Caught in the Joint-Revision Trap?
Treaty Amendments in the Treaty of Lisbon

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In any legal context, the rules for changing the rules are of crucial importance, and nowhere more so than when it comes to constitutional amendments. Whether a foundational document is stable enough to exert influence on the world and at the same time flexible enough not to be marginalised by changing circumstances, is largely a function of its revision procedures.

In the EU, this has become only too obvious in recent years. Out of the five last rounds of revision, four have run into more or less serious difficulties (Maastricht, Nice, the Constitutional Treaty, and now Lisbon), and there is a general perception that reform, while overdue, is close to impossible. However, attempts at reform – including the Lisbon Treaty – have hardly begun to tackle the amendment procedure. In my presentation, I will sketch the innovations the Lisbon Treaty presents in this area (I), assess their scope and likely impact (II), and finally evaluate the appropriateness of the old and new revision processes (III).

I.

The amendment provisions after the Nice Treaty (Article 48 TEU) were largely the same as they had been since the Treaty of Rome. In a classical international law fashion, they foresee an Inter-Governmental Conference (IGC) and require ratification of the outcome by all member states. The Constitutional Treaty had set out to modify this in some respects (in Articles IV-443 to IV-445), and the Lisbon Treaty largely follows it. It foresees changes in four areas:

1. Like the Constitutional Treaty, the Lisbon Treaty seeks to make the Convention Method the ordinary treaty revision procedure. Building on the example of the Convention on the Future of Europe, major revisions are meant to be prepared by a convention composed of various constituencies, while the final decision remains

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reserved for an IGC, followed by normal ratification processes (Article 48 paras. 3 and 4).

2. Also like the Constitutional Treaty, the Lisbon Treaty provides for a *Simplified Revision Procedure* for the international policies of the Union contained in Part Three of the Treaty on the Functioning of the European Union (TFEU). For those amendments, no IGC need be held and the European Council can adopt the revision itself; it is then submitted to member states for ratification (Article 48 para. 6).

3. Again following in the footsteps of the Constitutional Treaty, the Lisbon Treaty contains a broad, generalised *Passerelle Clause* that allows for a simplified move from unanimity to qualified majority voting, and from a special legislative procedure to the ordinary legislative procedure. This does not apply to military and defence matters, and several other areas, such as the system of own resources, are also excluded (Article 308 TFEU). Yet where it applies and unless a national parliament objects, it allows for a revision by a unanimous decision of the European Council, with the consent of the European Parliament, and therefore dispenses with the typical ratification process (Article 48 para. 7).

4. The Lisbon Treaty also contains a clause that addresses *difficulties in the ratification process*. If two years after the adoption four fifths of member states, but not all, have ratified a revision, the matter is referred to the European Council. However, as in the Constitutional Treaty, the further consequences of such a referral are not spelled out (Article 48 para. 5).

II.

These changes do not touch the centrality of the IGC and the ensuing ratification process for major revisions, but they still provide for a seriously altered procedure in a number of areas. In this section, I seek to assess the likely impact of the proposed changes.

1. When it was first introduced for the Charter of Fundamental Rights and then taken up again after the Laeken summit, the *Convention Method* was widely hailed as a revolutionary step towards a smoother, more principled approach to treaty revision and as a step away from the predominance of intergovernmental bargaining that had characterised most major reform attempts and had stalled in an ever-expanding Union. The analysis of the actual functioning of the conventions, however, has led to
more cautious assessments. Some parts of the literature maintain that the conventions have brought a significant increase in deliberative quality, while others argue that the deliberation was overshadowed by intergovernmental bargaining and therefore did not qualitatively differ much from the IGC method. Whether or not the convention method will make a real difference will then depend on the way it conducts its proceedings and on how its relationship with the IGC is structured.

2. The *Simplified Revision Procedure*, dispensing with an IGC, is designed to make the revision process less time-consuming and cumbersome, and it is likely to achieve that to some extent. However, it is not immediately clear whether it will entail a change in the quality of decision-making. For example, IGCs have tended to be dominated by large member states, and it is unclear to what extent the European Council replicates this dynamic or develops a more inclusive, argument-oriented tendency.

