New Modes of EU Constitution Making: Towards Fewer and More Flexible Provisions?

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1 Abstract

To solve the ratification crisis a political solution is needed. Meanwhile legal developments take place. There are alternative legal ways forward. The most obvious are those supported, or at least not excluded, by the EC and EU Treaties. While looking at such alternative ways forward, it becomes apparent that they have a certain amount of flexibility in common. In an ever larger union, flexibility is needed in order to avoid decision making and treaty revisions being stalled. However, the benefit of flexibility must be weighted against the risk of fragmentation, inconsistencies and loss of overview. In order to prevent *ad hoc* developments where political control is lost over legal developments, the right balance should be struck in the basic treaties where a certain amount of flexibility needs to be granted. Arguably, to avoid future treaty revisions being stalled, the basic treaties should consist of fewer provisions some of which enable flexible solutions. Hence, this article argues that the current ratification crisis provides us with a golden opportunity to slim and still improve the basic treaties.

2 Introduction

More than one year after the French and Dutch no-vote to the Constitutional Treaty,[1] we still do not know the outcome of the reflection period announced by the European Council in June 2005. Meanwhile, legal developments take place and there are alternative ways forward. The most obvious are those supported, or at least not excluded, by the EC and EU Treaties as last amended.

While looking at such alternative ways forward, it becomes apparent that they have a certain amount of flexibility in common. Different forms of flexibility have great potential, not least as an aid to solve the veto problem. In an ever larger union, flexibility is needed in order to avoid decision making and treaty revisions being stalled. However, the benefit of flexibility must be weighted against the risk of fragmentation, inconsistencies and loss of overview. In order to prevent *ad hoc* developments where political control might be lost over legal developments, the right balance should be struck in the basic treaties where a certain amount of flexibility needs to be granted.

Arguably, to avoid future treaty revisions being stalled, the basic treaties should consist of fewer provisions some of which enable flexible solutions. Hence, this article argues that the current ratification crisis provides us with a golden opportunity to slim and still improve the EC and EU Treaties.

1 Treaty establishing a Constitution for Europe, OJ 2004, C 310/1.

3 The Ratification Crisis – Still No Solution to the Constitutional Deadlock

Although a majority of the EU Member States have ratified the Constitutional Treaty,[2] there is still no sign of a solution to the constitutional deadlock. What the EU Member States agreed upon unanimously within the framework of the last intergovernmental conference has thereby been put on ice until further notice. The Constitutional Treaty can only take effect if all 25 Member States ratify it either in a parliamentary vote or by referendum.[3] Undoubtedly, the chances for ratification in Denmark, Great Britain, Ireland, Poland, the Czech Republic and not least France and the Netherlands are uncertain. Most probably therefore, a political solution with a carefully negotiated compromise is needed to surmount the current deadlock. Whether this will include an entirely new Treaty or merely some form of "cherry picking" is yet to be seen. Although a political solution is needed, legal developments continue to take place during the constitutional deadlock.

4 Legal Ways Forward

Taking the provisions of the Constitutional Treaty as the starting point, there are alternative legal ways forward. The most obvious are those supported, or at least not excluded, by the current treaties. While looking at such alternatives, it becomes apparent that they have a certain amount of flexibility in common.

The alternatives without express legal basis in the treaties include some interinstitutional agreements,[4] institutional praxis, Member State conduct and traditional intergovernmental cooperation. Accordingly, action can be taken on three different levels. By the EU institutions, by the Member States acting alone, and by the Member States acting outside the scope of the current treaties within the framework of traditional intergovernmental cooperation. The EU membership ultimately limits what can be done in that action by the institutions or the Member States must not go against their obligations under the treaties.

The provisions granting national parliaments more power in the legislative process in accordance with the subsidiarity test,[5] is one of the news of the

2 For an overview of the current situation in the Member States, see e.g. the Gateway to the European Union at "europa.eu.int/constitution/ratification_en.htm" and the EU Policy Portal EurActiv at: "www.euractiv.com/en/constitution/ratification-eu-constitution-state-play-member-states/article-130616".

3 According to Article 48 TEU, amendments of the basic treaties are governed by a two step process. In brief, the Member States need to approve a text within the framwork of an intergovernmental conference. To enter into force, these changes then need to be ratified by all the Member States in accordance with their respective constitutional requirements.

4 *See*, however, Article 193, para. 3, Article 228.1, Article 248.3, para 3, Article 272.9, para 5, and Article 195.4 EC. Compare Article 161, para 3 EC.

