Revision

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Article IV-7 Draco[1]

Many proponents of the Constitutional Treaty admit that this document is far from perfect, indeed quite disappointing in many respects, but argue that the Treaty should be seen as a step in the long process of European integration rather than an end-point. It will be possible to learn from the failings of the new Treaty and correct them later on, just like this Treaty itself has corrected some of the mistakes, and fill in some of the blanks left by earlier Treaty revisions. According to this view, there is no reason why the semi-permanent process of Treaty revision and constitutional change, which started in 1985 with the preparation of the Single European Act, should suddenly come to a halt with the entry into force of the Constitutional Treaty.[2] However, one may wonder whether this idea – of an ongoing process in which the Constitutional Treaty is just an important milestone – is realistic. The existing rules of Treaty revision have been modified by the Constitutional Treaty in a number of ways, but the essence remains untouched: as before, all changes will have to be approved by all the Member State governments and submitted to a ratification process governed by the constitutional rules of each country separately. Given the fact that at the next Treaty revision (assuming that the Constitutional Treaty itself will enter into force), there are likely to be 27 or even 28 Member States, how probable is it that meaningful amendments of the Constitutional Treaty will still be possible?

Before commenting on the revision rules newly enacted by the Constitutional Treaty, I will begin by briefly recalling the present rules on Treaty revi-

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

[2] See for example: T. Padoa-Schioppa, 'Il carattere dell'Europa', *Corriere della Sera*, 22 June 2004, p. 1; B. Delanoë et D. Strauss-Kahn, 'Il faut ratifier le projet de Constitution européenne', *Le Monde*, 3 July 2004, p. 13.

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sion. Until now, revision treaties have been adopted 'by common accord' of the Member States' representatives at an intergovernmental conference (Article 48 EU Treaty). Formally speaking, the Member States have acted as masters of the treaty, freely deciding when and how the existing constitutional regime of the European Communities and Union should be adopted. However, even the earlier revisions involved more than traditional diplomacy and bargaining: other actors, both national and European, have helped to shape the outcome of intergovernmental conferences. Further, in the interaction between state delegations at the IGC, reaching a common accord was never exactly the same thing as the unanimity rule, which applies for the adoption of certain categories of secondary EU acts. The term 'common accord' conveys rather well what has been the practice in the various rounds of Treaty revision, namely that states are prepared to accept certain amendments which they do not approve of or even may positively dislike, because of the importance they attach to an overall accord on the revision Treaty. The 'package deal' negotiation style is more vigorously pursued at the level of the IGC than in day-to-day Council decision-making and is much more vital for the success of the negotiation. It has tended to culminate dramatically in the final night of the European Council meeting at which, after some hasty last-minute deal cutting between heads of government, the revision agreement is reached. The last European Council meeting at which a Treaty revision was agreed (Brussels, June 2004) was, however, distinctly less long and dramatic than the previous ones. The work of the Convention on the Future of the European Union, which technically speaking was only an informal preparation of the formal revision steps provided by Article 48 EU, profoundly modified the nature of this last Intergovernmental Conference by restricting the terms of the diplomatic debate to the broad lines traced by the Convention. This episode thus constitutes an important, though informal, modification of the Treaty revision rules through political practice.

The effect of the Convention was very visible in the first phase of the revision process, namely the adoption of a revised text. It is much less clear whether the work of the Convention (and particularly, the involvement in it of members of the national parliaments) will also affect the second phase, namely the separate ratification of the revision treaty by each of the Member States according to their own constitutional rules. In this second phase, the common accord mode of negotiation gives way to the cruder rule of unanimity whereby every single government must separately deliver an act of ratification after having received the constitutional green light at the domestic level. At this stage, small incidents can bring down the whole patiently constructed edifice. In Belgium, for instance, the Treaty of Amsterdam had to be approved by no less than eight parliamentary bodies, and in the smallest of these bodies, a shift of one single vote

could have blocked Belgian ratification and, hence, the Treaty revision process as a whole. Referendums had such an obstructive effect for the Treaty of Maastricht (the Danish referendum) and for the Treaty of Nice (the Irish referendums). In both cases, a combination of diplomatic cunning and political good luck saved the treaties, but the fragility of the national ratification phase became clear to all, and today, 25 swords of Damocles are again suspended over the youthful head of the Constitutional Treaty.

