



EU Constitution/Lisbon Treaty

So what's all the fuss about?

'EU Constitution', 'Lisbon Treaty', 'Reform Treaty', it's had so many names and incarnations you may begin to wonder if this is for real? Well, wonder no more, below is a clear and concise summary on what this means for you and how it will effect Britain in this independent analysis by Professor Anthony Coughlan. Professor Coughlan, is the Secretary of the National Platform EU Research and Information in Dublin, and this has been drafted in consultation with authorities on European and Constitutional Law. Professor Coughlan may be reached at 24 Crawford Avenue, Dublin 9, Ireland. Tel: 00-353-1-830792. Email: nationalplatformeuric@eircom.net. (Click the numbers to jump to the detail)

The Lisbon Treaty which was signed by European Union leaders has yet to be ratified in the UK before it can be adopted. This treaty gives the EU the constitutional form of a state. These are the ten most important things the Lisbon Treaty does:

- 1.** It establishes a legally new European Union in the constitutional form of a supranational European State.
- 2.** It empowers this new European Union to act as a State vis-à-vis other States and its own citizens.
- 3.** It makes us all citizens of this new European Union.
- 4.** To hide the enormity of the change, the same name - European Union - will be kept while the Lisbon Treaty changes fundamentally the legal and constitutional nature of the Union.
- 5.** It creates a Union Parliament for the Union's new citizens.
- 6.** It creates a Cabinet Government of the new Union.
- 7.** It creates a new Union political President.
- 8.** It creates a civil rights code for the new Union's citizens.
- 9.** It makes national Parliaments subordinate to the new Union.

10. It gives the new Union self-empowerment powers.

1. The Lisbon Treaty establishes a legally quite new European Union. This is a Union in the constitutional form of a supranational European State:

The Treaty gives this new Union a State Constitution which is identical in its legal effects to the EU Constitution that French and Dutch voters rejected in their 2005 referendums. It does this by amending the two existing basic European Treaties, the "Treaty on European Union" (TEU) and the "Treaty Establishing the European Community" (TEC). The former retains its name, while the latter is renamed the "Treaty on the Functioning of the Union" (TFU). These two amended Treaties become the de facto Constitution of the new Union which they constitute or establish, although they are not called a Constitution. The EU has thus been given a Constitution indirectly rather than in direct form, as had been proposed in the Treaty which the peoples of France and Holland rejected in 2005.

The provision of the Lisbon Treaty that "The Union shall replace and succeed the European Community" (Art.1.3, amended TEU) makes absolutely clear that the post-Lisbon Union will be quite a new entity, as the European Community of which our countries are all currently members ceases to exist.

2. The Treaty empowers this new European Union to act as a State vis-à-vis other States and its own citizens:

To understand the change introduced by the Lisbon Treaty one needs to understand that what we call the European Union today is not a State. It is not even a legal or corporate entity in its own right, for it does not have legal personality. The name "European Union" at present is a descriptive term for all the relations between its 27 Member States. At present these relations cover both the "European Community" area where supranational European law is operative, and the "intergovernmental" areas of foreign policy and justice and home affairs where Member States cooperate with one another on the basis of keeping their sovereignty and where European laws do not apply. The Lisbon Treaty changes this situation by creating a constitutionally and legally quite new EU, while retaining the same name, the "Union".

Unlike the present European Union, this legally new EU will be separate from and superior to its Member States, just as the USA is separate from and superior to California or New York, or Federal Germany to Bavaria or Brandenburg.

This new European Union can sign treaties with other States in all areas of its competence and conduct itself as a State in the international community of States. It can speak at the

United Nations on agreed foreign policy positions of its Member States, just as in the days of the Soviet Union the USSR had a UN seat while Russia, Ukraine and Byelorussia had UN seats also.

The Lisbon Treaty also gives the EU a political President, a Foreign Minister - to be called a High Representative - a diplomatic corps and a Public Prosecutor. The new EU will accede to the European Convention on Human Rights, as all other European States have already done, including those outside the EU.

The Treaty also sets out the principle of the primacy of the laws of the new Union over the laws of its Member States (Declaration 27). The new EU makes the majority of laws for its Member States each year and under the Lisbon Treaty the new Union, which will replace the European Community, gets further power to make laws or take decisions by qualified majority vote in relation to some 68 new policy areas or matters where Member States currently have a veto.