5 The Constitutional Treaty introduced an "Early warning system" allowing a national Parliament or a chamber of a Parliament to contest a legislative proposal with regard to its compliance with the subsidiarity principle. The requirements are rather harsh though and a reasoned opinion demanding the Commission to review its proposal needs to be supported by

Constitutional Treaty that could be introduced already today. What would be needed are changes in the institutional praxis or an interinstitutional agreement between the lawmaking institutions of the Community, combined with national legislation or practice. In this respect it is interesting to note that the Dutch Parliament has already initiated the subsidiarity control set out in the Constitutional Treaty. Both Houses have concluded that the Commission's amended proposal for a directive on criminal measures, aimed at ensuring the enforcement of intellectual property rights,[6] is in breach of the subsidiarity and the proportionality principles and thus falls outside the powers of the Community.[7] They have communicated their views not only to the Commission, but also to the European Parliament, the Council and COSAC.[8]

Another example includes the provisions establishing the Charter of Fundamental Rights. Its substance is already being referred to by the Court of Justice as general principles of Community law, and the political institutions have taken it on to apply it by own accord.[9]

Other innovations contained in the Constitutional Treaty that are not incompatible with the present treaties could be enacted by the case law of the Court of Justice. The transferral of powers from the third pillar to the first Community pillar, as stated in the Constitutional Treaty, would give the Community a general competence to harmonise Member State criminal law by a qualified majority decision in the Council. After a ruling of the Court of Justice in September 2005,[10] it has become clear that the Community already has power, at least in the field of environmental protection, to harmonise Member State

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at least 1/3 of the Parliaments within six weeks after the transmission of the proposal. Although required to review its proposal in such cases, there is no formal obligation for the Commission to take the reasoned opinion into account.

6 COM (2006)168 final.

7 With reference to Article 5 EC and Protocol 30 to the Amsterdam Treaty on the application of the principles of subsidiarity and proportionality.

8 COSAC, Conference of Community and European Affairs Committees of Parliaments of the European Union, see further their homepage at: "www.cosac.eu/en".

9 *See* further de Witte, B. R*atificieringen av EU:s nya fördrag – vad händer om den misslyckas?* Sieps 2004:8.

10 Case C-176/03 Commission v Council, not yet reported. In this case, the Court of Justice struck down a Framework Decision on criminal sanctions applying to environemental protection which had been adopted by the Council on a Third Pillar legal base. As I pointed out in my commentary, the legal effects of a framework decision under the third pillar are different from those of directives. Framework decisions do not have direct effect and cannot therefore be invoked by private parties in national courts. Neither can the Commission take Member States to the Court of Justice for failure to implement a framwork decision. Further, the jurisdiction of the Court to interpret framework decisions is limited. Besides these effects, framework decisions are taken by unanimity in the Council while directives can be adopted by a qualified majority vote by the Council codeciding with the European Parliament. Bergström, M., Straffrättsliga påföljder inom ramen för den första pelaren, ERT 2006, s. 135; see also Krämer, L. Environment, Crime and EC Law, Case Law Analysis of Case C-176/03, Journal of Environmental Law. 2006; 18(2): 277-288.

criminal law.[11] According to the ruling, the Community legislator may take necessary measures which relate to the criminal law of the Member States in order to ensure the effective protection of the environment.[12] Hence, novel about the case is that it is identifying a criminal law competence for the Community.[13]

Like interinstitutional agreements, the praxis of the Court of Justice has repeatedly been anticipating later Treaty reforms. This time it works both ways, since innovations of the Constitutional Treaty can be achieved with the aid of such legal instruments.

Yet another possibility included in the EU Treaty, is the so called "passerelle" or "bridge", allowing the Council to transfer powers from the third intergovernmental, to the first supranational pillar. According to Article 42 EU Treaty,[14] the Council may by an unanimous vote transfer powers concerning police and judicial cooperation in criminal matters to the first Community pillar and at the same time decide upon which voting rules should apply. Further, Article 42 provides that the Council shall *recommend* the Member States to adopt the decision in accordance with their respective constitutional requirements. In other words, there is no absolute requirement of a parliamentary vote or referendum. The French Government,[15] the Commission, and the Finish presidency have put the use of the passerelle on the agenda.[16] So far the necessary support from the Member States has not been reached.[17]

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11 In November 2005 the Commission published a Communication explaining its view of the ruling. According to the Commission, the judgement lays down principles which go far beyond the case in question and which may apply to Community policies other than environmental protection. The Commission accepts two limitations, i.e. the principles of necessity and consistency. See further Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C–176/03 Commission v Council). COM(2005) 583 final/2.

