

## AMENDMENT OF THE CONSTITUTION PROCEDURAL AND POLITICAL QUESTIONS

by

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The Treaty establishing a Constitution for Europe<sup>1</sup> has just been signed by the Heads of States and Governments of the current 25 Member States of the European Union<sup>2</sup>. The final text of the Treaty has not been published yet; therefore this paper will be based on the version available on line<sup>3</sup>.

Like many international treaties and many constitutions, the Treaty provides rules for its own revision. These provisions are Article IV-443, which foresees an ordinary revision procedure, and Articles IV-444 and IV-445 that determine simplified revision procedures strictly applied to Part III.

The ordinary revision procedure is without any doubt inspired by Article 48 of the EU Treaty, and the simplified revision procedures have also some kind of inspiration in the EU Treaty, for instance, in Article 22 EC Treaty on Citizenship.

The purpose of this paper is to analyse those three different revision procedures in the context of the constitutionalisation of the EU. That means in general terms to assess whether those provisions of the European Constitution provide the Union with the legal and political instruments for developing itself efficiently and autonomously in an enlarged space.

Notwithstanding, before starting it is necessary to draw attention to the following preliminary points:

- Firstly, one has to admit that the question of the constitutionalisation or the internationalisation of the revision procedures is a tricky one and it has always been overestimated. Actually, the difference between the revision of a treaty and the revision of a constitution is not as clear as that<sup>4</sup>. On the one hand, the unanimity is not absolutely linked to the

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1 With the aim of differentiating the Treaty currently in force of this one and of simplifying the text, I am using below the term Constitution for designating this Treaty.

2 The Treaty has been recently signed in Rome on the last 29 October. The candidate countries Turkey, Bulgaria and Romania signed the Final Act and Croatia attended the ceremony without signing.

3 See CIG 87/2/04 REV 1 (<http://www.europa.eu.int>).

4 See in this sense LUIS MARÍA DíEZ-PICAZO, *Tratados y constitución*, Constitucionalismo de la Unión Europea, Madrid, 2002, p. 98.

international treaties, as there are some treaties that can be amended and enter into force by a more or less enlarged majority of States<sup>5</sup>. On the other hand, it is very difficult to identify the common rules of the federal constitutions. There is, however, a common point, if one compares, for instance, the constitution of the USA<sup>6</sup>, Germany<sup>7</sup> and Switzerland<sup>8</sup>: none of them requires unanimity for its revision.

- Secondly, some scholars<sup>9</sup> distinguish between revision and amendment of a treaty or of a constitution, considering that the revision comprises either more changes<sup>10</sup> than the amendment or at least deeper and wider ones<sup>11</sup>. In my point of view, this distinction is irrelevant, since it is impossible to draw clearly a line between the two terms. Revision and amendment are two different words to express the same idea: the idea of modification of something – in this case, the wording of a rule. Anyway, the European Constitution does not take that distinction into account. Neither do I in this paper.

In section 2, I will briefly list the criticism that has been subjected to the revision procedures currently in force. In section 3, I will look at the ordinary revision procedure. In section 4, I will study the simplified revision procedures and to finalise, in section 5, I will present some necessarily provisional conclusions.

5 See Articles 108 and 109 of the Charter of the United Nations, Article 36 of the Constitution of the International Labour Organisation, Article 13 of the Statute of UNESCO, Article 28 of Convention of World Meteorological Organisation, Article 73 of the Constitution of the World Health Organisation.

6 See Article 5 of the USA Constitution.

7 See Article 79 of Fundamental Law of Bonn.

8 See Articles 192-195 and 142, par. 2, of the Swiss Constitution.

9 JEAN LECA, *Les techniques de révision des conventions internationales*, Paris, 1961, p. 42 and 43. Considering the distinction irrelevant, see NANCY KONTOU, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Oxford, 1994, p. 9; CONSTANTIN P. ECONOMIDES, *La Révision de la Charte des Nations Unies (état actuel de la question)*, Revue Helénique de Droit International (RHDI), 1977, p. 22; G. GUARINO, *La Revisione dei trattati - Spunti critico ricostruttivi*, Neapel, 1971, p. 113; RALPH ZACKLIN, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, Leyden, 1968, p. 4.

