MAX PLANCK INSTITUTE
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EU Constitutional Development since the Treaty of Lisbon: From Revision to Change?
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After a most active phase of constitutional revision since the mid-1980s, why has there been virtually no formal amendment to EU constitutional law in the last ten years, and, possibly, why will be there be virtually no further amendments in the future? Formally speaking, this is due to the extreme rigidity of amendment rules of the constitutionalized EU Treaties, which require unanimity, irrespective of the substantive nature of the amendment. In a (still) "polycrisis"-shaken Union of (still) 28 Member States this is all the more problematic: While formal revision of the EU constitution is practically excluded given the multitude of veto positions, substantive adaptation is restricted to infra-constitutional developments.

It might be argued that veto playing, the high number of veto holders and, accordingly, the general unattainability of the unanimity quorum have led to a number of institutional strategies to work around it. These strategies might become relevant for a meaningful description of EU constitutional development, even though it takes place in non-formal ways. Since the Treaty of Lisbon, such constitutional change ("Verfassungswandel"), i.e. changes of the EU constitution without alterations to its text, has taken place more intensively and has been initiated by a broad number of actors using a variety of instruments. Given the overwhelming "pressure" to amend the constitution in spite of the unsurmountable quorum, alternative "valves" of informal change open up. Such evasive legislative, executive or judicial strategies might be identified in the dilation of legal bases or the recourse to robust soft law, in the bypass to inter-se agreements and executive informalism, and are sometimes accompanied by judicial deference to politically or technically legitimated institutions and bodies, or, quite the contrary, fostered by judicial activism.

Is there an added value to center such developments around the concept of unanimity workarounds and to analyze some of them as amounting to constitutional change? Or is that only a stylish proxy to analyze existing, yet interwoven issues such as methodological limits to Treaty interpretation, the increase of intergovernmentalism or the recourse to informalization and agencification?

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