12 In its ruling the Court confirmed that, as a general rule, criminal law and criminal procedures are matters which do not fall within the scope of the EC Treaty. However, that did not "prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective". Case C-176/03, para 48.

13 The extent of that competence is by no means clear. It has been suggested that in practical terms, the judgment may not be too far-reaching insofar as many Member States already choose to criminalise certain non-compliance with Community law. House of Lords European Union Committee, The Criminal Law Competence of the European Community: Report with evidence, 42nd Report of Session 2005-06, (28 July 2006), HL Paper 227, p. 8.

14 Article 42 TEU was introduced by the Amsterdam Treaty.

15 The French Government proposed the use of Article 42 TEU as part of a number of measures designed to improve institutional arrangements under the present Treaties. Institutional improvement based on the framework provided by existing Treaties. French Contribution. 24 April 2006.

16 In its Communication on a "Citizen's Agenda" from May 2006, the Commission pointed out the possibility of Community competence on judicial cooperation in criminal matters based on transferring such competence from the third pillar through the passerelle. COM(2006) 211 final, p.6.

To move powers vested under the third pillar into the EC Treaty increases the roles of the European Parliament and the Court of Justice. Most significant is (possible) change of voting rules from unanimity to qualified majority voting in the Council. This might be the reason why eleven out of the then fifteen Member States intervened in support of the Council in the case before the Court. National veto power is traditionally important in this field of law. The following statement by the House of Lords European Union Committee is elucidating:[18]

> Criminal laws and procedures lie at the heart of the legal traditions of States and, within the European Union, divergences in Member States' laws (and even between different jurisdictions within a Member State such as the United Kingdom) reflect fundamental historical, political and constitutional differences. Member States have therefore guarded their criminal jurisdiction as a key part of their sovereignty and have acted on the basis that they had conferred competence over criminal matters to the EU for the first time at Maastricht and then only limited competence within the scope of the Third Pillar.

Besides the passerelle and examples at the best tolerated by the current treaties, there are other flexible alternatives explicitly allowed in the EC and EU Treaties. The increased use of the principles of subsidiarity and proportionality could serve as tools for flexible solutions. The use of directives rather than regulations, and framework directives rather than more detailed Community measures could serve as a generalised subsidiarity principle allowing more room for flexibility at the regional and national levels. Although a pattern could be distinguished in recent legislation towards more room for the national legislature, the Court of Justice has often limited this room. If not, there is a risk that the aim of the legislation at hand could be undermined.[19]

Then in June 2006, the Council called upon the incoming Finnish presidency to explore the possibilities of improving decisionmaking in the area of Freedom, Security and Justice on the basis of existing treaties, i.e. more specifically, the passerelle. Presidency Conclusions 10633/1/06, subtitle II (para.10) p.5.

See also the homepage of the Finnish presidency at: "www.eu2006.fi/news_and_documents/press_releases/vko38/en_GB/168925".

17 As of 22 September 2006, at an informal meeting in Tampere, the justice and home affairs ministers were not convinced to give up their veto on decisions related to crime, the judiciary and immigration. For example, Germany has traditionally opposed surrendering its veto on police and judicial matters and was amongst the member states opposing "cherry picking" and the passerelle being used fearing that it may undermine efforts towards an EU constitution. See further the EU Policy Portal EurActiv at: "www.euractiv.com/en/justice/justice-veto-left-standing-post-tampere/article-158120".

18 House of Lords European Union Committee, *The Criminal Law Competence of the European Community: Report with evidence*, 42nd Report of Session 2005-06, (28 July 2006), HL Paper 227, p. 10.

19 According to de Búrca, the potential of the subsidiarity and the proportionality principles as intruments of differentiation must therefore not be overestimated. de Búrca, G. *Legal Principles as an Instrument of Differentiation?* The Principles of Proportionality and Subsidiarity, in de Witte, B., Hanf, D., Vos, E. (eds.) The Many Faces of Differentiation in EU Law. Intersentia: Antwerpen, 2001, p. 141 ff.

More specifically, secondary legislation could be used as a flexible tool. In general, and as was previously mentioned, the use of directives and in particular framework directives gives the Member States more room for national and regional differences than the issuing of regulations. There are also possibilities to introduce harmonising measures with explicit exceptions or rules of minimum harmonisation.

