

Federal Trust Policy Commentary

January 2008 • The Federal Trust, 31 Jewry Street, London EC3N 2EY • www.fedtrust.co.uk • info@fedtrust.co.uk

Abridged version of speech given to a conference in Sofia, Bulgaria, on 14th December, 2007. A full version of this speech will be available later in the year on the website of the Bulgarian European Community Studies Association (BECSA), who organised the conference as part of the PHARE project.

Constitutionalisation Without a Constitution

Summary

In the negotiating mandate adopted by the European Council of June, 2007, the heads of state and government asserted that they were abandoning the “constitutional concept” contained in the European Constitutional Treaty rejected by the French and Dutch voters in 2005. In 2004, when the European Constitutional Treaty was signed, it was too early for the Union to give itself such a constitutional document. Nevertheless, the “constitutionalisation” of the European Union is continuing and will continue without either a European constitution or even a formal European “constitutional concept.”

The European Constitutional Convention

The concept of a European Constitution (or more precisely a European Constitutional Treaty) was born in the deliberations of the Convention on the Future of Europe, which met under the chairmanship of the former French President, Valéry Giscard d'Estaing in 2002 and the first half of 2003. The Convention decided to produce a single agreed document and not to present (apart from a minority report signed by a handful of members of the Convention) a range of options to the European Council. More importantly, it went far beyond the cautious original language of the Laeken Declaration in producing a “constitutional text” a mere eighteen months after the heads of state and government had described this simply as a possibility in the “long run.”

Critics of the Convention have sometimes claimed that its work was excessively motivated by the desire to leave an ambitious historical legacy, that of a re-founded European Union. Even if there is some justice in this criticism, it is not the whole truth. The consolidated text of the Union’s treaties which the Convention produced, and which was largely endorsed by the heads of state and government, was a simpler and more comprehensible document than the jigsaw of legal instruments which it sought to replace. Unfortunately, this simplification had its limits and was bought at a political price.

In too many instances, the text adopted by the Convention and finally accepted by the European Council was only acceptable to the Convention as a whole precisely because of its obscurity or ambiguity; both qualities which permitted the dissemination by interested parties of widely differing accounts of what had been agreed. The Charter of Fundamental Rights, the quasi-permanent President of the European Council, the “election” of the President of the European Commission by the European Parliament, the allocation of competences between Union and member states, the so-called “Foreign Minister” for the European Union and the very concept of a European Constitution were all elements of the Convention’s work infused with a deep ambiguity which was the condition of consensus within the Convention. The dividing lines between the integrationists and the intergovernmentalists, between the large countries and the small countries, between the economic liberals and the regulators, between the Atlanticists and the Europeanists, between the new member states and the older member states, between the net beneficiaries of the European budget and the net losers, were simply too many and too deep to allow for an agreement without a

substantial admixture of vagueness and imprecision in its formulation. This ambiguity was a highly damaging legacy for the public discussion in many member states after the Constitutional Treaty had been signed in 2004, and for the referendums in France and the Netherlands in particular.

Research after the French and Dutch referendums suggested that only rarely had voters considered the specifically new proposals of the Constitutional Treaty and used them as a basis for voting against the Treaty. Considerations of purely domestic politics played some role in both the French and Dutch referendum campaigns, and in so far as European issues were decisive for voters, they either related to matters unaffected by the new treaty, such as the Stability Pact and enlargement; or stemmed from a general unease with the perceived current direction of the European Union under the existing European treaties. Some supporters of the Constitutional Treaty have derived comfort from the apparently marginal contribution that the actual text of the new “European Constitution” made to the document’s rejection in France and the Netherlands.

It is possible on the other hand to take an altogether more damning view. It says little for the popular attractiveness of the Constitutional Treaty that two referendums could be held on its text, and that the text itself could be so peripheral to the outcome of these referendums. The Treaty simply did not possess any message or underlying philosophy accessible or arresting enough to serve as the basis for passionate public debate. Despite all the best efforts of the Convention’s members, their European Constitution was not one with which many French or Dutch voters could feel any significant degree of affective identification.

