The European Union's Trap of Constitutional Politics: From the Convention Towards the Failure of the Treaty of Lisbon

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The Project of a European Constitution and the Treaty of Lisbon

In a national referendum held on 12 June 2008, 53.4 percent of Irish citizens voted "no" to the *Treaty of Lisbon*. As its provisions require ratification by all member states, the Irish vote marks a further setback for attempts at constitutional reform of the European Union (EU). The Lisbon reform treaty, officially entitled the *Treaty of Lisbon* amending the *Treaty on European Union and the Treaty establishing the European Community*,[1] was signed by the prime ministers and presidents of EU member states in December 2007. It was the result of a process set in motion by the European Council in a meeting held in Laeken, Belgium in December 2001. Intended to make the "ever closer union" more democratic, and to facilitate the adjustment of European institutions to the new political situation brought on by the accession to the EU of Central and Eastern European states, the "Laeken Council" issued a declaration triggering efforts to constitutionalize the European Union. To this end, a reform process was initiated involving a body called the Convention on the Future of Europe (Convention), made up of European and member state government representatives and parliamentarians.[2] This reform process resulted in the recommendation in 2003 of a draft *Treaty Establishing a Constitution for Europe* (*Constitutional Treaty*),[3] which was subsequently approved by the Intergovernmental Conference and the European Council in Rome in October 2004. Despite several member states ratifying the *Constitutional Treaty*, it was rejected by popular referenda in France and the Netherlands in the spring of 2005. At that time, and in view of the obvious risks to ratification in some other member states, the process of constitutionalization ground to a halt.

The "no" majorities in France and the Netherlands can indeed be explained by different national factors; in discussions following the referenda, it came to light that it was the very idea of a European constitution, rather than the substantive amendments proposed, that was the main issue in dispute. Although there is no doubt that the *Treaty on European Union*,[4] signed in Maastricht and in force since 1992, implies a set of basic institutional rules typical of any constitution, many have argued that the Convention process signified a kind of state-building exercise without the necessary social conditions for legitimizing such a change. Thus, the project of a European constitution was revealed to be a trap, inhibiting institutional reform.

After a two-year period of stagnation (or "reflection" for those judging the time lag more positively), the German presidency of 2007 sparked negotiations aimed at breaking the impasse. These negotiations were backed by a group of experienced member state politicians headed by Giuliano Amato of Italy, and were

further supported by two members of the European Commission, who had worked on a revised text for the *Constitutional Treaty*. Based on the proposals put forth by this group, the European Council began the negotiations on treaty reform which led to the *Treaty of Lisbon*. Disputes concerning the representation of states in the European Parliament and European Commission, as well as voting procedures in the European Council, were eventually settled by compromise. The drafters of the proposed *Treaty of Lisbon* were determined that it be ratified using an accelerated procedure in all member states; it should, if the original schedule is maintained, come into force before the next European Parliament elections in 2009.

If entered into force, the *Treaty of Lisbon* introduces a number of changes to make the EU more effective and democratic. All of the changes go back to the work of the Convention:

- European legislation would become more democratic as the European Parliament would gain powers. The codecision procedure would be turned into an "ordinary legislative procedure" and, with a few exceptions, the Council and Parliament would participate in legislation on an equal basis, including, importantly, decisions on the budget. This reform would turn the two institutions into something resembling a genuine bicameral legislature. Moreover, decision procedures would become more transparent in that the Council of Ministers would meet in public when consulting on legislation.

- Following evolving practice, the *Treaty of Lisbon* includes two rules designed to bring the institutional structure of the EU closer to that of a "responsible" parliamentary democracy. It explicitly states that the Commission shall be responsible to the Parliament, which shall be able to force the Commission to resign by a motion of censure. In addition, the Parliament shall elect the president of the Commission on the recommendation of the European Council.

