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Sisyphus Revisited: Options for the EU's Constitutional Future

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The rejection of the draft Constitutional Treaty in referendums in France and the Netherlands triggered a political crisis in the European Union. The crisis was quickly followed by the decisions of the United Kingdom and the Czech Republic to defer their referendums. The European Council reacted with a very mild Declaration calling for a period of reflection during which a broad debate could take place and for the alteration of the ratification timetable if member states so decided. Several member states (Denmark, Ireland, Portugal and Poland) decided to suspend planned referendums; only Luxembourg stuck to its original timetable, ratifying the Constitution by referendum on July 10, 2005. Clearly, the process of ratifying the Constitutional Treaty has broken down.

Can it be revived? The answer is far from clear. The efficacy of any given reform plan depends on achieving a certain degree of political will and leadership that unfortunately seems to be in short supply within the EU. It is therefore tempting to abandon any ambition of constitutional reform and to fall back on the legal framework of the Nice Treaty. That treaty technically remains in force, but there are real questions about the EU's ability to function under its rules. The proposed Constitution was designed precisely as a response to the perceived shortcomings and defects of the Nice Treaty. The solution (i.e. the Constitution) has failed, but this does not mean that the problems have disappeared. On the contrary, it is logical to assume that they persist and like Sisyphus, the EU must once again begin to push the boulder up the hill. What are the current options for reforming the EU and which ones make the most sense?¹

Option 1. *Selective application of parts of the Constitution within the framework of Nice.* Some recent proposals suggest implementing some of the constitutional novelties, such as, the Ministry for Foreign Affairs, the diplomatic service and the early warning mechanism.² Some of these reforms could be realized with no additional juridical structure. For instance, the Eurozone Council detailed in the Constitution is already functioning. Some others, such as the Charter of Fundamental Rights, could presumably be added to the existing Treaties without much opposition even if they would require national ratifications. Yet the political and juridical difficulties in implementing some of the constitutional reforms (for instance, including the

¹ A comprehensive bibliography of papers discussing the constitutional future of the EU can be found at <http://www.unizar.es/euroconstitucion/Home.htm>.

² See for example Brendan Donnelly, "No European Constitution, No European flexibility?," *Federal Trust Policy Brief*, Number 14, July 2005.

Minister of Foreign Affairs as part of the Commission) limit the ability to use this mechanism extensively. Moreover, the Constitution is a complete package that includes various interconnected compromises by the Member States that cannot be easily de-constructed.

Option 2. *Incremental reform (i.e. partial and progressive constitution building).* Andrew Moravcsik, an American scholar at Princeton University, advocates a return to the old-fashioned incremental reform procedure.³ Paradoxically, the process for creating the Constitution began because of the exhaustion of this method; a return to it would mark the abandonment of the constitutional objectives (e.g. simplification and codification, the attempt to delineate EU responsibilities, and the creation of a clearer system of norms). Incrementalism is not a recipe for success. Former rounds of reform were characterized by a diminishing will of national governments to compromise and, hence, agreements were reached on increasingly smaller packages of reforms. This outcome caused frustration among politicians and political elites and triggered discontent and calls for radical changes in the mechanism of reform.

Option 3. *Restarting the process: renegotiation of the Constitution.* Some politicians (such as the Danish Euro-skeptic Peter Bonde) and academics⁴ have argued that a new constitutional round should start to accommodate the demands voiced by the citizens in the referendum. The objections to this option are quite clear. First, there would be a problem of identification of demands—just what do EU citizens want? Secondly, there would be a problem of congruency between these demands—citizens in different countries appear to want different and indeed opposing reforms of the EU. But even if those obstacles could be overcome and agreement reached, the process of ratification would have to start again. If countries again resorted to referendums (and they would be difficult to avoid), the same situation would probably be repeated.

Option 4. *Keep the ratification process open.* Declaration 30 of the Constitutional Treaty implicitly commits national governments to complete ratification in order to verify whether 20 or more member states are able to do so and, then, decide accordingly. Obviously, the negative votes in France and the Netherlands transformed the significance of ratification of other states. The EU Constitution is technically a reform of the Treaty of Nice, and thus, according to Article 48 of the Treaty on European Union, requires unanimous approval. Under these conditions, ratification by any number of other member states will not suffice to bring the Constitution into force.

The negative attitudes toward the Constitution fuelled by the French and Dutch referendums combined with the requirement of unanimity make it unattractive for any government to face the trial of ratification. Subsequent referendums will no doubt produce large “no” votes, even if they pass, and even parliamentary ratification may provoke negative public reactions. Meanwhile, subsequent ratifications will not solve the problem and, thus, national governments face large political risks with very little expected gain. Anticipating this situation, governments with

³ Andrew Moravcsik, “EU works well without grand illusions,” *Financial Times*, June 13, 2005.

⁴ See the arguments by Julie Smith and Eric Erikssen et al in EU Constitution Newsletter Special Issue, The Federal Trust, July 2005 <http://www.fedtrust.co.uk/default.asp?pageid=280&mpageid=67&msubid=280&groupid=6>

sizeable Euroskeptic populaces and/or with shaky parliamentary support for the Constitution suspended the process (i.e. UK, Denmark, Poland, the Czech Republic).

