Thinking faith
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# Does the European Union Need a Constitutional Treaty?

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Frank Turner SJ of the Jesuits' European Parliamentary Office examines the much-debated Treaty of Lisbon: Is it really needed? Does it threaten British sovereignty? What difference will it make?

As so often, a seemingly innocent question ramifies into a multitude of second-order questions, only a few of which will be discussed here. I imagine that readers of *Thinking Faith* may be interested in two main themes.

Firstly, what is a 'Constitutional Treaty' as opposed to simply a 'Constitution', or simply a Treaty? And is the Treaty of Lisbon such a Constitutional Treaty?


Secondly, from a British perspective, is the Treaty of Lisbon an improvement on what went before? And how valid are the 'typical British objections' concerning loss of sovereignty, the Charter of Fundamental Rights?

My approach will rely on the notion, deeply Christian, of the 'common good': the sum of those conditions of social life which allow social groups and individuals reasonably thorough and ready access to their own fulfilment. The ideal of the common good stands against any benefits to certain groups or individuals that systematically excludes others, and especially the poor. Individuals, groups – and nations – legitimately seek their own good, if and only if that good be compatible with the good of the wider community: in principle, of the whole of humanity. On the other hand, the common good necessarily includes **freedom,** including freedom from any centralised control that denies the relative autonomy of local communities and individuals. This tension between particular and universal goods will play itself out in this reflection.

It is easy to find elsewhere explanations of the EU's institutions and how they function, and institutional analysis is not my focus here. The EU's own websites are often models of clear exposition. Getting beyond 'institutional descriptivism' raises issues of ideology, political conviction, even of fundamental moral orientation. So in this reflection I shall shift from relatively objective description in Part One to a muted personal testimony in Part Two.

## Part One: A Constitutional Treaty?

The *Shorter OED* defines a constitution as 'The system or body of fundamental principles according to which a nation, state, or body politic is constituted or governed'. It cites Thomas Carlyle, 1864: 'By the English constitution we understand a few great traditional principles of government, any fundamental breach of which would involve either tyranny or anarchy'. Interestingly, this citation identifies a key element disappointingly omitted from the OED's definition, though stressed by constitutional theorists. A constitution ought to guarantee a people's essential rights, specify a state's essential obligations, and thus defend subjects against the arbitrary abuse of power.

Famously, Britain lacks a **written** constitution – along with countries such as Israel and New Zealand – so the 'great principles' remain tacit. But even if a single state may survive and flourish on the basis of implicit principles, enshrined in a common tradition, no disparate body of twenty-seven states can plausibly do so. In my view, therefore, the EU needs **some** constitution: positively, to state the basis of its specific laws and practices; negatively, to

declare its **self-limitation**, where its rights and powers end.

As for 'treaty', the *OED* moves from the general to the particular: 'a settlement arrived at by treating or negotiation: a contract between states, relating to peace, truce, alliance, commerce, or other international relation; also, the document embodying such contract'.

By a 'Constitutional Treaty of the EU', then, we may understand a contract between the member states that establishes – or consolidates – the fundamental principles determining the EU's prerogatives, powers and limits.

The Treaty of Lisbon is no such contract. Its full title is 'Treaty of Lisbon amending the Treaty on European Union (i.e. the Maastricht Treaty of 1992) and the Treaty Establishing the European Community' (i.e. the first of the two Treaties of Rome of 1957). According to the prologue , it desires to complete the process embodied in earlier treaties 'with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action'.

The process culminating in the Treaty of Lisbon was originally far more ambitious, even grandiose. The 2004 'Convention on the Future of Europe' planned to draft 'a Treaty establishing a Constitution for Europe' which would have swept away previous treaties, not merely amended them. It was to 'reflect the will of the citizens and States of Europe to build a common future', and would 'establish' the European Union (which of course was already quite well established!). It spoke glowingly of the symbols of the Union: the flag, the anthem, the motto, the currency, and the celebration of 'Europe Day' throughout the Union.

But after the pivotal rejection of that text by the voters of France and Holland, and given the practical certainty that the UK would for once have followed the French lead – though for almost opposite reasons – the Treaty of Lisbon is far more restrained. The tone is more modest, the symbols are stripped out. Minimally, the EU is a 'political system'. It is a 'body politic' too, since it claims common objectives and values, not merely a set of institutions. But it has none of the marks of the legendary giant pseudo-state of 500 million people, ruled from Brussels: no monopoly of legitimate force, no power to determine universal levels of social welfare and taxation or to set a foreign policy. On the contrary, competences not explicitly transferred to the EU remain national competences (*Art* 3a, 1). The EU 'shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security' (*Art* 3a, 2).

In fact, the EU combines two polar modalities: **shared** sovereignty and **national** sovereignty. These tensions are managed through a careful institutional balance:

(i) The European Commission expresses the common life of the EU. Officials of the Commission serve the EU itself, **not** their own country.

(ii) The 750 members of the European Parliament are directly elected by their constituents – that is, citizens of their own member state – and are accountable to those constituents.