- Further strengthening democracy at the European level, national parliaments would be given an enhanced role in the EU governance structure. The *Treaty of Lisbon*'s new article 33 acknowledges the right of national parliaments to acquire information from European institutions, and to evaluate EU policies in the areas of freedom, security, and justice. Moreover, the *Treaty of Lisbon* endorses the power of national parliaments to control European Commission powers according to the 2004 *Protocol on the Application of the Principles of Subsidiarity and Proportionality*;[5] it also provides for the participation of national parliaments in a convention that in future shall prepare any further treaty reforms. While national parliaments gain veto powers over changes to the *Treaty of Lisbon*, citizens will also be able to initiative policy proposals for consideration by the EU. Of course, since both procedures require the coordination of many actors, only experience can reveal their actual impact.

- To make the enlarged EU more effective, the European Council's complicated decision rules, laid out in the 2003 *Treaty of Nice*,[6] have been revised. Under the *Treaty of Lisbon*, a qualified majority shall require the agreement of 55 percent of Council members, provided that they represent countries with at least 65 percent of the EU's population. The presidency of the European Council, currently rotated every six months, shall be elected for a two-and-a-half year term to improve the coordination of EU strategic policies, and thus make them more effective. After 2014, the size of the Commission shall be reduced to eighteen members.

- Regarding EU foreign policy, the *Treaty of Lisbon* would end the dual positions of High Representative for the Common Foreign and Security Policy, and the Commissioner for External Relations and European Neighborhood Policy. The revised High Representative shall at the same time be a vice-president of the Commission. As a result, the need for coordination would be reduced, and the EU would be better able to act in a unified manner in its relations with other states or international organizations.

It should not be ignored that in contrast to the *Constitutional Treaty* proposed by the Convention in 2003, the *Treaty of Lisbon* involves some backward steps that are the result of the compromises struck by the heads of member state governments. For example, the word "constitution" was explicitly avoided in the wording of the *Treaty of Lisbon*, as was all symbolism which might have implied EU statehood. Ironically, this triggered discussions about whether the *Treaty of Lisbon* might be a "constitution in disguise."

More significant is a substantial loss of transparency for citizens. Instead of consolidating existing treaties into a single document (as the proposed *Constitutional Treaty* would have done), the legal foundation for the EU polity would continue to exist in separate documents: one still called the *Treaty on European Union*, the other renamed the *Treaty on the Functioning of the European Union*. The 2000 *Charter of Fundamental Rights of the European Union* (*Charter*)[7] is not one of the treaties considered part of the legal foundation of the EU, although the *Treaty of Lisbon* does makes reference to the Charter, and its provisions are binding (except on the United Kingdom and Poland). The new decision procedures in the Council would not come into effect until 2014, and, until 2017, each member of the Council will be able to request that the decision rules established in the *Treaty of Nice* be applied.

In spite of the abovementioned shortcomings, agreement on the *Treaty of Lisbon* remains an important step in overcoming the crisis faced by the EU after the failure of the *Constitutional Treaty*. After the *Constitutional Treaty* received widespread support in public debate (and in the ratification process), the heads of member state governments had every reason to build on the work of the Convention. The *Treaty of Lisbon* is the product of this effort. Despite some compromise revisions arising from intergovernmental bargaining, the improvements of the existing treaties would be significant, both in the effectiveness of governance, in and the democratic legitimacy of the EU.

State of Ratification

As of August 2008 twenty-two member states have signed the *Treaty of Lisbon*.[8] So far only Ireland has chosen not to ratify it. In Germany, the Czech Republic, Finland, and Poland, parliaments have approved the *Treaty of Lisbon* according to the required procedures. However, the formal signatures of heads of state are still pending in these countries. In Germany and the Czech Republic, this delay is related to proceedings in their respective constitutional courts; in Poland, delay is due to the hesitations of a Eurosceptic president. In Sweden and Italy (where the Senate has already given its approval), parliaments have yet to decide on the *Treaty of Lisbon*, but plan to finish ratification in the fall of 2008.