10 Quantitative criteria.

11 Qualitative criteria.

I. *Main criticism of Article 48 of the EU Treaty*

Under the terms of Article 48, the revision of the EU Treaty depends on a consensus of the representatives of the Member States assembled in an Intergovernmental Conference that is organised in a diplomatic way and on the ratification of all Member States according to their constitutional law. This is a rather rigid procedure, internationally featured, in which the acceptance and the entry into force of the amendments depend on a double consensus of the States.

As I have already underlined the EU Treaty also provides less rigid procedures for specific matters<sup>12</sup>, but even in the majority of those cases the entry into force of the amended rules depends on the ratification by all Member States.

Therefore, the revision of the EU Treaty is in almost all the cases preponderantly a competence of the States<sup>13</sup>. The European institutions either participate in a preparatory phase, being excluded from the final decision, or they might approve a final act containing the revised rules<sup>14</sup>, but the last word goes on to belong to the States.

Notwithstanding, the future rules, due to the EC principles of primacy and direct applicability, apply to the citizens of the EU. Therefore, the revision procedure contained in Article 48 of the EU Treaty has been firmly criticised, according to its democratic deficit<sup>15</sup>.

For the ones who support the idea that the EU Treaty has been suffering a slow transformation into a transnational constitution, like me, they can hardly accept that the EU revision procedures are made in accordance with pure international methods<sup>16</sup> even more rigid than some international treaties<sup>17</sup>. The constitutional

12 The EC Treaty provides simplified revision procedures, amongst others, for the following matters: the monetary policy (Articles 104, par. 14, and 107, par. 5), the composition of the Commission (Article 213, par. 1), the composition of the ECJ and the increase of the general advocates number (Articles 221, par. 4 and 222, par. 3), etc.

13 See in this sense MAR CAMPINS ERITJA, *La revisione del Tratado de la Union Europea*, Gaceta Juridica (GJ), 1995 (Oct.), p. 9 at p. 60. See against ULRICH EVERLING, *Zur Stellung der Mitgliedstaaten der Europäischen Union als "Herren der Verträge"*, in Ulrich BEYERLIN e. a., *Recht zwischen Umbruch und Bewahrung*, Festschrift für Rudolf BERNHARDT, Berlin, 1995, p. 1161, at p. 1176.

14 See on the participation of the European institutions in the revision procedure, CHRISTIAN KOENIG / MATTHIAS PECHSTEIN, *EU-Vertragsänderungen*, Europarecht, 1998, p. 135, at p. 145.

15 See, recently, THOMAS SCHMITZ, *Le peuple européen et son rôle lors d'un acte constituant dans l'Union européenne*, *Revue du Droit Public (RDP)*, 2003, p. 1709, at p. 1733 et seq.

16 See J. L. CRUZ VILAÇA / NUNO PIÇARRA, *Y a-t-il des limites matérielles à la révision des traités instituant les CE?*, *Cahiers de Droit Européen (CDE)*, 1993, p. 3, at p.10 et seq.

17 As a matter of fact, the Treaties of some Specialised Agencies of the UN, such as ILO, provide less rigid rules to be amended than the EU Treaty.

instrument of an entity composed by States and citizens should be revised with a more intensive participation of the citizens<sup>18</sup>.

In spite of this rigidity<sup>19</sup> the EU Treaty and the former EC Treaties have been subjected to more revisions in the last fifteen years than the majority of the constitutions in the last fifty years. The rigidity of the procedure has not prevented the accomplishment of four different revisions since 1987, indeed.

Apart from the theoretical criticism essentially based on the contradiction between the evolution of the EU and the EU Law in a constitutional sense and the revision clauses that are more and more linked to international law<sup>20</sup>, there are other reasons for criticism.

The IGC in Nice demonstrated that the achieving of the consensus by all Member States is everything but an easy goal, especially when the issues on the table concern the hard core of the sovereignty of the States with the consequent loss of power and when the content of the agenda is narrow<sup>21</sup>.

18 For a deeper and wider discussion on this issue, see ANA MARIA GUERRA MARTINS, *A natureza jurídica da revisão do Tratado da União Europeia*, Lisbon, 2000, at p. 317 et seq.

19 This word is also used to stress the fact that the States and the European institutions shall respect the revision procedures provided by the EU Treaty. In other words, this concerns the question of the formal limits of the revision. Further see ROLAND BIEBER, *Les limites matérielles et formelles à la révision des traités établissant la Communauté européenne*, *Revue du Marché Commun et de l'Union Européenne (RMCUE)*, 1993, p. 343 et seq; ANA MARIA GUERRA MARTINS, *A natureza jurídica da revisão...*, p. 469 et seq.

