THE TREATY OF LISBON AND ITS IMPACT ON THE EUROPEAN UNION’S DEMOCRATIC DEFICIT

Stephen C. Sieberson

Editor’s Note: In volume 10 of this journal the editors published an extensive article by the author, entitled “The Proposed European Union Constitution—Will It Eliminate the EU’s Democratic Deficit?” That article analyzed the first draft of the European Union’s Constitution against a wide array of scholarly comment on the EU’s so-called “democratic deficit.” When the Union abandoned the Constitution in 2007, the editors invited Professor Sieberson to follow up his earlier article with an analysis of the Constitution’s replacement, the new Treaty of Lisbon. Because this article builds on the previous piece, the full background analysis will not be repeated. Rather, the author will draw from his earlier catalogue of factors that comprise the democratic deficit, briefly identifying the primary components of the theory and citing representative sources. For each item he will offer a brief evaluation of whether and how the Lisbon Treaty will affect the deficit.

Ph.D. in European Law, Erasmus University Rotterdam; J.D., University of Iowa; member of the faculty, Creighton University School of Law.

I. INTRODUCTION

On December 13, 2007, leaders of the 27 European Union nations met in Portugal’s capital to sign a new treaty amendment called the Treaty of Lisbon. This document has now been forwarded to the Member State governments. If fully ratified, it will amend the EU’s two primary constituent treaties, the Treaty Establishing the European Community (EC Treaty) and the Treaty on European Union (TEU). When it takes effect the Lisbon Treaty will be the latest step in the 50-year course of European integration.

The new Treaty was born out of the Union’s failure to ratify the 2004 Constitution, which would have completely superseded the current Treaties. After the Constitution’s rejection in French and Dutch referenda in 2005, and after two years of unsuccessful salvage attempts, the European Council officially scrapped the controversial document in June of 2007. At the same time the heads of state declared their intention to move forward with a new treaty amendment that would contain most of the Constitution’s substantive and procedural innovations. From that resolve the Lisbon Treaty was drafted and signed during the second half of 2007.

This article will analyze the Lisbon Treaty to determine its potential for reducing the European Union’s “democratic deficit.” This term has been used to describe a perceived lack of democratic structures and processes within the EU’s institutions, in contrast to those that prominently exist at the national level within the Union. After a brief description of three competing theories regarding the character of the EU, the analysis will identify the historical complaints regarding the Union’s lack of democratic legitimacy. This will serve as a concise catalogue of those elements that together comprise the democratic deficit. Against these complaints,
relevant provisions of the Lisbon Treaty will be cited to demonstrate how the
document does or does not respond to the perceived shortcomings. The conclusion
is that the Lisbon Treaty will resolve certain of the expressed concerns, but the
changes are not sufficient to eliminate the EU’s democratic deficit.

II. THE CONTEXT FOR DISCUSSION OF THE DEMOCRATIC DEFICIT

The concept of a democratic deficit in the European Union is intertwined with
an ongoing debate as to what the EU is and, more importantly, what it should be. 7
Three primary schools of thought have characterized this discussion. Intergovernmental. Many commentators believe that the EU is and must remain an
intergovernmental organization (IGO). It may be a sophisticated IGO with an
extensive institutional apparatus, but its powers must be carefully contained. The
Member States must retain their essential sovereignty as nations, and the democratic
rights of citizens must be guarded primarily at the national level. Federal. European
federalists insist that the EU is evolving from its intergovernmental roots into a
federation of some sort. Further centralization of authority is inevitable and
necessary. The process of integration carries with it a recognition that EU citizens
must be able to relate directly to Brussels through democratic rights and processes at
the Union level. Hybrid. The realist position is that the EU has moved well beyond
the IGO model, but it need not integrate to the point of becoming a centrally driven
federation. The hybrid Union possesses a unique blend of interstate and intrastate
elements, applying centralization where useful and leaving much authority at the
national level. Because of the EU’s significant impact on the lives of its citizens,
some features of democracy are appropriate at the Union level, but the EU and its
operating procedures need not contain all of the democratic elements found in the
Member States.

Concerns over the democratic deficit are not confined to the realm of academic
theory. To the contrary, the European Commission raised many such issues in its
July, 2001 White Paper on European Governance.8 Likewise, increasing the
democratic legitimacy of the EU was a principal mandate for the convention that
drafted the Constitution. In the Laeken Declaration of December, 2001, which
instituted the convention, the European Council referred to the “democratic
challenge facing Europe.”9 It asserted that the Union “derives its legitimacy from
the democratic values it projects, the aims it pursues and the powers and instruments
it possesses . . . from democratic, transparent and efficient institutions” and from
contributions by the national parliaments.10 It called for the EU to be “brought
closer to its citizens.”11 These expressions reflect ideas that have been raised by
politicians, journalists, and social critics.

---

7 For an extensive discussion of the debate, see Sieberson, supra note 1, at 175–88.
8 Commission White Paper on European Governance, at 10 COM (2001) 428 final (July 25,
2001) [hereafter White Paper].
9 Laeken Declaration on the Future of the European Union, in Presidency Conclusions,
European Council meeting in Laeken, Annex 1 at 19, 20 (December 15, 2001), available
10 Id. at 22–23.
11 Id. at 20.
In the analysis below, the issues are grouped into two main categories. First, there are broad concerns about the nature of the EU and the way it functions. Second, there are specific complaints and suggestions regarding individual EU institutions and other players related to the Union. It must be emphasized that the democratic deficit concepts identified in this article are by no means universally accepted. Especially to those who subscribe to the intergovernmental or hybrid theories, the EU may be sufficiently democratic in its current form.