There are, though, good reasons for keeping the process going: opinions of parliaments and citizens in the Member States that have not yet voted should be heard so that they are put on a similar footing. Since the “no” votes in France and the Netherlands, Latvia, Cyprus, Malta and Luxembourg (through a referendum) have all ratified the Constitution. But some observers, such as Charles Grant of the Center for European Reform, consider these ratifications essentially meaningless from the point of view of “reviving” the Constitution (even though they mean that 13 member states comprising both a majority of states and population have ratified it).⁵

Strategically, it makes sense to have a cooling-down period or an extended ratification period that goes beyond the initial target of November 2006. This would smooth the ride for certain governments, but for France and the Netherlands a different solution would have to be engineered. Since ratification requires unanimity, the remainder of the process is invalid until a second successful ratification in these two countries happens. Hence, it is up to the governments of these countries to identify what would be satisfactory for them. One option could be devising specific Declarations that incorporate specifications on the Constitution as the Edinburgh Declaration did for Denmark after the failure at the first referendum on Maastricht. In any case, completing ratification may be essential for mapping out alternatives and eventual participants in the various alternatives.

Option 5. *We are seafarers and we must rebuild the ship at sea.* Rebuilding the ship at high-seas means that both the Constitution and the ratification process have to be adapted on the spot to the current circumstances and an eventual mechanism has to be improvised. The starting point is a correct diagnosis of the factors that triggered rejection. A number of reasons for the “no” vote have been identified (fear of globalization, protest against enlargement, nationalism, anti-Turkish feeling, anti-government sentiment, etc.). The two options to cater to these are either renegotiation (option 3) or specific reassurances by means of Declarations (option 4). However, a more precise diagnosis of the rejection would note that the Constitution was not the source of these fears but, rather, the repository of fears nurtured over many years and which the EU only provoked in part. The referendums merely provided an outlet for expressing a more general malaise. In any case, the constitutional blockage came about not so much because of the referendums but because of their combination with unanimity. The following suggest a revision of the requirements and procedures for ratification:

Requirements. A mini-IGC could reform Article 48 of the Treaty of European Union and remove the unanimity requirement. At the same time, a similar reform of Article 477 of the EU Constitution (i.e. removal of unanimity for its entering into force) would be required. Since the resulting Constitution would technically be a new one, it would require a new round of ratification. For those countries that have already ratified the Constitution, this would not be a real problem, but for those that did not do so, conditions would have dramatically changed. This

⁵ See Charles Grant quoted in Nicholas Watt, “Luxembourg says yes to European constitution: Triumphant prime minister says result revives hopes for treaty,” *The Guardian*, July 11, 2005.

procedure has the following advantages: it keeps the ratification process alive (and, hence, the Constitution); it integrates affirmative votes; and it also gives citizens the opportunity to confirm their negative decisions in a different setting. Those member states that prefer to ratify via referendum would do so assuming fully the costs of their decisions and without the possibility of externalizing them. Last but not least, the rejection of the Constitution does not exclude the same State from becoming a party at some future point (as was the case after Rhode Island's initial rejection of the U.S. Constitution). The biggest problem is that the elimination of unanimity must be approved unanimously. Thus, those governments that may be afraid of being unable to ratify (and, hence, facing exclusion) would likely not accept, *a priori*, the elimination of the unanimity clause.

Procedures. Another controversial issue is whether such a bold move (constitution without unanimity) should be left to national ratification procedures decided upon by each country or, whether some sort of complementary procedures to bring about additional legitimacy should be considered. Several options can be considered:

- Ratification conventions (on the U.S. model). Citizens would vote directly in *ad hoc* assemblies whose only purpose would be ratifying the Constitution. This option has a logical problem, however, in that the purpose of an assembly is for deliberation, and the impossibility of modifying the Constitution renders this a futile exercise.
- A European Congress (or Assizes). This would be made up of Members of the European Parliament and national parliamentarians sitting together for the purpose of ratifying the Constitution. The Assizes were called as a consultative body in the drafting of the Treaty of Maastricht.
- A Pan-European referendum. Polish President Alexander Kwasniewski has added his voice in favor of a proposal that Austrian politicians championed earlier. In order to respond to fears of minority repression, a minimum EU voter participation rate could be devised as well as a requirement for concurrent majorities of states and populations.
- Synchronization of national referendums with minimum participation rates and shares of votes that create solid majorities.

Option 6. Differentiated integration. A number of models that could be grouped under the term “differentiated” integration have been discussed since the 1970s in order to cope with the increasing diversity within the EU. “Variable geometry,” “multi-speed Europe,” “Europe à la carte,” “concentric circles,” etc. are all analytical constructions to deal with the issue that is now arising again: a wider and more diverse EU with (at least) two competing views on the goal of the integration process.

Among these, “reinforced co-operation” finds juridical support in the current treaties although it has been never used. The Constitution itself strengthens greatly this mechanism and, in fact, some commentators argue that the dismissal of the Constitution may decrease rather than increase the flexibility of the EU. Within the Nice provisions, enhanced cooperation could be applied to a number of fields, but the value of such arrangements is open to question. Fields

such as social policy require an all-inclusive effort, unless participants are willing to risk social dumping or are willing to re-establish market barriers within the Single Market. In fields such as foreign and security policy, or judicial cooperation, various flexible arrangements operate on *ad hoc* basis outside of the framework of the Treaties.

Option 7. Refoundation. This option would admit the failure of the current model of “all the same at the same time.” It advocates the creation of a hard nucleus of states around a Constitutional Union. If elimination of unanimity was not accepted, interested states could stage a collective withdrawal of the EU and a reconstruction of the Constitutional union outside of the current structure. This is an extreme option, however, even relative to the other options described and seems well beyond the bounds of the possible.

The Gods condemned Sisyphus to endlessly repeat a hopeless task. The EU seems condemned to a similar situation in its efforts at reform. But with or without a Constitution, the EU cannot avoid pending issues. In a 12 or 15 member community, unanimity (costly as it was) allowed the accommodation of even antagonistic visions through strenuous efforts. With 25 members, unanimity seems a recipe for disintegration. In this context, the guiding principle could be that no one should be forced to take part in a constitutional union, but none should be prevented from this option. That means revisiting the principle of unanimity, however drastic that may sound.