20 See in this sense B. DE WITTE, *Rules of Change in International Law: How Special is the European Community?*, *Netherlands Yearbook of International Law (NYIL)*, 1994, p. 310 at p. 331.

21 See ANA MARIA GUERRA MARTINS, *O Tratado de Nice – a reforma institucional e o futuro da Europa*, in RUI MANUEL DE MOURA RAMOS e. a. (org.), *Estudos em homenagem à Professora Doutora Magalhães Collaço*, vol. I, Coimbra, 2002, p. 779 et seq; FRANCISCO SEIXAS DA COSTA, *Portugal e o Tratado de Nice – Notas sobre a estratégia negocial portuguesa*, *Negócios Estrangeiros*, 2001, n. 1, p. 45 et seq; CLAUDE BLUMANN, *La conférence intergouvernementale 2000 et le traité de Nice*, in *Les procédures de révision des traités communautaires : du droit international au droit communautaire*, Brussels, 2001, p. 88 et seq; CESÁREO GUTIÉRREZ ESPADA, *Una reforma «difícil pero productiva»: la revisión institucional en el Tratado de Niza*, *Revista de Derecho Comunitario Europeo (Rev. Der. Com. Eur.)*, 2001, p. 28 et seq; XENOPHON A. YATAGANAS, *The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective*, *European Law Journal (ELJ)*, 2001, p. 243 et seq; PIETER VAN NUFFEL, *Le traité de Nice – un commentaire*, *Revue de Droit de l'Union Européenne (RDUE)*, 2001, p. 332 et seq; THOMAS WIEDMANN, *Der Vertrag von Nizza – Genesis einer Reform*, *Europarecht (EuR)*, 2001, p. 185 et seq; FRANCISCO J. FONSECA MORILLO, *De Berlín a Niza: panorama y lecciones*, *Boletín Europeo de l'Universidad de Rioja (BEUR)*, 2001, p. 2 et seq; FRANCISCO ALDECOA LUZARRAGA, *La apertura del proceso constituyente*, *BEUR*, 2001, p. 7 et seq.

These practical aspects tend to become worse in an enlarged Union and claim for an urgent solution<sup>22</sup>.

Otherwise, the internal procedures of ratification have always been rather complex. The delay in the entry into force of the Single European Act, caused by Ireland, the serious risk of not coming into force of the Maastricht and Nice treaties, due to the referendum in Denmark and Ireland, respectively, demonstrate those difficulties very well.

To sum up, the current revision procedures permit a broad participation of the citizens neither at a European nor at a national level. As a consequence, the weight of the States is too heavy. Moreover, the consensus in the IGC and the unanimity of the internal ratification procedures prevent a rapid and efficient decision<sup>23</sup>.

## *II. Ordinary revision procedure*

Taking this panorama into account, one might not be astonished that the European Convention<sup>24</sup> has been preceded by quite a large debate on this issue<sup>25</sup>, which culminated in the change of the revision clauses.

As long as the European Convention decided to elaborate a draft of a constitutional treaty, which implied a global revision of the current treaties, the need to modify the revision procedures did become clear.

Therefore, the European Constitution's Draft approved by the European Convention<sup>26</sup> contains a provision (Article IV-7) on the revision procedure in Part IV<sup>27</sup>.

22 LENAERTS and MARLIES pointed out that «since subsequent Treaty changes have turned the Union into a true political union, directly touching the citizens, it has become apparent that the IGC method has reached its limits». See KOEN LENAERTS / MARLIES DESOMER, *New Models of Constitution-making in Europe: The Quest for Legitimacy*, Common Market Law Review (CMLR), 2002, p. 1217, at p. 1231.

23 See BRUNO DE WITTE's paper delivered in this volume.

24 The European Convention was convened by the European Council of Laeken (December 2001) in order to ensure the preparation of the forthcoming IGC would be as broadly-based and transparent as possible (see Conclusions of that Council on the site of the European Union: <http://www.europa.eu.int>).

25 On the terms of that debate see KOEN LENAERTS / MARLIES DESOMER, *New Models...*, p. 1217, at p. 1228 et seq.

26 See CONV 850/03.

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The above-mentioned Article IV-7 has been accepted by the IGC with slight formal changes and it is now Article IV-443.

First of all, I would like to compare Article IV-443 to current Article 48 of the EU Treaty, trying to find out whether it responds in a positive sense to the above-listed criticisms.