III. GENERAL CONCERNS ABOUT THE EU

Official EU polls demonstrate that the citizens of the European Union do not widely understand its structure, its activities, or the benefits it provides. This lack of appreciation translates into a variety of broad criticisms about the Union.

A. Complexity of the EU system

1. The Treaties are an awkward collection of documents.

The Lisbon Treaty rearranges a number of provisions to make the Treaties somewhat easier to navigate. Significantly, the TEU is partly redesigned as an overview of the Union. Its first title offers broad statements of goals and principles, while Title II consolidates and clarifies provisions on democratic principles governing the EU. Title III provides a novel overview of the Union’s primary institutions. After addressing enhanced cooperation and the common foreign and security policy, the TEU concludes with a title governing treaty amendments, accession to the EU, and withdrawal from it.

The Lisbon Treaty also reorganizes the EC Treaty to make it more understandable. The amended Treaty’s Part One offers a particularly useful delineation of the Union’s competences. In the Treaty’s primary substantive section, Part Three, the former Third Pillar provisions of the TEU are joined with related EC Treaty provisions to form a complete title on the “area of freedom, security and justice” (AFSJ). Also, a new Part Five is created to govern all aspects of the EU’s external action other than the TEU’s common foreign and security

---

14 Lisbon Treaty Arts. 1(2) – 1(11).
15 Lisbon Treaty Art. 1(12).
17 Lisbon Treaty Art. 1(22).
18 Lisbon Treaty Arts. 1(23) – 1(50).
19 Lisbon Treaty Arts. 1(54) – 1(61).
20 Lisbon Treaty Art. 2(12).
21 Lisbon Treaty Arts. 2(63) – 2(68). The Third Pillar under the current TEU governs matters of police cooperation and judicial cooperation in criminal matters. TEU Arts. 29–92. Related First Pillar matters in the current EC Treaty include visas, asylum, immigration and judicial cooperation in civil matters. EC Treaty Arts. 61–19.
policy (CFSP). Part Six offers a new title on enhanced cooperation, which replaces provisions that had been located throughout the Treaties.

2. The EU is too complex, containing both a European Community and a European Union.

The current TEU rather unhelpfully states: “The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.” The Community still exists, and it is still technically correct to refer to the Community as the body that carries out most of the EU’s activity (the First Pillar). The Union is the entity that carries out Second and Third Pillar actions. Despite this division, it is normal to use the name “European Union” when referring to all activities under each of the Three Pillars.

Under the Lisbon Treaty the European Union will “replace and succeed” the European Community. The two entities will be one. This is an easily accomplished change that offers true simplification.

3. The Three Pillars are confusing, especially since each Pillar has its own forms of legislation and decision-making.

Legal acts in the current EC Treaty’s First Pillar are “regulations,” “directives,” “decisions,” “recommendations,” and “opinions.” Under the current TEU the Second Pillar employs “common strategies,” “joint actions,” and “common positions,” while the Third Pillar uses “common positions,” “framework decisions,” and “conventions.”

Under the Lisbon Treaty there will be two Pillars. In the amended EC Treaty the First Pillar will include the current Third Pillar, and the Third Pillar will disappear. The expanded First Pillar will remain subject to the EC Treaty’s current instruments and procedures. The Second Pillar will continue its separate existence in the amended TEU, but it will generally become subject to “decisions,” which are a
standard form of action under the EC Treaty. Thus, most EU activity under the Lisbon Treaty will fall under the current EC Treaty’s five forms of action.

4. The division of competences between the EU and its Member State governments is imprecise and confusing.

The current Treaties do mention competences, but they fail to elaborate on them. The Lisbon Treaty responds to this situation by adding to the EC Treaty an entirely new title called “Categories and Areas of Union Competence.” Its articles provide an unprecedented delineation of when Union competence is exclusive, when it is shared with the Member States, and when the EU is limited to taking action that “supports, coordinates or supplements” that of the Member States. EU supporting action may not supersede the basic competence of the Member States in those fields. These provisions are supplemented by a revised version of the EC Treaty’s flexibility clause, Article 308, that permits the Union to act (subject to a unanimous vote of the Council) to achieve an EU objective where “the Treaties have not provided the necessary powers.”

5. There is unclear separation of powers among the EU institutions.

The Commission serves as executive, but also as the body that initiates legislation. The Council serves both as a legislature and as an executive that may implement legislation. The role of the European Council is unclear; is it a senior legislature, senior executive, both of these, or neither?