3. The *Passerelle Clause* is likely to have a broader impact. Building upon, but widely expanding, the specific passerelle clauses in the Maastricht and Nice Treaties, it mainly disconnects the move to majority voting from the typical ratification procedure. The focus on national parliaments instead has two implications: first, parliaments do not have to agree but have to positively decide to raise an objection, which can shift the burden of argument and voting significantly. Second, and most importantly, it bypasses national referenda and instead prescribes a purely representative domestic decision-making process. In that respect, it removes one of the main obstacles to treaty revision today, and it initiates a shift to a supranational, rather than international, revision procedure. Obviously, though, it only applies to a very particular, clearly circumscribed type of revision.

4. Whether the referral to the European Council in case of *difficulties in the ratification process* will have a measurable impact is doubtful, especially as such a referral would most likely have taken place in such cases anyway. The new clause might, however, serve to bolster the political authority of the Council in this case; in exceptional circumstances, it might also help it to move beyond the legal constraints the revision procedure with its requirement for unanimous ratification imposes.

Overall, then, the likely impact of the changes in the Lisbon Treaty is relatively small. It affects the character of the revision process only marginally: for the most part, it remains a classical procedure along international law lines, and a strict one at that. And there are only
very few signs that a move towards a more ‘constitutional’ amendment process is underway; in that, the Lisbon Treaty shares the limitations of the Constitutional Treaty and decidedly reflects a non-constitutional vision.

III.

Both pragmatically and normatively, the continued adequacy of this amendment process is doubtful, but attempts at large-scale change have so far not borne fruit. The European Parliament had moved away from the unanimity requirement already in the 1984 draft Treaty on European Union and then again in its 1994 draft Constitution, and during the Convention on the Future of Europe various proposals took this further; some of them even went so far as to untie the adoption process of the Constitutional Treaty itself from the requirement of unanimous ratification. All of them were, however, regarded as politically too problematic and therefore did not find their way into the final Convention proposal.

1. Practically, though, the result of this caution is an enormously cumbersome revision process that, in a Union of 27 member states, is likely to cause much further gridlock. It largely follows consociationalist lines and may indeed be a reasonable response to the high diversity within the Union, but like all consociationalist approaches, it has great difficulty avoiding stalemate when the number of participating groups is high. In addition, it faces a serious problem with public accountability: like consociationalism in general, it works relatively well when political leaders enjoy significant independence from citizens, and as we can see, parliamentary approval of treaty revisions also rarely poses serious difficulties (though it casts a long shadow over IGCs). When accountability to citizens becomes stronger, though, as is the case when referenda are held, such an approach typically runs into problems because the compromises struck on the inter-group (European) level are difficult to defend in domestic publics.

The consequence of the amendment provisions is then a “joint-revision trap”: as in Fritz Scharpf’s “joint decision-making trap”, the main problem is that change of once unanimously adopted decisions becomes prohibitively difficult. This may result in attempts at informal change, either through institutional practice or the judiciary; but informal change has its limits, especially when it comes to institutional provisions which are often too unambiguous to lend themselves to an interpretative adaptation to new circumstances and challenges.
2. The current revision process is often seen as closely linked to the continuing sovereignty of member states, and any change therefore as a direct challenge to that sovereignty. But this is not necessarily the case. Also on the basis of sovereignty, one can devise less cumbersome solutions – the method chosen in the passerelle clause would be one of those. But one could go even further and provide for treaty revision by majority decision, with an opt-out right for those discontent with the substance of the amendment. This would respect each country’s right to decide which obligations it is subject to and would at the same time shift the burden around, requiring a positive decision to leave the Union. Because the costs of such a decision would invariably be very high, it is unlikely that it would be used in more than a few, exceptional cases.

3. Normatively, however, it is not at all clear that the sovereignty model should remain the basis for the revision process in the future. It has often been pointed out that sovereign rights to self-government have become increasingly difficult to justify in an interdependent world in which decisions affect outsiders (foreigners) to a large extent; this is particularly true in the European Union. As a result, the European (and in part, global) polity enjoy an own, independent legitimacy that is based on its greater inclusiveness – and thus eventually, as in the case of the national polity, on a strong notion of self-government and public autonomy. If then the national and European levels can tap into parallel legitimacy resources that are not derived from one another, it is not clear that national polities should retain the right to veto changes in the shape of the common project. The treaty revision process should, instead, be designed in such a way as to balance the influence of the different polities. This can be achieved through qualified majorities, suspensive vetos, or in a myriad of other ways – except by requiring the unanimous ratification in all member states.

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