After the two failed referendums in France and the Netherlands, some such outcome as the Treaty of Lisbon was always the most likely result. The long period of stalemate after the events of mid 2005 gave way under the German Presidency to a sudden burst of activity culminating in the mandate for and the signature of the Lisbon Treaty. In the mandate for this Treaty, the heads of state and government spoke of abandoning the “constitutional concept” for the European Union. But if the forms and rhetoric of constitutionalisation have been abandoned, the constitutionalising process itself certainly continues under the aegis of the Treaty of Lisbon. It is today much easier to foresee the final institutional structure of the Union than it was five years ago. A number of previously unresolved institutional questions have either been resolved, or the terms of their future resolution much better defined.

Justice and Home Affairs

The most dramatically important “constitutionalising” aspect of the Treaty of Lisbon is the abolition of the pillar structure of the European Union. In 1992, the Maastricht Treaty established the intergovernmental ‘Justice and Home Affairs’ (JHA) pillar of the European Union, since when the constitutional landscape of JHA has been in continuous evolution. In 1997, the Amsterdam Treaty transferred many of the less politically sensitive areas of JHA (visas, asylum and immigration) from the intergovernmental third pillar to Title IV of the Community pillar. In 2004, the scope of Qualified Majority Voting in JHA was greatly extended under a procedure envisaged in the Amsterdam Treaty. The European Constitutional Treaty of 2004 would in its turn have greatly reduced the scope of intergovernmental decision-making in JHA. Contrary to the expectation of some, the Lisbon Treaty of 2007 has maintained and indeed completed this movement away from intergovernmentalism. With isolated exceptions, JHA decisions will be taken by QMV in the Council of Ministers, with the European Parliament enjoying a full legislative role through the co-decision procedure and the ECJ (in time) having full jurisdiction to enforce JHA decisions.

The European Parliament

A precisely similar development has occurred in the case of the European Parliament, through the generalisation of the co-decision procedure and the reinforcement of the Parliament’s role in monitoring the implementation of European legislation (“comitology”). The latter is an important extension of the Parliament’s powers, but largely bears on matters of technical detail. The constitutional implications of the general application of the co-decision procedure are more obviously significant. In the new areas now subject to co-decision, democratically elected politicians will come to play a larger role in a decision-making process traditionally dominated by civil servants, both national and international, and national ministers for whom European questions represented often only a small proportion of their responsibilities.

The President of the European Commission

Members of the European Parliament are themselves uncomfortably aware of a striking paradox, namely that their increasing powers over the past three decades have not led to generally greater public prestige for or greater public interest in their institution. It may be doubted whether the extension of the co-decision procedure will of itself reverse this phenomenon. Many factors certainly contribute to the lack of public salience of the debates and decisions of the European Parliament, such as the consensual nature of much of its work, the complex nature of the European Union's decision-making system and perhaps above all the absence of an identifiable European executive arising directly from the European Parliament. The Treaty of Lisbon offers the possibility of at least some mitigation for this last restriction on the Parliament's public profile.

In one of its many ambiguous provisions, the Treaty of Lisbon stipulates that in future the European Parliament will "elect" the President of the European Commission "in the light of the results of the European Elections." In fact, the Parliament should more accurately be described as having a veto on the candidate for this post put forward by the European Council, but even this limited power offers intriguing possibilities for the European Parliament. There is no reason why the main political groupings in the European Parliament should not, before the European Elections of 2009, put forward to the European electorate named candidates for the Presidency of the Commission, with the understanding among themselves that after the results of the European Elections were known, they would rally behind the candidate who had been most successful in those elections. Under the new system, the European Parliament certainly does not need to acquiesce in having a candidate imposed upon it, simply because his or her name is the result of horse-trading within the European Council.

The European Commission, Qualified Majority Voting (QMV) and Legal Personality

If the most important constitutionalising aspects of the Lisbon Treaty bear on JHA and the European Parliament, a number of other provisions in the Treaty have constitutional import, such as the reform of the European Commission, the extension of Qualified Majority Voting and the establishment of a legal personality for the Union. The breaking of the exact correspondence between the composition of the Commission and the number of member states is a symbolically important move away from intergovernmentalism, while greater (although by no means universal) use of qualified majority voting under the Treaty of Lisbon will reinforce an unbroken trend of every amendment to the European treaties since the Single European Act. More symbolically and politically significant, however, than either of these changes, is the question of legal personality for the Union.

At a superficial level, the establishment of a legal personality for the Union simply puts an end to an existing controversy about whether the Union may not already have this legal personality. The Union's recognition by third parties as having treaty-signing power would strongly suggest that it does already have this personality and that the Treaty of Lisbon simply recognises an existing reality. It can well be argued that the new treaty's approach to this question is nothing more than a "tidying-up exercise," a controversial description once applied by the British government to the original European Constitutional Treaty as a whole.