The EU’s unusual blend of legislative and executive functions will not meaningfully change under the Lisbon Treaty. The Commission will continue to initiate legislation and enforce it. The Council will legislate and retain the

---

33 Lisbon Treaty Art. 1(28)(b).
34 White Paper, supra note 8, at 7, 34–35; Laeken Declaration, supra note 9, at 21–22.
35 See, e.g., EC Treaty Arts. 5, 127(1), 174(4).
36 Lisbon Treaty Art. 2(12).
38 Lisbon Treaty Art. 2(12)(2C).
40 Lisbon Treaty Art. 2(12)(2A)(5).
41 EC Treaty Art. 308, as amended by Lisbon Treaty Art. 2(289).
42 Andreu Olesti-Rayo, Some Remarks on the Participation of Citizens in the Process of European Integration, 8 MICHIGAN STATE UNIVERSITY-DCL JOURNAL OF INTERNATIONAL LAW 651, 661 (1999); Giandomenico Majone, Europe’s ‘Democratic Deficit’: The Question of Standards, 4 EUR. L.J. 5, 8 (1998); White Paper, supra note 8, at 34; Laeken Declaration, supra note 9, at 21–22.
43 EC Treaty Art. 211.
44 EC Treaty Art. 251.
45 EC Treaty Art. 251.
46 The EC Treaty permits the Council to “reserve the right, in specific cases, to exercise directly implementing powers itself.” EC Treaty, supra note 4, Art. 202.
47 The only current Treaty provision describing the European Council in general terms is TEU Art. 4, which states that the body “shall provide the Union with the necessary impetus for its development and shall provide the general political guidelines thereof.”
49 Lisbon Treaty Art. 1(18)(1).
THE TREATY OF LISBON

power to implement. However, there are two notable points of change. First, the Lisbon Treaty makes the unprecedented statement that the European Council is to set policy and not to legislate. Taken at face value, this is a clarification. However, the amended Treaties do provide situations in which new legislation subject to a qualified majority decision on the Council may be referred to the European Council for a consensus decision. The ensuing decision by the European Council is surely legislating. Second, under the Lisbon Treaty the new post of High Representative for Foreign Affairs will combine the roles of the Commission’s vice-president for external relations and chair of the Council’s Foreign Affairs configuration. The new “two-hatted” foreign affairs post may create more operational efficiency in the Union’s external relations, but it actually constitutes a new form of institutional overlap.

6. Shifting methods of decision-making and informal consultations among the EU institutions make it difficult to predict just how legislation will be created.

There is no reason to expect that the adoption of the Lisbon Treaty will alter the informal political and bureaucratic consultations that are part of daily practice in Brussels. In fact, the Lisbon Treaty reiterates the right and responsibility of the Commission, Council and European Parliament to consult with one another.

7. Lack of uniformity in Member State implementation of EU law and participation in EU programs, such as the common currency, creates confusion as to how and where EU law will apply.

The Lisbon Treaty will not affect the ability of EU decision-makers to grant opt-outs and derogations to certain Member States where politically necessary. Indeed, the existing opt-outs in the common currency and in the Schengen program on border controls will be left in place. Furthermore, the new Treaty updates the

---

50 Lisbon Treaty Art. 1(17)(1).
51 Lisbon Treaty Art. 2(236)(249C)(2).
53 See, e.g., Lisbon Treaty Art. 2(51)(b).
54 Lisbon Treaty Art. 1(19). The full title of the High Representative is “High Representative of the Union for Foreign Affairs and Security Policy.” Id. at 1(19)(1).
56 Lisbon Treaty Art. 2(240), replacing EC Treaty Art. 218 (consultation between the Council and Commission only).
57 Majone, supra note 42, at 8; Lord, supra note 55, at 653.
58 Lisbon Treaty Art. 2(101); Protocol on the Euro Group, CIG 14/07, TL/P/en 10; Schengen Protocol, CIG 14/07, TL/P/en 57.
current ‘Treaties’ provisions on enhanced cooperation, and it will permit other forms of cooperation among groups of Member States.

8. The EU’s Treaties have been amended every few years, causing uncertainty and instability.

The Lisbon Treaty will perpetuate the Treaties as instruments containing a great deal of procedural and substantive detail. Because today’s Treaty authors cannot anticipate the precise needs that will arise from Europe’s ever-changing economic and political landscape, it is inevitable that the Treaties will require further amendment in due course. In contrast, a more broadly worded document such as the United States Constitution has proven to be more flexible in its interpretation and thus more resistant to periodic amendment.

9. The EU itself is regularly changing through accessions, creating an ongoing identity crisis.

The EU will likely continue to expand under the Lisbon Treaty. Interestingly, the new Treaty will for the first time provide a mechanism for states to withdraw from the EU. The effect of this provision is difficult to predict, but it will permit the EU to evolve by contraction as well as expansion.

B. Lack of Accountability

1. Too much EU activity is carried out by non-majoritarian institutions, such as the Commission, the European Court of Justice, and the European Central Bank, none of which are directly accountable to the citizens of the EU.

The general powers of these institutions will not be changed by the Lisbon Treaty, and they will not be subject to any significant new accountability requirements. However, increased co-decision in legislation under the Lisbon Treaty means that the more democratic European Parliament will have a greater role in creating EU law. Furthermore, as noted in part IV(B) below, national
parliaments will be granted a greater consultative role on new legislation, and a right of citizen initiative will be created.

2. *The Commission and Council should be more accountable to the European Parliament, as is the government in a parliamentary system.*

   The Lisbon Treaty offers no significant change to the inter-institutional checks and balances found in the Treaties. The Commission as a whole will remain subject to censure by the Parliament, but its individual members will not be subject to such control. The Parliament will have no authority to censure or otherwise assert control over the Council as a body or over its individual members. However, the Lisbon Treaty issues a reminder that both European Council and Council members represent their respective national governments, “themselves democratically accountable either to their national Parliaments, or to their citizens.”