3. The Treaty makes us all real citizens of this new European Union for the first time, instead of our being notional or honorary European "citizens" as at present:-

A State must have citizens and one can only be a citizen of a State.

Citizenship of the European Union at present is stated to "complement" national citizenship, the latter being clearly primary, not least because the present EU is not a State. It is not even a corporate entity that can have individuals as members, not to mind citizens. By transforming the legal character of the Union, the Lisbon Treaty transforms the meaning of Union citizenship. Article.17b.1 TEC/TFU replace the word "complement" in the sentence "Citizenship of the Union shall complement national citizenship", so that the new sentence reads: "Citizenship of the Union shall be in addition to national citizenship."

This gives the 500 million inhabitants of the present EU Member States a real separate citizenship from citizenship of their national States for the first time. It gives a treble citizenship to citizens of Bavaria and Brandenburg within a Federal State like Germany. The rights and duties attaching to this citizenship of the new Union are to be superior to those attaching to citizenship of one's own national State in any case of conflict between the two, because of the superiority of EU law over national law and constitutions. As most States only recognise that one can have a single citizenship, henceforth it is one's Union citizenship which will be regarded by other countries as primary and superior to one's national citizenship.

Although we will be given rights as EU citizens, we should not forget that as real citizens of the new European Union we also owe it the normal citizens' duty of obedience to its laws and loyalty to its authority, which will be a higher authority than that of our national States

and constitutions. Member States retain their national constitutions, but they are subordinate to the new Union Constitution.

As such they will no longer be constitutions of sovereign States, just as the various local states of the USA retain their constitutions although they are subordinate to the Federal US Constitution.

4. To hide the enormity of the change, the same name - European Union - will be kept while the Lisbon Treaty changes fundamentally the legal and constitutional nature of the Union. By this means the importance of the proposed change is kept hidden from the people:

The change in the constitutional nature of both the Union and its Member States will be made in three legal steps that are set out in the Treaty:

(a) It establishes a European Union with an entire legal personality and independent corporate existence in all Union areas for the first time, so that it can function as a State vis-à-vis other States and in relation to its own citizens (Art.32, amended TEU);

(b) This new European Union replaces the existing European Community and takes over all of its powers and institutions. It takes over as well the "intergovernmental" powers over foreign policy and crime, justice and home affairs which at present are outside the scope of European law, leaving only the Common Foreign and Security Policy outside the scope of its supranational power (Art.11.1, amended TEU). It thereby gives a unified constitutional structure to the new Union which it will constitute or establish. The European Community disappears and all spheres of public policy will come within the scope of supranational EU law-making either actually or potentially, as in any constitutionally unified State.

(One says "potentially" because further inter-State treaties would be required to transfer the minority of law-making powers still remaining with the Member States to the new Union in the future, or to shift powers back from the supranational level to the Member States - something that has never happened up to now.

Supranational legislative acts would not yet be adopted in the sphere of Common Foreign and Security Policy and new treaties would be needed to change that. However the Commission, a key supranational body, will through the High Representative/Foreign Minister gain the right of initiative in the foreign policy field, so that even in the light of Art.11.1 TEU a de facto "supranationality" will be attained here);

(c) It makes us all real citizens of the new Federal Union which the Treaty establishes, with all the implications of that for downgrading our present personal status as citizens of sovereign nation States and superseding it by citizenship of a supranational European Federation.

5. It creates a Union Parliament for the Union's new citizens:-

The Lisbon Treaty/EU Constitution makes Members of the European Parliament, who at present are "representatives of the peoples of the Member States", into "representatives of the Union's citizens" (Art.9a, amended TEU). This illustrates the constitutional shift the Treaty makes from the present European Union of national States and peoples to the new Federal Union of European citizens and their national states - the latter henceforth reduced constitutionally and politically to provincial or regional status.