Besides secondary legislation, there is the so far unused possibility to initiate closer or enhanced cooperation within certain policy areas. This gives the Member States that are "willing and able", the possibility to deepen their cooperation within the institutional framework of the Union. This possibility was introduced by the Amsterdam Treaty and was developed further in the following Nice Treaty as well as in the Constitutional Treaty. According to the current rules, a minimum of eight Member States need to participate and the cooperation needs to be open to all. It must not be used outside the competence of the Union and may not entail any military implications. Although the possibility has not as yet been used, its insertion into the treaties has far reaching consequences for how we perceive the Union. From mainly unanimity and the corresponding veto power, we have seen a development where qualified majority voting is becoming the general rule of the cooperation, towards many different constellations and a Union of different groups, speeds and goals.[20] The formalisation of this type of flexibility was comparably uncontroversial, at least on the highest political level. While the negotiation concerning the introduction of the concept closer cooperation by the Amsterdam Treaty lasted seven minutes, the corresponding negotiation before the introduction of enhanced cooperation by the Nice Treaty lasted fifteen minutes. Yet, according to Stubb, flexibility had different meaning for different people.[21]

5 Flexibility as the Guiding Star

While looking at alternative legal ways forward,[22] it becomes apparent that they have a certain amount of flexibility in common. Different forms of flexibility have great potential, not least as an aid to solve the veto problem. In an ever larger union, flexibility is needed in order to avoid decision making and treaty revisions being stalled. However, the benefit of flexibility must be weighted against the risk of fragmentation, inconsistencies and loss of overview. In order to prevent *ad hoc* developments where political control might be lost over legal

20 *See* in general Tuytschaever, F. *Differentiation in European Union Law*, Oxford: Hart Publishing, 1999; de Búrca, G. och Scott, J. (eds.), Constitutional Change in the EU – From Uniformity to Flexibility? Hart, 2000; and de Witte, B., Hanf, D., Vos, E. (eds.) The Many Faces of Differentiation in EU Law. Intersentia: Antwerpen, 2001.

21 Stubb, A. *Negotiating Flexibility in the European Union* – Amsterdam, Nice and Beyond, Basingstoke: Palgraave, 2002, Chapters 4 and 5.

22 *See* further Bergström, M. *Rättsliga handlingsalternativ efter ratificeringskrisen: mot ökad flexibilitet och avkonstitutionalisering?* In Vad hände(r) med den konstitutionella krisen i EU? Sieps 2006:6.

developments, the right balance should be struck in the basic treaties where a certain amount of flexibility needs to be granted.

6 Conclusions - Towards Fewer and More Flexible Provisions?

Flexible solutions are beneficial in an ever larger union, not least in relation to the veto problem and the few remaining instances where unanimity is still required in the Council.

However, the ratification crisis as materialised by the no-votes in France and the Netherlands, could not be solved by the "outvoting" neither of France nor the Netherlands. In contrast to the previous ratification dilemmas in Denmark and Ireland, this time there is no simple explanation let alone remedy. Hence, it would not be worthwhile advancing proposals including explicatory protocols or declarations.

Neither would any opt-outs be helpful since it is impossible to identify why exactly the outcome was negative. If mainly due to the Constitutional Treaty itself, it would be even more difficult to identify any specific provision or set of provisions that were decisive for all or for a majority of the no-voters.

It might therefore be suggested that some provisions were relatively uncontroversial for most voters, while other provisions – possibly different ones for different groups of people – led to a negative judgement of the entire treaty. It might therefore be argued that the solution to this and future constitutional deadlock is to regulate less in the basic treaties. Arguably, not all provisions need to be protected by the double mechanism connected with treaty changes. Much more could be regulated by secondary legislation or possibly by a new hybrid mix of secondary legislation and primary law. The benefit would undoubtedly be fewer provisions to include in a possible compromise. This way, only the provisions most worthy of the double protection mechanism would need to be negotiated towards unanimous approval. Above all, provisions on division of competencies should be spelled out. Likewise could the increased use of flexible solutions directly supported by the treaties, such as passerelles and the provisions on enhanced cooperation, help avoiding future constitutional deadlock. Not all needs to be decided at the same time and by all. By focusing on more limited changes, the public debate could truly follow or even guide the necessary improvements.

Arguably, to avoid future treaty revisions being stalled, with more *ad hoc* developments as the result, possibly to the detriment of consistency and political control, the basic treaties should consist of fewer provisions some of which enable flexible solutions. As a concluding remark, this article suggests that the current ratification crisis provides us with a golden opportunity to slim and still improve the current treaties.