3. *The technocrats in Brussels are distant from the public and unaccountable for their actions.*

   Except for the increased access to Council meetings and EU documents described below, no new direct accountability mechanisms are built into the Lisbon Treaty.

C. Lack of Transparency

1. Too much EU activity takes place behind closed doors. Official meetings of Union institutions should be held in public.

   The Lisbon Treaty will require the Council to meet in public “when it deliberates and votes on a draft legislative act.” It also requires the European Parliament to meet in public. Neither of these requirements is found in the current Treaties. However, even under the Lisbon Treaty neither the European Council nor the Commission will be subject to such rules. For more on this, see further comments below on the scope of the Council’s open-meeting mandate.

2. Better information must be disseminated by EU institutions. The public should be granted wider access to Union documents.

   The Lisbon Treaty will increase the public right of access to EU documents, expanding the coverage under the current Treaties from the Parliament, Council, and

---

68 Lisbon Treaty Art. 1(18)(8).
70 Laeken Declaration, supra note 9, at 21.
73 Lisbon Treaty Art. 2(28)(a).
Commission to "documents of the Union institutions, bodies, offices and agencies, whatever their medium." For more on this, see further comments below on how this requirement will apply to the European Court of Justice and the European Central Bank.

D. A Delivery Failure—Lack of Social Legitimacy

The EU fails to deliver the output demanded by its citizens. The EU would be more widely accepted by the Europeans if it would more effectively deliver the social justice and general social welfare that they expect.

The Laeken Declaration itself mentions a public demand for "more jobs, better quality of life, less crime, decent education, and better health care," but the Lisbon Treaty has not responded with a significant expansion in Union-wide social programs. One shift in emphasis is that the Lisbon Treaty declares the Charter of Fundamental Rights to be of "the same legal value as the Treaties." Currently the Charter has been adopted by the Union as a "solemn proclamation" but not as part of the Treaties. The Charter guarantees a wide range of both civil and social rights, and its new status could open the door to more aggressive enforcement of its broad principles by the European Court of Justice. In time, this might play a role in increasing the EU's social legitimacy. Overall, however, the Lisbon Treaty focuses on structural and procedural improvements, doing little to expand a social welfare agenda for the EU.

E. Lack of a European Demos

It will be difficult to create more democracy in the Union in the absence of a demos, an identifiable people. There can be no demos in a continent with so many different languages and cultures.

The more permanent European Council president and the new High Representative for Foreign Affairs (both of which are discussed below) will be recognizable public figures who might offer EU citizens a greater sense of shared identity. Furthermore, the increasing success of the EU project may contribute to increasing acceptance of a European identity that could supplant national identity on
many fronts. Nonetheless, a treaty amendment by itself can do little to alter the average Union citizen’s primary identification with his or her Member State.

IV. SPECIFIC CONCERNS ABOUT THE EU INSTITUTIONS AND OTHER ACTORS

This section will identify specific criticisms of the primary EU institutions and other actors, framed in terms of the democratic deficit. The analysis will also identify suggestions for improving the institutions and their methods of operation.

A. Improving the Institutions and the Institutional Balance of Power

The Laeken Declaration asks whether there should be a “reorganisation of competence” among the EU institutions, and how “balance and reciprocal control” among them could be ensured. An ongoing concern is that the “institutional” or “constitutional” EU bodies (principally the Commission, Court of Justice, and European Central Bank) may enjoy dominance over the “majoritarian” institutions (the European Parliament and Council), thus contributing to a lack of democratic control over EU activity. These concerns are not universally shared, but they frame the institutional aspects of the democratic deficit debate.

1. European Parliament

The Parliament has enjoyed a steady expansion of its powers, but it is argued that a further increase in its authority is necessary to enhance democracy at the EU level. Four principal changes have been suggested:

a. The Parliament should have the right to initiate legislation, a power generally reserved to the Commission.

As under the current EC Treaty, the Lisbon Treaty will permit the Parliament to “request” the Commission to propose legislation, and the Lisbon text adds that the Commission must inform Parliament of its reasons if it does not act on the request. The Lisbon Treaty will not give Parliament the general right to initiate legislation.

b. The Parliament’s co-decision authority on new legislation should be extended.

The current Treaties provide for both “co-decision,” in which the Parliament’s approval is necessary for the enactment of EU legislation, and “cooperation,” in which the Parliament is merely consulted and its approval is not necessary. The Lisbon Treaty will eliminate cooperation and make co-decision the “ordinary

---

83 Laeken Declaration, supra note 9, at 22, 23.
84 Mény, supra note 76, at 11.
85 Majone, supra note 42, at 7; Newman, supra note 74, at 180.
86 EC Treaty Art. 192.
87 Lisbon Treaty Art. 2(181).
88 White Paper, supra note 8, at 34; Von Bogdandy, supra note 55, at 50.
89 EC Treaty Art. 251.
90 EC Treaty Art. 252.
91 Lisbon Treaty Art. 2(240).
legislative procedure. This sounds like a significant development, but in fact there are only a few areas in the current Treaties in which the cooperation procedure is applicable. Furthermore, the Lisbon Treaty contains many provisions relating to non-legislative decisions of the Council in which the Parliament must be consulted but lacks a vote on the matter. As a result, the Lisbon Treaty’s full adoption of co-decision is a modest step.

c. Parliament’s budgetary powers should be increased.