6. It creates a Cabinet Government of the new Union:-

The Treaty turns the European Council, the quarterly "summit" meetings of Member State Heads of State or Government, into an institution of the new Union, so that its acts and failures to act will, like all other Union institutions, be subject to legal review by the EU Court of Justice. Legally speaking these summit meetings of the European Council will no longer be "intergovernmental" gatherings of Prime Ministers and Presidents outside supranational European structures. As part of the new EU's institutional framework, they will instead be constitutionally required to "promote the Union's values, advance its objectives, serve its interests" and "ensure the consistency, effectiveness and continuity of its policies and actions." (Art. 9 amended TEU).

They will also "define the general political direction and priorities thereof" (Art.9b).

The European Council thus becomes in effect the Cabinet Government of the new Federal EU, and its individual members will be primarily obliged to represent the Union to their Member States rather than their Member States to the Union.

7. It creates a new Union political President:-

The federalist character of the European Council "summit" meetings in the proposed new Union structure is further underlined by the provision which gives the European Council a permanent political President for up to five years (two and a half years renewable once) (Art.9b).

There is no gathering of Heads of State or Government in any other international context which maintains the same chairman or president for several years while individual national prime ministers and prime ministers come and go. The federal character of the new

President is emphasised also by the Treaty provision which forbids that person from holding any national office and which lays down that he/she shall "ensure the external representation of the Union".

8. It creates a civil rights code for the new Union's citizens:-

All States have codes setting out the rights of their citizens. The EU Charter of Fundamental Rights will be that. It will be made legally binding by the new Treaty and will be an essential part of the new Union's constitutional structure (Art.6, amended TEU).

The Charter is stated to be binding on the Union's own institutions and on Member States in implementing Union law. This limitation to EU law and to the EU institutions is unrealistic however, because (a) the principles of primacy and uniformity of Union law mean that Member States will not only be bound by the Fundamental Rights Charter when implementing EU law, but also through the "interpretation and application of their national laws in conformity with Union laws" (v. ECJ judgements in the Factortame, Simmenthal and other law cases); and because (b) the Charter sets out fundamental rights in areas in which the Union has currently no competence, e.g. outlawing the death penalty, asserting citizens' rights in criminal proceedings and various other areas.

This gives a new and extensive human and civil rights jurisdiction to the EU Court of Justice and makes that Court the final body to decide what people's rights are in the vast area covered by European law, as against national Supreme Courts and the Court of Human Rights in Strasbourg - the latter Court serving all other European States, not just the EU members - which are our final fundamental rights Courts today. The EU Commission can be expected in time to propose European laws to ensure the uniform implementation and guarantee of the rights provisions of the Charter throughout the Member States, even in areas which are basically outside the scope of Union competence. American constitutional history provides ample evidence of the radical federalising potential of the fundamental rights jurisdiction of the US Supreme Court.

9. It makes national Parliaments subordinate to the new Union:

The Treaty underlines the subordinate role of National Parliaments in the constitutional structure of the new Union by stating that "National Parliaments shall contribute actively to the good functioning of the Union" by various means set out in Article 8c, amended TEU. The imperative "shall" implies an obligation on National Parliaments to further the interests of the new Union.

National Parliaments have in any case already lost most of their law-making powers to the EC/EU. The citizens who elect them have lost their powers to decide these laws too.

The provision of the Treaty that if one-third of the National Parliaments object to a Commission proposal, the Commission must reconsider it but not necessarily abandon it, is small compensation for the loss of democracy involved by the loss of 68 vetoes by National Parliaments as a result of other changes proposed by the Lisbon Treaty.

10. It gives the new Union self-empowerment powers:-

These are shown by:-

(a) The enlarged scope of the Flexibility Clause (Art.308 TEC/TFU), whereby if the Treaty does not provide the necessary powers to enable the new Union attain its very wide objectives, the Council may take appropriate measures by unanimity. The Lisbon Treaty extends this provision from the area of operation of the common market to all of the new Union's policies directed at attaining its much wider objectives.

The Flexibility Clause has been widely used to extend EU law-making over the years;

(b) the proposed "Simplified Treaty Revision Procedure" which permits the Prime Ministers and Presidents on the European Council to shift Union decision-taking from unanimity to qualified majority voting in the "Treaty on the Functioning of the Union" (Art.33.6, amended TEU), where the population size of certain Member States is likely to be decisive; and

(c) the several "ratchet-clauses" or "passerelles" which would allow the European Council to switch from unanimity to majority voting in certain specified areas such as judicial cooperation in civil matters (Art.69d.3.2), in criminal matters (Art.69f.2), in relation to the EU Public Prosecutor (69i.4), and in a number of other areas.