Or at a first glance, between both revision procedures one can remark the following differences:

- Whereas Article 48 of the EU Treaty does limit the participation of the European Parliament being consulted, Article IV-443, par. 1, maintains this competence and adds the power to submit proposals for the amendment of the Treaty;
- Article 48 of the EU Treaty provides neither the participation of the European Council nor of the national parliaments. By contrast, Article IV-443, par. 1, provides that the above-mentioned proposals shall be submitted to the European Council and to the national Parliaments of the Member States;
- Article 48 EU Treaty does not foresee any Convention. On the contrary, Article IV-443, par. 2, provides that if the European Council adopts a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed by the representatives of national Parliaments of the Member States, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. This Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to the IGC. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention, because it is not justified by the extent of the proposed amendments;
- Article 48 of the EU Treaty provides that the amendments enter into force after being ratified by all Member States in accordance with their respective constitutional requirements, so does Article IV-443, par. 3, but it adds in par. 4 the following text:

27 This Part relates to final and general provisions. BRUNO DE WITTE pointed out that it undervalues the revision procedure, since the constitutional matters are placed in Part One and Part Two. Part III is more technical and Part IV includes the provisions that do not belong to the other ones. The revision clauses are without any doubt a constitutional matter, so they would have been placed in Part One. See "Entry into Force and Revision", in BRUNO DE WITTE (Ed.), *Ten Reflections on the Constitutional Treaty for Europe*, E. book, Robert Schuman Centre for Advanced Studies and European University Institute, San Domenico di Fiesole, 2003, p. 205.

“If, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”.

I will come back to this point hereafter.

To be honest one has to say that the majority of these differences are more apparent than real, as they are still part of the States and institutions’ practice.

Firstly, one has to mention the EP competence to submit proposals. Although it has not been explicitly provided by the Treaty, it has been in practice accepted at least since the IGC 1996.

Secondly, the formal reference to the European Council follows the practice of the former revisions, as well. In all former revisions the decision to initiate the procedure, the content of the agenda and the final agreement have always been taken by the European Council<sup>28</sup>. So this organ plays quite an important role.

Finally, the prevision of a specific body that prepares the IGC – the Convention – is the formalisation of a practice more recently developed. Effectively, the Charter of Fundamental Rights<sup>29</sup> and the current revision of the Treaty<sup>30</sup> had been prepared by a Convention with a similar composition.

28 On the role that has been played by the European Council in the former revisions procedures see B. DE WITTE, *Rules of Change...*, at p. 317; PANAYOTIS SOLDATOS, *Le Conseil européen et la Conférence intergouvernementale: une déviation par rapport à la méthode communautaire de révision des traités*, in *Les procédures de révision des traités communautaires...*, p. 53 at p. 58 et seq.

29 On the Convention of the Charter see GILLES DE KERCHOKE, *L’initiative de la Charte et le processus de son élaboration*, in YVES CARLIER / OLIVIER DE SCHUTTER (dir.), *La Charte des droits fondamentaux de l’Union européenne – son apport à la protection des droits de l’Homme en Europe*, Brussels, 2002, p. 29 et seq.; GRÁINNE DE BÚRCA, *The Drafting of the European Union Charter of Fundamental Rights*, *European Law Review (ELR)*, 2001, p. 138; WOLFGANG DIX, *Charte des droits fondamentaux et convention – de nouvelles voies pour réformer l’UE ?*, *RMCUE*, 2001, p. 307 et seq.; ANA MARIA GUERRA MARTINS, *A Carta dos Direitos Fundamentais da União Europeia e os direitos sociais*, *O Direito*, 2001, p. 211 et seq.; JEAN-PAUL JACQUÉ, *La démarche initiée par le Conseil européen de Cologne*, *Revue Universelle des Droits de l’Homme (RUDH)*, 2000, p. 3 et seq.; JACQUELINE DUTHEIL DE LA ROCHÈRE, *La Convention sur la Charte des droits fondamentaux et le processus de construction européenne*, *RMCUE*, 2000, p. 223 et seq.; *Idem*, *La Charte des droits fondamentaux de l’Union européenne: quelle valeur ajoutée, quel avenir?*, *RMCUE*, 2000, p. 674 et seq.; ALBRECHT WEBER, *Die Europäische Grundrechtscharta - auf dem Weg zu einer europäischen Verfassung*, *Neue Juristische Wochenschrift (NJW)*, 2000, p. 538.