(iii) The Council of the EU represents the 'inter-governmental' dimension of the EU. It exists at two levels (of Prime Ministers and Heads of State, and of other government ministers with thematic portfolios). They represent their own mandating governments, and they relate as competitors no less than colleagues.

(iv) The Commission alone has the prerogative to propose and elaborate initiatives. But the Commission is a civil service not a government, and it is the Council and the Parliament which **decide** policy – and on some issues, must decide together ('codecision').

The Treaty of Lisbon in no way dissolves this tension, though it makes important amendments. For example, until now the Presidency of the EU Council had rotated every six months, with a significant cost in discontinuity. Under the Treaty, the Council will elect its President for two and a half years, renewable once. A new post will

combine the present roles of the Commissioner for External Affairs (i.e. a member of the Commission) and the 'Secretary General & High Representative of the Council', although this official will be far from 'Foreign Minister of the EU' since foreign policy remains the competence of the member states. The Treaty actually stresses **subsidiarity** as a core EU principle: that is, the EU may only act in areas that are not better tackled at the national level. For example, national parliaments are given a stronger 'watchdog' role than before – including the responsibility to warn when draft legislative acts of the EU might weaken national sovereignty!

It is true that the EU is given a 'legal personality' (Article 46A). But then even such organisations as the British Province of the Society of Jesus have a legal personality. It is nowhere claimed that EU law as such takes precedence over national laws. Those areas where EU law does have exclusive competence are by definition **cross-border** – such as the customs union and the establishing of the competition rules necessary for the functioning of the internal market (Art 2B).

Finally, it is interesting to observe how the President of the Commission, José Manuel Barroso, as well as several national leaders hailed the signing of the Treaty. Now that the institutional impasse is resolved for the present, they are free to address what 'the people of Europe really care about': for example, climate change, migration, globalisation, economic growth, and security in the face of terrorism. It appears that people 'really care about' Europe's willingness to cooperate to stave off urgent global threats, but not to construct a deeper shared identity: message understood by the EU.

I conclude: the Treaty of Lisbon is **not** a new, free-standing 'constitutional treaty'. With the major exception of the Charter of Fundamental Rights of the EU, to which I shall return, it restructures the institutions in order to cope better with a Union of twenty-seven members, as against fifteen when the Treaty of Nice was signed in 2001.

If the Treaty of Lisbon is not an 'EU Constitution', neither is any other single treaty. We have only a series of treaties signed by the member states of the time, each amending earlier treaties, each accepted by states joining later. For different reasons than the UK, the EU lacks any constitutional document that articulates its character and its vision in a limpid, possibly inspiring manner. Perhaps this lack honestly reflects the messy reality. Nevertheless, even if the EU does not absolutely need a written constitution, it would gain by having one.

## Part Two: The UK and the EU

We all experience 'belonging' at multiple levels. Yet I suspect that many English people (perhaps some other Britons too) are brought up to experience nationality in an unusually narrow sense. Britons speak of each other as 'Eurosceptics' or 'Europhiles', as if they were not Europeans.

A personal example: my generally open-minded father belonged to a generation marked by loyalties that crystallised, even ossified, under the pressure of world wars. As a Catholic he never reconciled himself to the hymn *'Tantum Ergo* being sung to the tune he thought of as 'Deutschland, Deutschland, über alles', though I do not remember his being upset by 'Rule, Britannia, Britannia rule the waves!'. Nationalisms **collide**.

Britons under sixty, however, have had every opportunity by the grace of peace to abandon this mortgage of exclusive nationalism. In its turn, the EU has served that peace well. Sixty million people died of violence in Europe between 1900 and 1950, one million between 1950 and 2000. The EU's concerted military strength is used for peacekeeping not for conquest.

On the whole, and granted some anomalies, I do not feel English or British in any stronger sense than I feel European, though I am usually content

to be both. Yet so often, in Britain, the EU is affirmed insofar as it seems likely to promote British interests, opposed where it is feared to prejudice British interests. In either case 'British interests' are the unchallenged yardstick. Few

would dream of asking of a policy proposed in Westminster, 'Is this good for Europe?'.

Take another example: the British Government has strongly advocated Turkish accession to the EU against other states (e.g., France, Austria) with strong reservations. But the UK's championship of Turkey has struck others as less about **Turkey** than about the defence of the UK's own preferred model of the EU. The UK seeks the broadest possible membership to promote a wider 'common market' (as the EU used to be known in Britain, quite significantly) whilst undermining any **political** project of deepening. In fact Britain has consistently opposed structures that might express and inspire common objectives and identity: the Schengen 'shared space', the single currency, and now the Charter of Fundamental Rights. It is neatly symbolic that Britain's current commissioner, Peter Mandelson, holds responsibility for Trade, the sphere which pre-eminently expresses **national** self-interest by accepting the obvious need to stick together in the face of fierce global competition.

Many Britons, and therefore their government, take sovereignty to be a zero-sum game, assuming that shared sovereignty is lost sovereignty. The founders of the EU believed on the contrary that sharing is an enrichment. This is the central point at issue, and this is why any referendum in Britain ought logically to focus not on the ratification of **this** Treaty but on whether the UK ought or ought not to leave the EU, in order to restore 'true' sovereignty.