Conclusion:

It is hard to think of any major function of a State which the new European Union will not have once the Lisbon Treaty is ratified. The main one seems to be the power to make its Member States go to war against their will. The Treaty does provide that the EU may go to war while individual Member States may "constructively abstain".

The obligation on the Union to "provide itself with the means necessary to attain its objectives and carry through its policies" (Art. TEC/TFU 269 a), which means raising its "own resources" to finance them, may be regarded as conferring on it wide taxation and revenue-raising powers, although these will require unanimity to exercise.

Currently public expenditure and the tax measures needed to finance it remain overwhelmingly at national state level. This is because such social services as health, education, social security and public housing, as well as defence, policing and public transport - the government functions which cost most money - are still mainly at this level.

However the new European Union will have its own government, with a legislative, executive and judicial arm, its own political President, its own citizens and citizenship, its own human and civil rights code, its own currency, economic policy and revenue, its own international treaty-making powers, foreign policy, foreign minister, diplomatic corps and United Nations voice, its own crime and justice code and Public Prosecutor. It already possesses such normal State symbols as its own flag, anthem, motto and annual official holiday.

As regards the State authority of the new Union, it is embodied in the Union's own executive, legislative and judicial institutions: the European Council, Council of Ministers, Commission, Parliament and Court of Justice.

It is also embodied in the Member States and their authorities as they implement and apply EU law and interpret and apply national law in conformity with Union law. Member States will be constitutionally required to do this under the Lisbon Treaty. Thus EU "State authorities" as represented for example by soldiers and policemen in EU uniforms on our streets are not needed as such.

Allowing for the special features of each case, all the classical Federal States which have been formed on the basis of power being surrendered by lower constituent states to a higher Federal authority have developed in a gradual way, just as has happened in the case of the European Union. Nineteenth century Germany, the USA, Canada and Australia are classical examples.

Indeed the EU has accumulated its powers much more rapidly than some of these Federal States - in the short historical time-span of some sixty years.

The key difference between these classical Federations and the new European Union is that the former, once their people had settled, share a common language, history, culture and national solidarity that gave them a democratic basis and made their State authority popularly legitimate and acceptable.

All stable States are founded on such communities where people speak a common language and mutually identify with one another as one people - a "We".

In the EU however, there is no European people or "demos", except statistically. The Lisbon Treaty is an attempt to construct a highly centralised European Federation artificially, from the top down, out of Europe's many nations, peoples and States, without their free consent and knowledge. If there were to be a European Federation that is democratic and

acceptable, the minimum constitutional requirement for it would be that its laws would be initiated and approved by the directly elected representatives of the people either in the European Parliament or the National Parliaments.

Unfortunately, neither the Lisbon Treaty nor the EU Constitution it establishes contains any such proposal.

By giving a Constitution indirectly rather than directly to the new European Union which it will establish, the Lisbon Treaty sets in place what Belgian Prime Minister Guy Verhofstadt has called the "capstone of a European Federal State".

For the Euro-federalist political elites who have been driving this process over decades this is the culmination of what started nearly 60 years ago when the 1950 Schuman Declaration, which is commemorated annually on 9 May, Europe Day, proclaimed the European Coal and Steel Community to be the "first step in the federation of Europe". The peoples of Europe do not want this kind of highly centralized Federal European Union whose most striking feature is that it is run virtually entirely by committees of politicians, bureaucrats and judges, none of whom are directly elected by the people.

The Constitutional Treaty setting it up has already been rejected by the French and the Dutch in 2005. As French President Nicolas Sarkozy has admitted, the Prime Ministers and Presidents have agreed among themselves on no account to have referendums on the Renamed Constitutional Treaty, for that would be rejected everywhere again. Only the Irish are enabled to have their say on it because of the constitutional case taken before the Supreme Court by the late Raymond Crotty. That action by that great Irishman stopped the State's politicians of that time from ratifying a previous European Treaty, the Single European Act, in an unconstitutional manner.

Footnote

The EU is waiting until the Constitution is ratified before going ahead with areas which will affect our NHS and the setting up of a ministry of the interior.