Nevertheless, the Irish "no" vote has raised doubts about the future of the ratification process, as the *Treaty of Lisbon* cannot be set into force without the unanimous approval of all member states. In turn, it is likely that the Irish referendum will have repercussions on ratification processes in other member states. (This is the case even in the United Kingdom where ratification debates have put pressure on the prime minister to call a referendum.) Meanwhile, the Irish government has endorsed a continuation of the ratification process, and has promised to issue proposals on how it might respond to the failed referendum. Still, the future of EU reform has become bleak.

The EU is in a paradoxical situation: the *Treaty of Lisbon*, like the draft of the *Constitutional Treaty* elaborated by the Convention, is designed to improve decision-making transparency; nevertheless, the Lisbon treaty's reforms — directed at democratizing the EU, and providing for better control of subsidiarity — have been jeopardized by a citizen majority in a small member state. While this does not in itself signify a crisis of the EU, the blockade of important EU reforms calls for a consideration of ways out of this situation.

Out of the Trap

The situation created by the recent Irish referendum should remind us of the risk posed to successful amendment of EU treaties, when

the ratification process provides every member state with a veto. Notably, ratification problems have occurred in nearly all treaty reform exercises between 1992 and 2001.

The reaction of the European Council to the events discussed here has not helped to resolve the problem. The history of the drafting of the *Constitutional Treaty* is revealing in this regard. Following the negative referenda in France and the Netherlands (after the two-year lull), the European Council began the negotiations which eventually led to the *Treaty of Lisbon*. Some substantial and symbolic changes, as well as an accelerated ratification process, were agreed to in order to save the Convention project. Although Convention negotiators included elected representatives from European and national parliaments, the Lisbon treaty was essentially the result of intergovernmental negotiation. The shift between the parliamentary and governmental decision settings hardly bolstered the legitimacy of the treaty amendment process. Rather, it led to the Convention appearing as an attempt to circumvent the broader input of democratically elected politicians in favour of government interests. Not surprising, citizens reacted negatively to this strategy. I am not claiming that the shift from a supranational constitutional process to intergovernmental negotiation necessarily explains the outcome of the Irish referendum. Nevertheless, from a normative point of view, this feature of the ratification process is problematic. To continue this practice of having governments renegotiate EU treaties can only lead European integration further towards a dead end.

But what can be done in the current situation if the option of intergovernmental renegotiation of the *Treaty of Lisbon* is no longer available? A number of strategies have been debated, most of them going back to the recommendations which followed previous problematic ratification exercises:[9]

- The first option is for Ireland to opt out of those provisions of the *Treaty of Lisbon* which might have wrankled Irish voters. However, important constitutional provisions like decision rules and legislative procedures should not be subject to an opt-out for a single state. Moreover, in the Irish case, we do not really know which provisions were rejected by a majority of citizens. If the *Treaty of Lisbon* were only partially applied to Ireland, this might still go against the will of a majority of Irish citizens; as a result, this strategy bears significant risks.

- A second strategy would be to adopt something like the informal mechanisms used by Canadians to solve their constitutional problems after the failure of reform attempts in 1990 and 1992. Indeed, once the *Treaty of Lisbon* gains the support of a broad majority of member state parliaments, it could be implemented through "implicit change."[10] New rules could be applied in practice, or implemented by informal interinstitutional or intergovernmental agreement. Such a process could be used to reallocate jurisdiction, for instance, by the application of the rules of enhanced cooperation (were an individual member state to rebut EU authority over a particular policy field). Implicit change may also be acceptable for amendments to European legislative procedures, although it is obviously inappropriate for other changes, including changes to European Council decision rules, or to significant institutional changes such as the introduction of an EU president.

