

The Lisbon Treaty: A constitutional revolution by stealth by Anthony Coughlan

When the Lisbon Treaty came into force at the end of last year, members of the European Parliament, who previously had been “representatives of the peoples of the States brought together in the Community”, became “representatives of the Union’s citizens”. This change in the legal status of MEPs is but one illustration of the constitutional revolution being brought about by the Lisbon Treaty.

For Lisbon, like the EU Constitution before it, establishes for the first time a European Union which is constitutionally separate from and superior to its Member States, just as the USA is separate from and superior to its 50 constituent states, or as Federal Germany is in relation to its Länder.

The 27 EU members thereby lose their character as true sovereign states. Constitutionally, they become more like regional states in a multinational federation, although they still retain some of the trappings of their former sovereignty.

Most people are unaware of these astonishing changes, for two reasons. One is that, with the exception of the Irish, the people of the EU member states have been denied any chance of learning about and debating them in national referendums. The other is that the terms “European Union”, “EU citizen” and “EU citizenship” were already in use before Lisbon, but Lisbon changes their constitutional content fundamentally.

The Lisbon Treaty therefore is a constitutional revolution by stealth.

Three steps to a federal-style Constitution

This revolution takes place in three interconnected steps:

Firstly, the Treaty establishes a European Union with legal personality and a fully independent corporate existence for the first time. This enables the post-Lisbon Union to function as a State vis-a-vis other States externally, and in relation to its own citizens internally.

Secondly, Lisbon abolishes the European Community which goes back to the Treaty of Rome and which makes European laws at present, and transfers the Community's powers and institutions to the new Union, so that it is the post-Lisbon Union, not the Community, which will make supranational European laws henceforth. Lisbon also transfers to the EU the "intergovernmental" powers over crime, justice and home affairs, as well as foreign policy and security, leaving only aspects of the Common Foreign, Security and Defence Policy outside the scope of its supranational powers. The Treaty thereby gives a unified constitutional structure to the post-Lisbon EU.

Thirdly, Lisbon then makes 500 million Europeans into real citizens of the new Federal-style Union which the Treaty establishes. Instead of EU citizenship "complementing" national citizenship, as under the Maastricht Treaty, Lisbon provides that EU citizenship shall be "additional to" national citizenship.

This is a real dual citizenship – not of two different States, but of two different levels of one State. One can only be a citizen of a State, and all States must have citizens. Dual citizenship like that provided for in Lisbon is normal in classical Federations which have been established from the bottom up by constituent states surrendering their sovereignty to a superior federal entity, in contrast to federations that have come into being "top-down", as it were, as a result of unitary states adopting federal form. Examples of the former are the USA, 19th Century Germany, Switzerland, Canada, and

Australia. Lisbon would confer a threefold citizenship on citizens of Federal Germany's Länder.

Being a citizen means that one must obey the law and give loyalty to the authority of the State of which one is a citizen – in the case of classical Federations, of the two state levels, the federal and the regional or provincial. In the post-Lisbon EU the rights and duties attaching to citizenship of the European Union will be superior to those attaching to one's national citizenship in any case of conflict between the two, because of the superiority of EU law over national law and Constitutions.

An alternative source of democratic legitimacy to the Nation State

Under Lisbon population size will in turn become the primary basis for EU law-making, as in any State with a common citizenry. This will happen after 2014, when the Treaty provision comes into force that EU laws will be made by 55% of the Member States – currently 15 out of 25 – as long as they represent between them 65% of the total population of the Union. Germany and France together have one third of the EU's population.

Lisbon provides an alternative source of democratic legitimacy which challenges the right of national governments to be the representatives of their electorates in the EU. The amended Treaty provides: "The functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments."

The constitutional structure of the post-Lisbon EU is completed by the provision which turns the European Council of Prime Ministers and Presidents into an "institution" of the

new European Union, so that its acts, or its failing to act would, like those of the other EU institutions, be subject to legal review by the EU Court of Justice.

Constitutionally speaking, the summit meetings of the European Council will henceforth no longer be “intergovernmental” gatherings outside supranational European structures, as they have been up to now. The European Council will in effect be the Cabinet Government of the post-Lisbon EU. Its individual members will be constitutionally obliged to represent the Union to their Member States as well as their Member States to the Union, with the former function imposing primacy of legal obligation in any case of conflict or tension between the two.

As regards the State authority of the post-Lisbon European Union, this will be embodied in the EU’s own legislative, executive and judicial institutions: the European Council, Council of Ministers, Parliament, Commission and Court of Justice. It will be embodied also in the Member States and their authorities as they implement and apply EU law and interpret and apply national law in conformity with European law. Member States will be constitutionally required to do this under the Lisbon Treaty.

Although the Lisbon Treaty has given the EU a Federal-style Constitution without most people noticing, they are bound to find out in time and react against what is being done. There is no democratic legitimacy to the institutions the Lisbon Treaty establishes and there is nothing that will make people identify with these as they do with the institutions of their home countries. This is the core problem of the EU integration project. Lisbon has, in effect, made the EU’s democratic deficit much worse.

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