Under the current EC Treaty the Parliament’s right to amend the EU’s annual budget is limited to compulsory expenditures. The Treaty states that the Parliament has a right “to amend the draft budget” and to propose to the Council “modifications to the draft budget relating to expenditure necessarily resulting from this Treaty or from acts adopted in accordance therewith.” Under the Lisbon Treaty the Parliament must approve the budget and may propose amendments to any part of it. The Lisbon Treaty thus expands the Parliament’s role, making it a full co-participant with the Council in the budgeting process.

d. There should be more parliamentary oversight over the Council (e.g., the ability to dismiss the Council or its members through a no-confidence vote) and over the Commission (e.g., a greater role in selecting the Commission President, and the ability to dismiss individual Commissioners).

The Lisbon Treaty offers the European Parliament no authority to dismiss the Council, no greater power in selecting the Commission or its president, and no authority to dismiss individual Commission members. The Parliament’s existing right to dismiss the entire Commission is preserved.

2. European Council

The primary issues regarding the European Council under the Treaties relate to its institutional role and its rotating presidency. It is argued that these factors contribute to the distancing of the EU from its citizens:

---

92 Lisbon Treaty Art. 2(239)(a).
93 The only instances in which the cooperation procedure is found after the Treaty of Nice relate to certain matters of economic and monetary union. See EC Treaty Arts. 99, 102, 103, 106.
95 Devuyst, supra note 55, at 38.
96 EC Treaty Art. 272(4) (emphasis added).
97 Lisbon Treaty Art. 2(265).
99 EC Treaty Art. 201; Lisbon Treaty Art. 1(18)(8).
a. The European Council’s status within the EU is unclear, and there is uncertainty as to its formal responsibilities.\textsuperscript{100}

The Lisbon Treaty for the first time lists the European Council among the EU institutions,\textsuperscript{101} although there may be no legal or practical consequence resulting from this clarification. Another new provision states that the European Council “shall not exercise legislative functions,”\textsuperscript{102} a concept that may offer some legal, if not practical substance. Realistically, the European Council will surely retain the political muscle to direct the legislative activities of the Council. Furthermore, there are instances under the Lisbon Treaty in which legislative decisions may be referred from the Council to the European Council.\textsuperscript{103} Its general charge to set broad policy guidelines for the Union is carried over from the TEU.\textsuperscript{104} The Lisbon Treaty does offer a measure of clarification as to the European Council, but little substantive change.

b. The European Council’s rotating presidency lacks continuity and is confusing to the average EU citizen.\textsuperscript{105}

The Lisbon Treaty will create a new, non-rotating European Council President who will not hold a national office, who will represent the European Council on a daily basis to interface with other EU institutions, and who will “ensure” the representation of the Union in its common foreign and security policy.\textsuperscript{106} This new position will be highly visible, but the President does not have the right to vote,\textsuperscript{107} and he or she may possess little actual power. Furthermore, the President’s external affairs mandate appears to overlap with that of the new High Representative for Foreign Affairs, who must “conduct” the Union’s common foreign and security policy.\textsuperscript{108} Overall, the new President will provide continuity, but the actual job description is confusing. The first President will surely set significant precedents for the success or failure of this position.

3. Council

As the EU’s senior legislative body, and as the institution representing the Member States in most EU decisions, the Council is prominent and possesses great power. The following are common criticisms and suggestions:

\textsuperscript{100} White Paper, supra note 8, at 29.
\textsuperscript{101} Lisbon Treaty Art. 1(14)(1).
\textsuperscript{102} Lisbon Treaty Art. 1(16)(1).
\textsuperscript{103} See, e.g., Lisbon Treaty Art. 2(51)(b).
\textsuperscript{104} TEU Art. 4; Lisbon Treaty Art. 1(16)(1).
\textsuperscript{105} Eurobarometer 59, supra note 12, at 34; Laeken Declaration, supra note 9, at 23.
\textsuperscript{106} Lisbon Treaty Art. 1(16)(5).
\textsuperscript{107} Lisbon Treaty Art. 2(189)(201a)(1).
\textsuperscript{108} Lisbon Treaty Art. 1(19)(2).
a. The Council’s legislative and executive roles are confusing.\textsuperscript{109}

Under the Lisbon Treaty the Council will retain its primary role as the EU’s senior legislature.\textsuperscript{110} However, it will also retain the right in certain cases to act as an executive that carries out the implementation of Union law.\textsuperscript{111} Thus, the new Treaty will not eliminate the current confusion.

b. The Council should be more transparent in its workings.\textsuperscript{112}

The Lisbon Treaty will require the Council to meet in public “when it deliberates and votes on a draft legislative act.”\textsuperscript{113} Legislative acts are regulations, directives, and decisions.\textsuperscript{114} This open meeting rule is unprecedented, but practically speaking the new requirement will not prevent extensive discussions behind closed doors prior to formal “deliberations.” Furthermore, deliberation and voting on non-legislative acts (which include recommendations and opinions) need not be public. This is a gain in transparency, but a modest one.