Even for those rules that could be adjusted implicitly, a "no" vote on a proposed amendment should prevent the Council and the European Parliament from proceeding with treaty changes. To do otherwise would go against the minority will of EU member states, which, according to existing amendment rules, have veto power. Indeed, under current conditions, the legitimacy of a policy of implicit change is dubious.

- A third, pragmatic way to save the *Treaty of Lisbon* might be to ask the Irish people to vote again, after a period of time has passed. This may be the simplest and best solution to the current deadlock, not least because it worked in October 2002 to overcome a failed referendum on the *Treaty of Nice*. However, this procedure makes sense only on the condition that the referendum ques-

tion submitted to citizens, along with other referendum conditions, be different from the first vote. Otherwise, a new referendum would not be taken seriously.

Even if these strategies worked, repeated ratification failures should encourage further general discussion of treaty amendment procedures. Experience with the difficulties involved in securing treaty amendments since the early 1990s, tells us that a clear majority of member states tend to support ratification, whereas only one or two tend to oppose it. Blockades preventing necessary reform could be avoided if treaty amendments were ratified with less than unanimous approval.

But is this possible? Given the character of the EU as a union of states, there seems to be no normative way to justify doing away with (or ignoring) the veto of a single member state. To suggest otherwise renders insecure the constitutional protection afforded to a member state's existing influence over EU affairs, and would facilitate the transfer of powers from a member state to the EU against the will of a national parliament or citizenry. To allow this to occur would imply that constituent power has shifted to the European level. It is, however, debatable whether the necessary societal foundation exists for such a constitutional transformation in the EU.[11] Indeed this transformation would require citizens to identify more with the community of Europeans than with their own nation. To be sure, a deviation from the existing unanimity rule would also require changing the existing amendment rules for EU treaty change; to expect this change to occur is far from realistic.

The difficulty with such reasoning is that it seems to lead us back to a dead end. The requirement of unanimous member state ratification will remain as long as the treaties are not revised in a kind of "constitutional moment." But, as explained above, it was the very discussion of the constitutionalization of Europe that blocked the development of the EU some years ago. Treaties in general, and in particular the treaty rules presently in force, require the consent of all partners; there seems to be no alternative to member state unanimity.

There is, however, the possibility of a moderate *de facto* deviation from the unanimity rule, with the proviso that member states voluntarily and explicitly allow themselves to be outvoted in the ratification process. A procedure which may allow this was proposed by the so called "Penelope" group, a group of experts who drafted a constitutional treaty proposal for the then president of the European Commission.[12] The idea was to introduce a qualified-majority rule through the mechanism of a second treaty, ratified alongside primary treaty reforms. This procedure could be defended with the argument that actors might accept rules which informally reallocate decision-making power if they are asked to do so under a "veil of ignorance"; in other words, it they do not know how they are affected by new decision rules, or if their decisions are guided exclusively by general norms. In reality, these "Rawlsian" conditions rarely apply among individual actors, not to mention relations among member state governments. Therefore, it is not likely that they will agree to a majority decision rule, particularly if those member states rejecting an amendment are ultimately confronted with the alternative to leave the European Union.

There is, however, another way to arrive at majority decisions without depriving individual member states of their right to decide on the course of EU treaty reform. In contrast to the "Penelope proposal," which requires all member states to conditionally surrender their veto without knowing the result of the ratification process, it is possible to give member states in which ratification failed the opportunity to declare their position *after* they know the decision made by other states.

