thus maintained (ibid.). Fourthly, enhanced cooperation within a group of at least nine Member States in a specific field is enabled, respecting the interests of various Member States (Articles 10 TEU & 280a-280i TFEU). Other Members may join later or choose to remain outside (ibid.). Fifthly, the LT entails several institutional changes. Now headed by a President elected every 2.5 years (currently Herman Van Rompuy), the European Council becomes a separate institution, which should increase its consistency and transparency (Article 9b TEU; Declaration 6, 28 Article 230 TFEU). From 2014, the number of Commissioners will be reduced to two-thirds of the number of Member States, based on an equal rota system every five years (Article 9d(5) TEU; Declaration 10), which is supposed to make it more effective. The newly-appointed High Representative of the Union for Foreign and Security Policy, Catherine Ashton, is the Vice-President of the Commission (Article 9e TEU), who is responsible for the EU's common foreign and security policy and the common defence policy, giving the Union one voice.

One part of the Lisbon Treaty is devoted to the renewal of the democratic principles of the EU, to making its institutions more open and to increasing the influence of European citizens' voices (Title II & III, TEU). The common values upon which the Union was founded are explicitly defined and clearly explained. All Member States must respect these values, *conditio sine qua*, and if they do not, they can be sanctioned by the European Court of Justice (Europaforum.lu [online]: 18). Moreover, the equality of Member States is respected and their national and regional identities are guaranteed autonomy (ibid.). Member States now have the official right to secession (Article 49a TEU), which signifies an important change and shows that the EU has not, as sceptics argue, turned into a power-hungry superstate. The roles of the European and national parliaments are reinforced in the light of strengthening the democracy and legitimacy of the Union (Europaforum.lu [online]: 19). The EP's legislative and budgetary duties, as well as its function to monitor the Commission, are strengthened (ibid.). The co-decision procedure has been extended and standardized, reinforcing the EP's legislative power (ibid.). A direct link between EP election results and the European Council's candidate for the President of the Commission is established (Article 9d(7) TEU; Declaration 6 & 11). National parliaments' rights and obligations have been clearly laid out and they are to be directly involved in the decision-making process (Europaforum.lu [online]: 19). EU legislative proposals must be in line with the principle of subsidiarity, which states that EU decisions must be taken at the closest possible level to its citizens (ibid: 21).

The LT also improves Citizens' Rights by recalling rights that already existed and by introducing new ones, as well as mechanisms to guarantee that they are respected (Europaforum.lu [online]: 21). Citizens have the right to democratic equality and participatory democracy, which enables an open, transparent dialogue with groups of civil society, churches and other associations and organizations (ibid.). From 2011, if more than a million citizens establish an initiative, they can send a petition to the Commission to submit a legislative proposal to the EP and the Council for consideration concerning the implementation of Treaty objectives (Economist [online], 14 January 2010). The Council now meets in public for votes on draft legislation or for deliberation, and thus citizens are granted more transparency as they can actually see what decisions their government is taking (Europaforum.lu [online]: 21). The

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Lisbon Treaty also makes the Charter of Fundamental Rights legally binding, so it enjoys the same value as the treaties (Church, Phinnemore, 2010: 58). These rights are enforced by the European Court of Justice but its application is restricted in Poland and the UK (ibid.). Additionally, the LT states that the EU will sign up to the independent European Convention on Human Rights (ibid.).

The Lisbon Treaty's political changes strive to create a Union of freedom, security and justice based on the freedoms and fundamental rights of its citizens (Europaforum.lu [online]: 24). A high level of security needs to be maintained in order to ensure the free movement of citizens and combat crime and terrorism (ibid.). Almost all issues of great importance in this field are now decided by qualified majority voting and co-decision between the EP and the Council (ibid.). The LT confirms a joint immigration policy, a common asylum system, as well as a system to manage the Union's external borders (ibid.). The High Representative of the Union for Foreign and Security Policy is supposed to enhance the organization and global visibility of the EU's external action (ibid.). In addition, he or she has an external action service cooperating with national diplomatic services at their disposal (Article 27.3 TEU, Duff, 2007: 4). The competences of the Union's common foreign and security policy are more clearly defined in the LT (Title V, TEU) and eventually the policy might lead to a system of common defence. Defence issues are still subject to the principle of unanimity (Article 42.4 TEU); however, Member States have an obligation to aid and assist another Member in the event of an armed aggression on its territory (Article 42.7). Moreover, Member States should show solidarity when a terrorist attack or a man-made disaster occurs within the Union (Part V Title VII, article 222 TFEU). Furthermore, the LT also addresses the issue of Global Warming and includes a new section on the EU's energy policy with a solidarity clause in case a Member State should suffer from problems of energy provision (Europaforum.lu [online]: 26-27). In addition, it enhances the EU's social policy in many different areas and focuses on EU citizenship, clarifying that the latter complements rather than replaces national citizenship (ibid: 27-29).

The rather dubious manner in which the EU went from constitutionalization to re-de-constitutionalization throws up several questions, in particular whether the Lisbon Treaty is really a *de facto* constitution and its differences from the Constitutional Treaty. Raz (1998) identifies "thin" and "thick" constitutions. A "thin" constitution is any law "that establishes and regulates the main organs of government, their constitution and their powers" (Raz, 1998: 153). Thus, European primary law qualifies as a "thin" constitution; as the Treaties make the regulations for the institutions of government, explain their competences and decision-making rules and relationships (Reh, 2009: 628). According to Andenas, there has been a "constitution ever since it [the EU] was constituted" (2002: 102). Raz suggests seven criteria to identify a "thick" constitution, namely whether it is: constitutive, stable, written, superior, justiciable, entrenched, and whether there exists a common ideology (1998: 153f.), which Reh bundles into three functional categories: formal (includes codification, constitution and continuity), material (entails the definitions and institutionalization of the principles of government), and symbolic (public recognition and acceptance) (Reh, 2009: 629f.). Looking at a constitution regarding these functions de-couples it from the national level (ibid: 630).