Even if the present Treaty scrapes into force in a few years from now, it will leave the problem of the cumbersome nature of Treaty revision entirely unresolved for the future. Article IV-7 of the Constitutional Treaty basically repeats the existing Treaty revision rules contained in Article 48 EU Treaty (that is, the ones applying to the adoption of the Constitutional Treaty itself) with only one significant addition: the Convention method, experimented in 2002/3, is being integrated as a normal feature also for future revisions. However, the common accord to be reached in an intergovernmental conference and the separate ratifications to be delivered by each country separately will remain central futures of the revision process also for the future. The European Union's rules of change will therefore continue to be much more rigid than those that apply to any national constitution and also more rigid than those applying to the founding instruments of other, less integrated, international organizations.

Much hope is being invested, by those who think that the Constitutional Treaty will not be the end of the constitutional reform road, in what became known in the Convention and IGC jargon as the *clause passerelle* and which is more accurately termed, in the final version of the Treaty, the *simplified revision procedure.* There are in fact two distinct simplified procedures contained in two separate Treaty articles that were provisionally numbered, in the concluding document of the IGC, as Article IV-7(a) and Article IV-7(b) so as to put them just after the *ordinary revision procedure,* which I described above.[3] The former of these clauses introduces a genuine measure of flexibility, whereas the latter does not. Article IV-7(a) provides that in all those areas and cases where Part III of the Treaty requires the Council to act by unanimity, a European Council decision (itself taken by unanimity and subject to the approval by the European Parliament) will be enough to remove the unanimity lock in a particular case or area and allow the Council to act henceforth by qualified majority. In the same way, the European Council will be able to introduce the 'ordinary legislative

[3] CIG 86/04, p. 323 and 324. This is preferable, from the point of view of constitutional drafting, to the approach taken in the Draft Treaty proposed by the Convention, which had put the simplified rules of change in Part I (Articles 22 and 33), thereby conveying the wrong impression on the reader of Part IV that the general revision clause of Article I-7 would be the only one available.

procedure' (that is, co-decision) in all the areas and cases in which Part III provides for a different (normally, more intergovernmental) procedure. In other words, a further deepening of integration will, to some extent, be possible without the need for setting up an IGC and, above all, without the need for constitutional ratification of these changes by all the Member States separately. However, each of the 25 (or more likely 28) states will retain a veto power in two different forms: first, because of the requirement of a unanimous European Council decision to walk over the 'passerelle' and, secondly, because each national parliament will be able to stop any such simplified revision decision by simply expressing its opposition within the six months preceding the revision. The other special revision clause, that of Article IV-7(b) (as provisionally numbered) has a broader scope, since it will apply to any amendment of Title III of Part III on internal policies (all together some 172 articles, that is, about half of the Treaty) – unless the proposed amendment would increase the Union's competences, in which case the general revision procedures applies. Under this procedure, there will be no need for a Convention or an IGC, and the amending procedure can be taken directly by the European Council acting by unanimity. However, it will still be subject to approval by each Member State under its constitutional requirements, which is, and will remain, a lengthy and delicate process. In my view, this Article IV-7(b) is not a meaningful simplification: intergovernmental conferences can be convened easily and can decide quickly if there is a political consensus. Therefore, replacing them by a European Council meeting does not, by itself, speed up or facilitate the amendment process: these European Council decisions will then have to be prepared and negotiated in some other framework than a formal IGC.

To conclude, the Constitutional Treaty will introduce a genuine dose of flexibility – consisting essentially in the removal of the ratification phase – only for shifting from unanimity to qualified majority and for adopting co-decision as the decision-making regime. There will be many questions other than those on which the need will arise to amend the very detailed and often badly worded Constitutional Treaty, and this need will have to be addressed under the increasingly cumbersome traditional revision procedure. The integration of the Convention in the revision mechanism is welcome as such, but it is not likely to remove the danger of a deadlock. All in all, there is much ground for pessimism about the capacity of the European Union to reform itself after this Constitutional Treaty has come into force. In the years to come, the Convention and IGC of 2002/4 could be severely blamed for their failure to allow for the further evolution of the European Union.

Questions

1. How can the Union keep evolving under the remaining extreme rigidity of its rules of change?
2. Will the Convention method of treaty revision (in particular, the involvement of national Members of Parliament) affect, positively or negatively, the ratification procedures in Member States?

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