### *Charter of Fundamental Rights of the EU*

The Charter is one section of the Treaty that may be called 'transcendent', in that it strives to express the core values of the EU, not just to make its institutions more effective. Britain has opted out. A lawyer could write a treatise on this topic dealing with some of the complex questions arising. Does the Charter simply apply and update the Universal Declaration of Human Rights (UDHR), 1948 – or change it? Since all EU countries belong to the Council of Europe, why was not the Council's 1950 European Convention for Human Rights sufficient for the EU? And does the UK's opt-out from the Charter rest on 'mere' legal technicalities, or does it mark a fundamental rejection of the Charter?

I attempt only some brief clarifications of the first and second questions, and expand on the third.

The Universal Declaration of Human Rights is accepted as an **obligation** of governments, but has no legal force except where enacted into legislation. The Charter, too, is a 'solemn proclamation' rather than itself a legal text. It specifically does **not** 'extend in any way the competences of the Union as defined in the Treaties'; in other words, it confers no additional legal powers. In this sense both the UDHR and the Charter provide 'general principles of law' (Treaty, Art 6.3). The Charter affirms the UDHR while adding certain new elements, as, for example, the prohibition on cloning (Art 3); the 'right to good administration' (Art 41) – which implies that this Charter primarily binds **the institutions of the EU itself**; and workers rights, including 'information and consultation within the undertaking' and collective bargaining and action (Art 27-28).

As to the 1950 European Convention for Human Rights, the EU as such is unable to sign this, since that is the prerogative of sovereign states. If the EU were a superstate, ironically, there would be no problem.

And the United Kingdom's opt-out from the Charter? The most explicit reason for the UK's opt-out is that it goes beyond the European Convention. The Convention limits itself to civil and political rights, the Charter includes economic and social rights. (But so does the UDHR, for example in Articles 23-24 which assure rights to 'just and favourable conditions of work' reasonable limitations of working hours, periodic holidays with pay'.)

The Anglo-Saxon tradition has tended to align itself with the *laissez faire* practices of the USA, preferring to encourage business freedom than to set limits to that freedom. But according to Catholic social thought, civil-political rights and economic-social rights are indivisible. In *Laborem Exercens*, for

instance, Pope John Paul II prioritised the rights of workers over the rights of capital, and even asserted the need for 'ever new movements of solidarity of the workers and with the workers' (sec 8). Over against such normative thinking, the UK fears, pragmatically, that such social rights will threaten its commercial competitiveness. Yet, with the probable exception of France, the UK's European competitors are not unduly harmed by acknowledging such rights. As for its competition with China, India, the USA, etc., the EU can only benefit from holding a common position. I am frankly uncomfortable that the British Government chooses to reject the Charter's provisions on social solidarity, and so to be a moral 'free rider', especially since the Charter itself is so temperate: for example, these workers' rights are assured, but 'in accordance with Community law and national laws and practices'.

### *Conclusions*

Member states that have joined the EU have since flourished, culturally and economically, and precisely as democracies – including such spectacular examples as Ireland, Spain and Portugal. Only one country has ever voted to leave: the 53,000 voters of Greenland, in 1982. Even so, if the UK decided to leave, that could be a rational decision, if to my mind a bad one.

But it would be irrational for the Westminster Parliament (or the voters in some hypothetical referendum) to reject the Treaty of Lisbon in the hope of striking a better deal. The Treaty in no way dissolves the necessary tension between the two modes of collaboration within the EU – association and integration, or 'inter-governmentalism' and 'federalism' – of which the balance must continuously be renegotiated. If anything, the drift is towards a looser and shallower partnership congenial to the UK. I regret that drift, as exemplifying the dominance of market economics over politics; but by the same token it is far less of a threat to those who prize above all the separate identity of the UK.

For Christians, the EU has one clear negative virtue: it is far less likely than the traditional nation-state, or than ethnic groups, to become an 'idol'. It attracts little affection and much criticism. This lack of 'pious esteem' is not unhealthy for a body politic, even if it often seems unfair and self-interested, as national delegations return from EU summits to proclaim their national negotiating gains as 'victories over Brussels' and their compromises as 'Brussels' pig-headedness'.

I also believe the EU has a profound positive virtue. It seems to me a genuine sign of solidarity, helping states to transcend their purely national identity and interests by agreeing to exercise their political authority not alone but together with other states; and by establishing economic arrangements (such as the influential structural funds) embodying a trans-national care for the weak. The EU is no paragon and its supporters should be 'critical'. For example, in my view the EU seriously fails in an obligation it explicitly accepts, of solidarity with those **beyond** its own borders, especially with the poorest peoples of the world: as for example for its trade and migration policy. All signs can be deceptive, all power can be abused, so that 'signs' may become 'counter-signs'. But the same is true of the appeal to national sovereignty, an 'ideal' that the twentieth century has left looking more than shabby.

The UK will not flourish split of from other European countries. Only by wholeheartedly and critically entering the partnership can it help to shape – for the common good and for its own good – the future development of the EU.

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