Considering all the implications of the Lisbon Treaty, it does not fundamentally change the *status quo* and a lot of the original Constitutional Treaty's content was preserved; however, the LT includes some significant new aspects. The symbolic category mentioned above that existed in the CT, containing constitutional language, a European anthem and flag, was removed. Moreover, the LT's function is to amend rather than replace the previous Treaties. The Lisbon Treaty itself actually disappears, leaving behind the amended TEU and the TFEU, now forming one legal personality, as well as 13 legally-binding Protocols (five of which were originally in the CT), an Annex, a Final Act, and 65 Declarations (Church, Phinnemore, 2010: 56). Therefore, the LT adds to rather than reduces the complexity of the EU. While there is a "constitutional feel" to many parts of the LT, it is not a formal Constitution. More accurately, the Lisbon Treaty is part of an evolving, underlying, informal or "thin", small-c European constitution, similar to that of Britain but based on a different framework (Weiler, 2002: 567). There is little point in labelling the LT either as "Europe's Constitution in all but name" or as the Constitution's failure (Reh, 2009: 327). A formal Constitution alone is not a guarantor for a more efficient democracy; instead, democratic patterns are rooted in the real underlying constitution (Erk, 2007: 634). In other words, had the Constitutional Treaty been enforced, it would not of necessarily have brought drastic change either, as democracy is an evolving process and cannot be expected to happen from one day to the other.

How much success have the LT's new developments shown so far and is it really the Treaty of Treaties? While the

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LT has definitely taken a step forward in combating the democratic deficit, increasing qualified majority voting and Citizens' Rights on paper does not really make citizens feel more included in EU negotiations and policy-making. For the vast majority of people, the EU is still, if not even more so, a vague set of institutions based in far-away Brussels, consisting of unknown and overpaid spokespeople taking decisions to their own advantage. The Lisbon Treaty, though it is supposed to simplify, is so complex in itself that it does not make the Union easier to understand for someone without a degree in law, and it has hardly changed awareness of the EU (The Economist [online], 25 June 2007; Carr, 2009). Not many EU citizens are really aware of their rights as such, which, for example, enable them to submit a petition to the EP or write a letter to an EU institution. As long as this is the case, there will be a continuing debate on the issue of legitimacy as well as the democratic deficit. By creating more popular European media, including newspapers and TV channels that actually have more to offer than EuroNews, for example, EU citizens might be made more aware of what it means to be an EU citizen and of EU policies. Concerning the prospect of a more equal footing between bigger and smaller Member States, recent events have shown that it is mostly countries like Germany and France that actually influence policies (i.e. Irish budgetary crisis, BBC News [online], 22 November 2010). Due to the importance of the German economy, it is likely to keep and increase its influential status within the Union. With regard to the EU as a global actor with a common foreign and security policy, the capability-expectation gap (Hill, 1993) of the EU is still wide, though somewhat strengthened by the creation of a High Representative and the President of the Council. Recalling the different European opinions on recent conflicts, such as Kosovo and Iraq 2003, a strong common foreign and security policy representing the whole of Europe is not easy to imagine and thus further developments in this area will be an exciting issue. Furthermore, while the Lisbon Treaty was supposed to be the last of its kind for a while, less than a year since its enforcement there has already been talk of yet another necessary Treaty revision (The Economist [online], 21 October 2010; 4 November 2010). Largely inspired by the Germans and Angela Merkel in particular, the Commission has proposed intensifying the monitoring of national budgets and economic imbalances and a system of warnings and sanctions (ibid.).

In conclusion, this essay has studied how internally the Lisbon Treaty aims to create more effectiveness, particularly by increasing qualified majority voting and the co-decision procedure of the European Parliament, how it strives to enhance democratic values and provide political changes to improve the Union's policies in fields such as economics, social welfare and environmentalism, while externally its goal is to strengthen the EU as a global actor with one voice. After the failure of the Constitutional Treaty, the Lisbon Treaty can be seen as part of the EU's evolving constitution. The rapid process from euphoric constitutionalism to de-constitutionalization, can be explained by European national parliaments' preference for intergovernmentalism, which encompasses a state-centric approach and sees international bargaining in the form of treaty negotiations as central to the European integration process. The Lisbon Treaty has not brought a revolutionary reform. The democratic deficit, though slightly improved, still has a long way to go, in terms of transparency, openness and public awareness of EU politics. It can be criticized for the tremendous complexity in itself, which doesn't really succeed in bringing the idea of a united Europe and what it entails closer to the people. Moreover, the LT includes the right to secession, stresses the role of national parliaments as well as subsidiarity and proportionality, and first and foremost EU citizens are citizens of their respective countries. The domestic-supranational gap has been widened rather than narrowed (Reh, 2009: 637). At the moment, the Union is thus still far from becoming a "United States of Europe". It is also unlikely that the LT will remain the "Treaty of Treaties", as there is already talk of further change. In a nutshell, the Union is still far from reaching finalité politique.

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