A real innovation is the duty to notify the proposals to the national Parliaments, which responds to an old claim of these organs. In fact, they have always argued that they should participate not only after the conclusion of the revision by the IGC, but previously, when they could influence the final decision<sup>31</sup>.

Having listed the differences between Article 48 of the EU Treaty and Article IV-443 of the European Constitution, one has to look for the similarities.

The most impressive one is included in par. 3 of Article IV-443, which provides that the amendments shall be approved by a conference of the representatives of the governments of the Member States by common accord and the entry into force of them depends on the ratification of all Member States.

This is contrary to the theses of some scholars, who consider that the IGC should adopt the amendments by an enlarged majority and the ratification of all Member States will be an exception solely required in some special cases<sup>32</sup>, the European Constitution rather preserves the principle of double unanimity in the revision.

Therefore, the States remain les maîtres des traités, die Herren der Verträge<sup>33</sup>.

30 Further on the European Convention see ANA MARIA GUERRA MARTINS, *O Projecto de Constituição Europeia. Contributo para o Debate sobre o Futuro da União*, 2ª ed., Coimbra, 2004, p. 32 et seq.; MARIA EDUARDA AZEVEDO, *Convenção sobre o futuro da Europa – Reflexões e Testemunhos*, Lisbon, 2004, p. 20 et seq.; ALBERTO COSTA, *Na Convenção Europeia – Posições, Argumentos, Debates*, Lisbon, 2004, p. 3 et seq.; GUILHERME D'OLIVEIRA MARTINS, *Que Constituição para a União Europeia – Análise do Projecto da Convenção*, Lisbon, 2003, p. 23 et seq.; PATRICIA HEINDL e. a., *The Future Constitution of Europe – European Convention, IGC 2004, and the Prospects for European Integration*, Verwaltung aktuell, 2003, p. 154 et seq.; VALÉRY GISCARD D'ESTAING, *The Convention and the Future of Europe: Issues and Goals*, International Journal of Constitutional Law (Int'l J. Const'l L.), 2003, p. 346 et seq.; ROBERT BADINTER, *A European Constitution: Perspectives of a French Delegate to the Convention*, Int'l J. Const'l L., 2003, p. 363 et seq.; GIULIANO AMATO, *The European Convention: First Achievements and Open Dilemmas*, Int'l J. Const'l L., 2003, p. 355 et seq.; JULIANE KOKOTT / ALEXANDRA RÜTH, *The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, CMLR, 2003, p. 1315, at p. 1316 et seq.; C. LADENBURGER, *Towards a Post-national Constitution – Federal, Confederal or Genuinely sui generis? Introductory Remarks on the Convention Method, and Some Features of an Improved Constitutional Charter*, European Review of Public Law / Revue Européenne de Droit Public (ERPL/REDP), 2003, p. 75 et seq.; ANA MARIA GUERRA MARTINS, *Vers une Constitution post-nationale – fédérale, confédérale ou vraiment sui generis ?*, ERPL/REDP, 2003, p. 39 et seq.; JAN WOUTERS, *Exit the Convention, Come the IGC. Some Reflections on the Convention as a Method for Constitutional Change in the EU*, Maastricht Journal of International and Comparative Law (MJ), 2003, p. 225 et seq.; GUY SCOFFONI, *Convention pour l'avenir de l'Europe et Convention de Philadelphia: la question du mode de production d'une constitution*, Revue des Affaires Européennes (RAE), 2001-2002, p. 683 et seq.

31 See KOEN LENAERTS / MARLIES DESOMER, *New Models...*, p. 1232.

32 See, for instance, BRUNO DE WITTE, "Entry into Force and Revision...", p. 216 et seq.

33 As INGOLF PERNICE very rightly affirmed «the «masters of the treaties, if any, can only be the citizens, not the Member States» in *Multilevel Constitutionalism in the European Union*, ELR, 2002, p. 511 et seq., at p. 518.

### *III. Simplified revision procedures*

Apart from an ordinary revision procedure, the final text of Treaty establishing a Constitution for Europe reorganises the matter of the revision by introducing two new and different simplified revision procedures in Article IV-444 and Article IV-445.

The European Convention's draft did not include such procedures. However, one has to point out that the content of Article IV-444 is similar to Article I-24, par. 4 of the above-mentioned draft.