The Lisbon Treaty will maintain the current Treaties’ requirement of public access to Council documents.\textsuperscript{115} One small change is that such access will be subject to regulations approved by the Council and Parliament rather than subject to the Council’s own rules of procedure.\textsuperscript{116}

c. The Council should be more accountable to the European Parliament.\textsuperscript{117}

The Lisbon Treaty will not give the Parliament any institutional control over the Council.

d. Qualified majority voting (QMV) on the Council should be extended to new areas.\textsuperscript{118}

The Lisbon Treaty states that QMV will be the default requirement for the Council,\textsuperscript{119} but this alone will not cause any meaningful shift from unanimity to

\textsuperscript{109} Newman, supra note 74, at 183; Lord, supra note 55, at 652–53.
\textsuperscript{110} EC Treaty Art. 251; Lisbon Treaty Art. 1(17)(1).
\textsuperscript{111} EC Treaty Art. 202; Lisbon Treaty Art. 2(236)(249C)(2).
\textsuperscript{112} Newman, supra note 74, at 183.
\textsuperscript{113} Lisbon Treaty Arts. 1(17)(8), 2(28)(a).
\textsuperscript{114} The Lisbon Treaty requires regulations, directives and decisions to be adopted by “legislative procedure.” These are called “legislative acts.” Lisbon Treaty Art. 2(236)(249A). This leaves recommendations and opinions as legal acts that are not legislative acts.
\textsuperscript{115} EC Treaty Art. 255; Lisbon Treaty Art. 2(28)(b).
\textsuperscript{116} Lisbon Treaty Art. 2(28)(d).
QMV in substantive matters. A significant extension of QMV will result from the transfer of the unanimity-based Third Pillar into the QMV-based First Pillar. Furthermore, a number of new fields of EU activity will be subject to the ordinary legislative procedure, which entails a qualified majority vote on the Council. These new fields include space, energy, tourism, sport, civil protection, administrative cooperation and humanitarian aid. The Lisbon Treaty carefully preserves unanimous voting in the Second Pillar and in most other areas of national sensitivity. It does not convert the EU into a fully majoritarian system.

e. The Council’s rotating presidency is confusing and inefficient.

Under the Lisbon Treaty, the Foreign Affairs configuration of the Council will be permanently chaired by the High Representative for Foreign Affairs. This will provide stability and continuity. Presidencies of the other configurations will continue to rotate every six months, although under the new Treaty a draft decision of the European Council will provide for groups of three Member States to share and coordinate the presidencies for periods of 18 months. This is a modest change from the present form of cooperation, in which the current presidency may informally receive assistance and coordination from the Member States representing the immediately preceding presidency and the one to follow.

Whether joint coordination and cooperation among the same three Member States for an 18-month period will result in more operational and policy consistency remains to be seen. It might be argued that the disruption caused by a complete replacement of the presidency team every year and a half would be greater than that caused by informally adding and removing a cooperating member every six months. However, even under the Lisbon Treaty’s proposed system it should be expected that outgoing and incoming presidencies will be available for consultation. Furthermore, the Committee of Permanent Representatives (COREPER) will remain fully active in providing ongoing bureaucratic support for the Council.

---

119 Lisbon Treaty Art. 1(17)(3). The default procedure under the current EC Treaty is a majority vote, EC Treaty Art. 205(1). However, most Council decisions are specified in the EC Treaty as either requiring either a qualified majority vote or unanimity.
120 The Pillars are described in parts II(A)(1) and (3) above.
121 Lisbon Treaty Art. 2(236).
122 Lisbon Treaty Arts. 2(142)(2) (space); 2(147)(2) (energy); 2(148) (tourism); 2(124) (sport); 2(149) (civil protection); 2(150) (administrative cooperation); 2(168)(3) (humanitarian aid).
123 Eurobarometer 59, supra note 12, at 34; Laeken Declaration, supra note 9, at 23.
126 In the area of the common foreign and security policy, the cooperative arrangement has been referred to as a “troika,” although Article 18(4) of the TEU says only that the current Council presidency “shall be assisted in these tasks if need be by the next Member State to hold the Presidency.”
4. Commission

The Commission, as the EU’s most bureaucratic institution, is regularly criticized for its remoteness and lack of accountability. A number of suggestions have been made:

a. The Commission should be popularly elected or chosen solely by the European Parliament.\textsuperscript{128}

The Lisbon Treaty does not propose the popular election of the Commission. It preserves the current right of the Parliament to approve first the Commission President and then the entire Commission, although all of them will first be selected by the European Council or Council and then presented to the Parliament for its approval.\textsuperscript{129} The Parliament will retain a real veto, but its procedural authority essentially will carry over from the current Treaties. One interesting innovation in the Lisbon Treaty is its requirement that the European Council must propose the new Commission President after “taking into account the elections to the European Parliament and after having held the appropriate consultations.”\textsuperscript{130} These guidelines have something of a democratic flavor, but their significance in practice may be minimal.

b. The Commission and its individual members should be more subject to control of the European Parliament.\textsuperscript{131}

The Lisbon Treaty will retain the current right of the Parliament to remove the entire Commission,\textsuperscript{132} but will offer no control over individual Commissioners.

c. The Commission should be more accountable in general to the European citizenry.\textsuperscript{133}

As under the current Treaties, the Lisbon Treaty will require the Commission to carry out its work in an entirely independent manner, free from instruction by any Member State government or any other institution or body.\textsuperscript{134} The eventual reduction in the size of the Commission to a number equal to two-thirds of the Member States\textsuperscript{135} may be seen as a step to increase the body’s efficiency and effectiveness. However, it may also be argued that this will decrease the Commission’s current direct connection with the people of each Member State and thus further isolate it from the European public. The Lisbon Treaty offers no mechanism for the public to select or remove the Commission.