This would lead to the following procedure: if four-fifths of member states (which should represent a qualified majority of the EU's population) have ratified a treaty amendment, those member states that have voted "no" will decide a second time, in accordance with their national constitutional provisions. In considering the "yes" vote already taken by a strong majority of other EU member states, the "no"–voting minority would be required to decide whether or not to accept the majority decision in favour of

proposed amendments. In this second decision on a revised question (and in a different political context), it is probable that the existence of a weak solidarity among European citizens will encourage citizens in holdout member states to vote in favour of treaty amendment.[13] If a member state national parliament or citizenry votes "no" in a second referendum, the European Council should determine how to proceed, after consideration of the substance of treaty amendments and the outcome of the ratification process. The Council could be permitted to come to the conclusion that the amendment process should be completed without a change to the proposals at issue; however, in the case of a single state blocking amendments which all other member states have explicitly accepted, the Council would have good reason to require the holdout state to decide either to secede from the EU, or accept the majority vote. In view of the consequences of secession, it is not very likely that a member state would opt for that course of action. A "no" vote on secession in the respective member state would then grant strong legitimacy for the EU to proceed with treaty amendments through the mechanism of implicit change.

This solution requires neither changing nor bending treaty law, and it avoids playing political games with member state parliaments and citizens. Ultimately, what is necessary to avoid the EU's trap of constitutional politics is an implicit, but legal change to the ratification rules, so that a majority decision on a particular amendment will be accepted by all member states. A second Irish referendum could be an adequate opportunity to test the merits of this solution.

Notes

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1 17.12.2007 OJ C 306/1.

2 Carlos Closa, "The Convention Method and the Transformation of EU Constitutional Politics" in Erik Oddvar Eriksen, John Erik Fossum & Agustín José Menéndez, eds., *Developing a Constitution for Europe* (New York: Routledge, 2004) at 183-206; Carlos Closa, "Deliberative Constitutional Politics and the Turn Towards a Norms-Based Legitimacy of the EU Constitution" (2005) 11 European Law Journal at 377-524; Alain Lamassoure, *Histoire secrète de la Convention européenne* (Paris: Lavoisier, 2004); Paul Magnette & Kalypso Nikolaidis, "The European Convention: Bargaining in the Shadow of Rhetoric" (2004) 27 West European Politics at 381-404; Peter Norman, *The Accidental Constitution. The Making of Europe's Constitutional Treaty* (Brussels: EuroComment, 2003); Sonja Puntscher-Riekmann & Wolfgang Wessels eds., *The Making of a European Constitution: Dynamics and Limits of the Convention Experience* (Wiesbaden: Verlag für Sozialwissenschaften, 2006).

3 18.7.2003 OJ C 169/1.

4 29.7.1992 OJ C 191/1.

5 16.12.2004 OJ C 310/207.

6 10.3.2001 OJ C 80/1.

7 18.12.2000 OJ C 364/7.

8 See "Ratification of the Treaty of Lisbon," online: COSAC <http://www.cosac.eu/en/info/Treaty>.

9 For a summary and discussion see Stanislaw Biernat, "Ratification of the Constitutional Treaty and Procedures for the Case of Veto" in Ingolf Pernice & Jirí Zemánek, eds., *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Baden-Baden: Nomos 2005).

10 Stefan Voigt, *Explaining Constitutional Change: a Positive Economics Approach* (Cheltenham: Edward Elgar, 1999) at 145-76.

11 Dieter Grimm, "Does Europe Need a Constitution?" (1995) 1 European Law Journal at 282-302.

12 Bruno de Witte, "European Treaty Revision: A Case of Multilevel Constitutionalism" in Ingolf Pernice & Jirí Zemánek, eds., *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Baden-Baden: Nomos, 2005).

13 There is a precedent for the proposed proceeding. The U.S. Constitution was to be based on a consensus of all the then-existing thirteen states. For practical reasons, the founding fathers decided to set the Constitution in force after only nine states had ratified, but for those states only (Article VII U.S. Constitution). The remaining states then had to decide whether they would join the new federal union or not. Two states, Rhode Island and North Carolina, first rejected the Constitution, but ultimately ratified it after a second decision was taken. See Russell Hardin, *Liberalism, Constitutionalism and Democracy* (Oxford: Oxford University Press, 1999) at 108; Vincent Ostrom, *The Political Theory of a Compound Republic* 2d ed. (Lincoln: University of Nebraska Press, 1987) at 84-85.