Quasi-constitutionalisation: Unresolved issues in the CFSP

Most commentators have drawn attention to the centrality in the Lisbon Treaty of its innovations in the field of the Union's external relations. The provisions of the Treaty of Lisbon on the external actions of the European Union are a conscious attempt to inject new momentum and coherence into the operation of the CFSP. In contrast to the Union's decisive move towards the "communitarisation" of Justice and Home Affairs in the Treaty, its external relations will remain for the foreseeable future an almost exclusively intergovernmental matter. Within this institutional structure, two contributors to future European foreign policy deserve particular consideration: the High Representative, whose powers are reinforced by the Treaty, and the European External Action Service, which will support the activities of the High Representative. Some uncertainty surrounds the effectiveness of both these contributors. The High Representative will depend for his authority in articulating the Union's external policies on the decisions of others; and the composition, budget and detailed remit of the Action Service remain hazy in the extreme.

Where the Lisbon Treaty offers no way forward

On CFSP, the Lisbon Treaty leaves open a number of questions, but does at least point the way towards their solution. Unfortunately, the Treaty also contains a limited number of elements, which either confuse existing structures or create new problems with no clear way of resolving them in the short term. These elements relate particularly to the role of national parliaments and to the President of the European Council.

National Parliaments

The provisions of the Treaty of Lisbon represent a clear compromise between those who wished to create for national parliaments a central and specific role within the European Union's legislative process and those who, for practical or philosophical reasons, did not favour such a role. Like many compromises attempting to bring together genuinely irreconcilable positions, it is unsatisfactory to both parties. The compromise attained by the Lisbon Treaty arguably gives to national parliaments no powers that they do not already enjoy. If a large number of national parliaments today protested to the European Commission about the supposed infraction by a new legislative proposal of the principles of subsidiarity or proportionality, it would be surprising indeed if the Commission took no notice. It also has to be asked how often the Commission would anyway put forward proposals which a large number of national parliaments would find unacceptable specifically on grounds of subsidiarity or proportionality. The supposed new role given to national parliaments under the Lisbon Treaty is likely to be used rarely, if ever.

President of European Council

When the concept of a semi-permanent President of the European Council was first mooted in the European Constitutional Convention, it was the hope of some advocates of the creation of this post that he or she would be endowed with a range of substantial powers to co-ordinate the work of the sectoral Councils and thereby possibly to modify the existing institutional balance of the European Union. In the event, the powers of the new Presidency seem in the Treaty of Lisbon to be limited to the point of marginality. It must be more than questionable just how substantial an impact the new President will be able to make on the day-to-day workings of the Union. Even less plausible is the hypothesis that he or she will be able, even if willing, to alter in any significant manner the existing institutional balance of the European Union.

One of the few specific powers given to the new President, that of external representation, is subject to an unhelpful sharing of responsibility with the High Representative. If, as is widely expected, the new President is a former head of a national government, it may be that he or she initially enjoys greater personal prestige than does the High Representative. It does not follow, however, that he or she will exercise over time more real influence than will the High Representative, whose integration into the European Union's decision-making structures will be much greater than that of the President. Some commentators have hoped that good personal relationships between the President of the European Council and the High Representative will ease and clarify this situation. It is hardly an auspicious beginning for any new post that its evolution should depend so much on the chances of good or bad personal relationships between its first holders and a third party.

Conclusion

A striking feature of discussion about the Treaty of Lisbon has been the ability of commentators, confronted with exactly the same text, to disagree radically over the document's significance. It is psychologically impossible for any commentator to assess the Treaty without being influenced by his or her pre-existent view of the European Union and in particular the way it has developed in recent years. There will not be many commentators content with the recent evolution of the European Union who will find the Lisbon Treaty wholly unacceptable. Equally, there will not be many wholly dissatisfied by the Union's present state who find their underlying discontent cured by the Treaty. Of the four major revisions of the Treaty of Rome, the first two, the Single European Act and the Maastricht Treaty, made more difference to the workings of the European Union than was generally expected at the time. The second pair, the Treaty of Nice and that of Amsterdam, made less. We will probably only know to which category the Treaty of Lisbon belongs when it is too late for either the optimists or the pessimists to do anything about it.