\textsuperscript{128} Vernon Bogdanor, \textit{The Future of the European Community: Two Models of Democracy}, 21 GOVERNMENT AND OPPOSITION 161, 175–76 (1996); Laeken Declaration, \textit{supra} note 9, at 23.
\textsuperscript{129} Lisbon Treaty Art. 1(18)(7); EC Treaty art 214(2).
\textsuperscript{130} Straw, \textit{supra} note 27.
\textsuperscript{131} Lisbon Treaty Art. 1(18)(8); EC Treaty Art. 201.
\textsuperscript{132} Newman, \textit{supra} note 74, at 183–84.
\textsuperscript{133} Lisbon Treaty Art. 1(18)(3); EC Treaty Art. 213(2).
\textsuperscript{134} Lisbon Treaty Art. 1(18)(5). The reduced Commission will be instituted in 2014.
d. *The Commission’s near-exclusive right of legislative initiative should be shared with the more democratically accountable Council or European Parliament.*

The Lisbon Treaty offers no significant change in who may initiate legislation. However, under the Lisbon Treaty the Commission for the first time will be required to state its reasons if it chooses not to honor a request by the Parliament to initiate a particular piece of legislation. This is a measure of accountability, but with no powers or penalties attached.

e. *The Commission’s work should be more open.*

The Lisbon Treaty will not require open Commission meetings, but under the new Treaty the public right of access to Commission documents will be maintained. This access will be subject to regulations rather than, as under the current Treaties, the Commission’s own rules of procedure.

5. European Court of Justice

*The Court has been criticized for its independence, particularly in relation to its seminal opinions that legitimized its own authority.* Also, there are concerns about lack of public input into the appointment of its members.

A court system removed from politics is considered a necessary component of any democracy, particularly because courts serve as the guardians of minority rights. The Lisbon Treaty offers very little change with respect to the Court and its basic powers. In fact, the new Treaty reiterates an EC Treaty statement that the Court must “ensure that in the interpretation and application of this Treaty the law is observed.” Furthermore, the Lisbon text, in its general description of the Commission, adds that it “shall oversee the application of Union law under the control of the Court of Justice.” Taken together these phrases confirm that the Court will retain the stature that it has developed during the past 50 years.

The Lisbon Treaty does provide that the Court will be subject to the access-to-documents requirements, but then “only when exercising [its] administrative tasks.” Furthermore, the suitability of proposed judges will for the first time be

---

136 Majone, supra note 42, at 7–8; White Paper, supra note 8, at 33.
137 Lisbon Treaty Art. 2(181). See EC Treaty Art. 192. In certain instances legislation under the Lisbon Treaty may be initiated by a group of Member States, the European Parliament or other EU Bodies. See Lisbon Treaty Art. 2(236)(249A)(4).
139 Lisbon Treaty Art. 2(28)(b), (d); EC Treaty Art. 255.
141 Mancini, supra note 67, at 212.
142 EC Treaty Art. 220; Lisbon Treaty Art. 1(20)(1). Note that in this phrase the Lisbon Treaty says “the Treaties” rather than “this Treaty.”
143 Lisbon Treaty Art. 1(18)(1).
144 Lisbon Treaty Art. 2(28)(d).
reviewed by an independent advisory panel. These are minor developments, but they do respond to some extent to the concerns that have been raised about the Court.

6. European Central Bank

The European Central Bank has been criticized for being completely independent in its work. Despite such criticism, the independence of the ECB and its insulation from political pressure are generally accepted. The Lisbon Treaty does not propose any changes for this institution, except that, like the Court of Justice, it will be subject to the access-to-documents requirements, but “only when exercising [its] administrative tasks.”

B. Other actors in relation to the EU institutions

1. Member State governments

The role of the Member State governments in making EU law should be clarified and enhanced.

As discussed in part III(A)(4) above, the Lisbon Treaty’s new articles on the division of competences offer a clearer explanation as to when the EU may legislate and when it should defer to the Member States, but they arguably will not add any procedural authority to the Member States. However, in an expansion of procedures existing under the current Treaties, new protocols will offer national parliaments the right to (i) review proposed EU legislation with respect to the principles of subsidiarity and proportionality, (ii) force further review of proposed legislation, on subsidiarity grounds, and (iii) challenge legislation, on subsidiarity grounds, in a case brought before the Court of Justice. These rights represent a significant opportunity for greater input from the national capitals, but the Member State parliaments will not be given any actual power to approve or veto proposed EU legislation.

2. Civil society; regional and local governments

The Economic and Social Committee (representing civil society) and the Committee of the Regions, (representing regional and local governments) should have a role in approving EU legislation.