During the Italian Presidency of the IGC, some changes on the revision issue<sup>34</sup> were proposed, which had influenced the final version of the above-mentioned Articles, introduced by the IGC 2004.

Article IV-444 provides a simplified procedure for changing the rules of voting by the Council, as well as the rules of legislative procedure. Article IV-445 is more comprehensive and applies to all rules of internal Union policies in general. Both provisions apply therefore to Part III.

Article IV-444, par. 1, reads that the European Council may adopt a European decision, authorising the Council to act by qualified majority, when it shall have to act by unanimity. It is to highlight that this simplified revision procedure is excluded to decisions with military implications or those in the area of defence.

Article IV-444, par. 2, applies the same procedure for the cases, when European laws and framework laws shall be adopted by a special legislative procedure, the European Council may adopt a European decision allowing for the adoption of such European laws and framework laws according to the ordinary legislative procedure.

With regard to par. 3 of Article IV-444 the initiative shall be taken by the European Council and notified to the national parliaments, which have the possibility to prevent the adoption of such an amendment by making known their opposition within 6 months of the date of such notification. The European Council shall adopt a European decision by unanimity after obtaining the consent of the European Parliament.

This simplified revision procedure does not provide any intervention of the Member States as such. It is completely carried through the European organs: the European Council decides, after the consent of the EP.

The intervention of the Member States is, however, assured, due to the participation of the national parliaments and the composition of the European Council, which is dominated by the Member States.

In terms of democratic legitimacy, one should stress that the procedure respects the three bases of legitimacy of the Union.

Article IV-445 relates to the simplified revision procedure concerning internal Union policies. So it applies to Title III of Part III.

34 See CIG 52/03 of 25 November 2003.

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The initiative of the procedure belongs to the Government of any Member State, the European Parliament or the Commission and the European decision amending the provisions shall be taken by the European Council by unanimity after consulting the European Parliament and the Commission and the European Central Bank in the case of institutional changes in the monetary union.

The amendments adopted by this simplified revision may not increase the competences attributed to the union by the Treaty.

In contrast to the simplified procedure provided in Article IV-444, the European decision adopted under Article IV-445 shall be approved by the Member States in accordance with their respective constitutional requirements.

The participation of the Member States in the simplified revision procedure provided in Article IV-445 is much more intensive than the one provided in Article IV-444, as they control the procedure from the beginning until its conclusion.

On the contrary, the participation of the EP is diminished, as it is limited to a consultation. The Commission and the European Central Bank that have any participation in Article IV-444 are now consulted.

In comparison to Article IV-444 the procedure of Article IV-445 is much more complex, it takes much more time and as the entry into force depends on the approval of all Member States in accordance with their constitutional requirements, the amendments may risk never coming into force.

In contrast to the ordinary revision procedure provided in Article IV-443, this procedure dispenses the intergovernmental conference and the convention. As a consequence, one can certainly expect some gain in terms of efficiency and rapidity.

#### *IV. Conclusions*

After the overview of the revision procedures, it is time to draw some conclusions.

Looking at the changes introduced in Article IV-443 the first impression is that they reflect two main concerns: the lack of democracy and efficiency of the current revision and the need of simplification. This explains the reinforcement of the participation of the organs, where the citizens are represented, and at the same time the mention to the Convention, which contributes not only to democratise the procedure, but also to simplify it, as the Convention is supposed to prepare a text, which should be submitted to the IGC. When the procedure functions effectively, this latter would only discuss the points that could not have reached an agreement before; which means the most controversial ones, but few, in principle.

However, the gains in terms of democracy, efficiency and simplification introduced by Article IV-443 are not so evident.

The citizens of the Union solely participate in a preliminary phase, which is not decisional. The EP has competence to submit proposals. The participation of the Convention is limited to examine the proposals for amendments and to adopt a recommendation by consensus. Taking into consideration its composition, its participation in the revision procedure should have been much more intensive. In

fact, the Convention is an assembly composed by the different interests represented in the EU and the three bases of democratic legitimacy – EP, Governments of the States and national Parliaments – it should act as such. Therefore, it should decide by majority, not by consensus and the final document should be a proposal to submit to the IGC, not just a recommendation.

Moreover, the convocation of the Convention can be eliminated. It is true that this possibility is merely open when the proposed amendments do not justify it, depending on a decision of the European Council, with consent of the EP, which assures the democratic legitimacy of the decision.