145 Lisbon Treaty Art. 2(209).
147 Lisbon Treaty Art. 2(28)(d).
148 Cassen, supra note 117, at 159; Laeken Declaration, supra note 9, at 3.
149 Lisbon Treaty Art. 2(12).
151 White Paper, supra note 8, at 4, 13.
The Committees will retain their current consultative status, but no voting power will be added by the Lisbon Treaty.\textsuperscript{152} However, a protocol to the new Treaty does offer both Committees for the first time the right to receive annual reports from the Commission regarding compliance of new EU laws with the principle of subsidiarity.\textsuperscript{153} Further, the Committee of the Regions is given the right to commence an action with the Court of Justice to challenge any new legislative act on the ground that it violates the subsidiarity principle.\textsuperscript{154}

3. Individual EU citizens

\textit{Individuals represent the deepest layer of democracy, and they should have greater rights and powers within the EU system.}\textsuperscript{155}

As noted in Part III(D) above, the Lisbon Treaty elevates the Charter of Fundamental Rights to Treaty status. This may provide greater recourse for EU citizens to seek enforcement of their rights in the courts of the Union. More open meetings and expanded access to documents have also been discussed above, and these are of direct benefit to the individual. Finally, the Lisbon Treaty creates a completely unprecedented right of citizen initiative.\textsuperscript{156} At least one million citizens from a “significant number” of Member States may “invite” the Commission to submit a particular piece of legislation. The editors of the European Law Review have complained that this is a “gimmick” that “reeks of crass populism,”\textsuperscript{157} but this is a clear example of the Lisbon Treaty’s authors attempting to bring the EU “closer to its citizens.”\textsuperscript{158}

V. WHAT REMAINS OF THE DEFICIT?

The Lisbon Treaty does respond to many of the concerns that comprise the EU’s democratic deficit. There will be less complexity as a result of a single EU entity, new overview provisions in the TEU, the formal elimination of the Third Pillar, and more consistency in the Union’s legislative instruments. The democratically elected and representative European Parliament will play a somewhat more significant role as a full co-legislator and full participant in the budgetary process. The European Council President and High Representative for Foreign Affairs will create new visibility for the Union and perhaps a greater connection with its citizens. National parliaments will play a more important role, albeit largely consultative, with respect to proposed Union legislation. EU citizens will receive the benefits of better information from open Council meetings and more uniform rules for access to Union

\textsuperscript{153} Protocol on Subsidiarity, \textit{supra} note 150, Art. 9.
\textsuperscript{154} Id. Art. 8.
\textsuperscript{156} Lisbon Treaty Art. 1(12)(8B)(4).
\textsuperscript{158} Laeken Declaration, \textit{supra} note 9, at 20.
documents. They will also enjoy a new initiative procedure and more formal protection of fundamental rights. In short, the Lisbon Treaty demonstrates that the European Union can be revamped to offer more openness and more opportunities for public input. It can be more like a national government, with more of the trappings of democracy.

Overall, this is a commendable set of gains, but does it eliminate the democratic deficit? It does not. Of the identified concerns over democratic legitimacy, many have not been fully or even partially addressed. The open items may be seen as falling into two categories: those that need not be dealt with, and those that must.

The complaints that arguably need not be resolved are the following:

- Fashioning a simple, understandable Union is not really possible, because all governments are highly complex.
- Fostering full social legitimacy is neither feasible nor necessary, given the fact that social programs are highly political, and that no government can satisfy all of its constituents.
- Creating a European *demos* is nothing but a theoretical construct, and it can be argued that most of the EU Member States themselves have such demographic diversity that they cannot be said to have a true national *demos*.
- Ensuring democracy does not require a Treaty that never needs amending or a union that will never change its membership.
- If effective democratic structures are offered through the existing EU institutions, it will not be necessary to offer further involvement to the national parliaments, regional governments, or civil society.

Since these issues are either beyond remedy or of relatively minor concern, it is contended that they may remain open without preventing the elimination of the EU’s democratic deficit.

What remains, then, are the identified concerns that arguably go to the heart of the democratic deficit. These issues reflect an aspiration to have the EU more closely resemble the governments of its Member States, but the Lisbon Treaty has not met the demands for their implementation. They include the following:

- The European Parliament should be granted full legislative power, particularly the general right to initiate legislation.
- All of the principal institutions—the Parliament, European Council, Council, and Commission—should be subjected to greater ongoing accountability through more extensive checks and balances.
- Commission members, or at least its president, should be appointed by the Parliament alone or elected by popular vote.
- There should be greater openness through public meetings in all sessions of the Council and European Council.
The Treaty of Lisbon

- All lawmaking and policy-making at the Council and European Council should be subject to a form of majority vote.

- Strict majority rule should be enforced by eliminating the practice of opt-outs and derogations by individual Member States.

To one degree or another, it must be acknowledged that as long as these matters remain unaddressed, the EU will continue to be viewed by some commentators as a system that suffers from a democratic deficit.

VI. CONCLUSION

If the Lisbon Treaty is ratified, the basic roles of the EU institutions will not change, and the Union method of operation will carry on as before. Most importantly, the division of competences between the EU and its still-sovereign Member States will not be appreciably altered, and the states will retain their veto power in many key areas of policy. Under the Lisbon Treaty the EU will not transform into a fully federal system, but neither will it return to its roots as an intergovernmental organization. As an "in between" polity, the hybrid Union will not possess all of the democratic elements of a classic democratic federation, especially full majoritarian rule and extensive institutional checks and balances. On the other hand, because of the EU’s sophisticated institutions and the wide range of its activity, neither will it be able to leave all aspects of democracy to the national governments, as a traditional IGO might. Under the Lisbon Treaty, the European Union will be more democratic, but, when measured against the standards of the Member States, not fully so.