The notification of the proposals to the national parliaments contributes to the democratisation of the procedure in quite an elementary way, since their representation lies at national level and not at European Union level.

By contrast, the simplified procedure of Article IV-444 represents a real gain in terms of democracy and simplification. On the one hand, the final decision is taken by the European Council, after obtaining the consent of the EP and the national parliaments can prevent the adoption of the decision. The final decision is coherent with Article I-1 of the European Constitution, which affirms the European Union as a union of States and citizens. On the other hand, the amendments enter into force without any national requirements.

However, one has to remember that this procedure has a rather narrow extent of application and it is expressly excluded from decisions with military implications or those in the area of defence. That means the decisions more linked to the States' sovereignty.

The simplified procedure previewed in Article IV-445, by contrast, has a larger extent of application – Title III of Part III – but the participation of the citizens is rather reduced. The EP has solely the power of initiative and consultation. By contrast, the participation of the States is clearly increased. They dominate the procedure in the community phase, as the decision belongs to the European Council, and afterwards comes a national phase that is also dominated by them. Otherwise, this procedure presupposes also substantial limitations, since it does not allow to increase the competences of the Union.

With regards to simplification, the revision procedures remain as complex as before.

To conclude, I would like to point out that in spite of the increased participation of the EP, the national parliaments and the Convention, which could be assessed as a step forward in the sense of the constitutionalisation of the revision procedures, the influence of international law remains as intensive as it was previously<sup>35</sup>. Indeed, the amendments shall be agreed by common accord in a conference of representatives of

35 In the same sense, see OTTO PFERSMANN, *The New Revision of the Old Constitution*, in WEILER / EISGRUBER (eds.), *Alteuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/04 (<http://www.jeanmonnetprogram.org/papers/04/040501-10.html>), *maxime*, p. 9.

the governments of the Member States and shall enter into force being ratified by all Member States in accordance with their respective constitutional requirements.

Nevertheless, the European Constitution's Draft accepted by the final text of the Constitution half-opens the door to discuss whether the amendments could enter into force without being ratified by all member States. Article 443, par. 4, raises this doubt when it provides that if, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. It is not mentioned what kind of acts the European Council can adopt and it seems excluded that the European Council has any means to oblige the State to ratify. The sole possibility is to persuade the State to ratify and in case of failure to persuade it to withdraw<sup>36 37</sup>.

One can hardly assess the importance of this paragraph in the context of the rules of the Constitution's revision. The History of the European integration frequently shows that the role and the importance of the rules can only be assessed *a posteriori*. It is, for instance, the case of the well-known Declaration n° 23 of the Treaty of Nice, which, without having any binding effects, has had a huge influence in the subsequent constitutional developments of the Union.

In comparison with that example, paragraph 4 contains a binding rule. So it allows the European Council at least to pressure by diplomatic means the recalcitrant State or States. Otherwise, if the terms of the option will be between the ratification of the amendments and the withdrawal, it might well be that paragraph 4 of Article 443 will function for the States as an incentive to ratify the future amendments.

In my opinion, this paragraph can play quite an important role in the future revisions. It can even be responsible for a substantial change in the nature of the revision of the Constitution. As a matter of fact, one of the most important elements argued in favour of the international nature of the revision procedure is the double requirement of the unanimity of the States.

The simple consideration of the possibility to amend the Treaty without this demand will displace the revision procedure to a constitutional field. The exercise of the constituent power in the Union is slowly winning new contours. Nevertheless, it is too early to affirm that the rule of the double unanimity is being removed. Paragraph 4 solely represents a timid step in that sense and opens the door to the ongoing discussion on this issue.

36 See in this sense, SERGIO BARTOLE, *A proposito della revisione del trattato che istituisce la costituzione dell' Unione Europea*, *Diritto Pubblico* (Dir. Pubb.), 2003, p. 779.

37 The withdrawal is expressly provided by the European Constitution (Article I-59) for the first time in the History of the European Union. Further on this issue see BRUNO DE WITTE, *The European Constitutional Treaty: Towards an Exit Strategy for Recalcitrant Member States ?*, *MJ*, 2003, p. 3 et seq.; RAYMOND J. FRIEL, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, *The International and Comparative Law Quarterly* (ICLQ), 2004, p. 407 et seq.

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The ones who supported the idea that, on one hand, a constitution shall be revised with constitutional tools, and on the other hand, the double requirement of the unanimity of States in an enlarged Union will prevent all amendments in the future, can find some hope in that paragraph.