

## CONSENT OF PARLIAMENT OR PEOPLES' REFERENDUM?

by  
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### *I. The general approach of Member States to the ratification of the European Constitution*

The Treaty on a Constitution for Europe ("European Constitution") "shall be ratified by the High Contracting Parties with their respective constitutional requirements" (Article IV-447 (1)). The European Constitution follows the standard way of the entry into force prescribed for revision of the EC/EU Treaties<sup>1</sup> and continues to rank the mode of giving such an approval with the essential elements of the Member States' "national identities, inherent in their fundamental structures, political and constitutional" (Article I-5 (1)).

"The respective constitutional requirements" and their implementation reflect the specific national traditions and range from a mere approval with the Constitutional Treaty by an act of Parliament passed by a simple majority (Germany) to an amendment of the national Constitution (France), validated in addition by an obligatory nation-wide referendum (Ireland). The practices of individual Member States differ in the scope of discretion in deciding on the mode of ratification, which is defined by specific features of the balance between the representative democracy and elements of the direct democracy. The *constitutional* framework of the not unlimited *political* choice must be respected. Though keeping the way of ratification with the national democratic tradition is essential for the acceptance and execution of the European Constitution in the future, it is irrelevant for legality of its entry into force at present, because nothing but the fact that the instrument of ratification has been deposited counts.

As compared with the previous revision Treaties, there is one striking difference: a high number of the Member States (9-10 of the total 25, including 8 of the "old" ones) decided to hold a referendum on its ratification:<sup>2</sup> *Spain* on 20 February 2005;<sup>3</sup> *Portugal* possibly on 10 April 2005; referendum in *France* was initially planned during the second half of 2005, could be held on 9 May - Europe day - possibly in

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1 Article 48 TEU.

2 See <http://europa.eu.int/constitution/futurum/ratification>.

3 Already approved as the first referendum organized within the Union, the ratification must be still authorized by the organic law under Article 93 of the Spanish Constitution.

co-ordination with other Member States;<sup>4</sup> *Denmark* in either late 2005 or early 2006; *Luxembourg*;<sup>5</sup> the *Netherlands* most likely in spring 2005 - it will be the first national referendum in the country's history;<sup>6</sup> in *Poland* probably during the second half of 2005, when the country would have elected its new President; the timing of the *Irish* referendum is not clear yet; *United Kingdom* will hold referendum during the first half of 2006 (possibly in March), after the country's presidency of the EU;<sup>7</sup> in the *Czech Republic* no decision on the way of ratification has been taken until now. Other Member States seek ratification through their Parliaments: *Austria*;<sup>8</sup> *Belgium* (most likely);<sup>9</sup> *Cyprus*;<sup>10</sup> *Estonia*; *Finland*;<sup>11</sup> *Germany*;<sup>12</sup> *Greece*; *Hungary*;<sup>13</sup> *Italy*;<sup>14</sup> *Latvia*; *Lithuania*;<sup>15</sup> *Malta*; *Slovakia*; *Slovenia*<sup>16</sup> and *Sweden*.<sup>17</sup>

The unusually high inclination of the Member States to the method of ratification through referendum appears to be attributable - whether justified or not - to various reasons. First, the *social-psychological* reason is an "added value" of the European

- 4 This would reduce the risk for the „yes“ campaign to lose momentum over the summer. It would also ensure voters differentiate this referendum from that on Turkey's membership announced by President Chirac. However, the Constitutional Court has only just started to work on the Treaty's implications on the French constitution and its conclusions are not expected before spring, which renders a May referendum difficult.
- 5 Most likely in early 2006 or in late 2005 in case the Government decides to make it coincide with the end of the country's Presidency of the EU. No referendum has been held since 1937. The Chamber of Deputies has overwhelmingly supported a motion in favour of a referendum. It remains to be seen whether it will be binding or merely consultative: the Parliament is said to declare, that it will respect the vote of the people.
- 6 Both chambers of the Parliament are currently discussing the Referendum Bill.
- 7 The parliamentary bill will be debated in early 2005, just before the general election which is likely to take place in May. The government claims it would be difficult to hold the presidency (from July to December 2005) and the referendum simultaneously. Besides, it hopes, it can take advantage of the presidency to persuade the public of the virtues of the Constitution and Europe alike, thereby gaining momentum in favour of the text.
- 8 The Chancellor Schüssel said, he would only support the referendum on an EU-wide basis.
- 9 The two-level process of parliamentary ratification is to be organized (national and regional), despite Prime Minister Verhofstadt's early intention to hold a non-binding referendum.
- 10 There was no referendum on EU accession.
- 11 Despite the Minister of Justice Koskinen's proposal to hold a referendum simultaneously to the presidential elections in June 2006.
- 12 There was uncertainty over the ratification method. The parliamentary process started on 3 November 2004 and could be completed by June 2005. At the same time the Government was trying to amend the Grundgesetz and allow for national referendums, at an instance of the people initiative, too, the first of which should be held on the European Constitution. However, the move requires a three-fifths majority in the Bundestag, which is beyond reach unless the parliamentary opposition support it. It has recently said its support would be linked to concessions on policy areas which have yet to be specified.
- 13 Approved on 20.12.2004.
- 14 Originally it sought ratification through Parliament before Christmas 2004, aiming to be the first Member State to ratify the European Constitution.
- 15 Approved on 11.11.2004, as the first EU Member State.
- 16 Approved on 1.2.2005.
- 17 In the second part of 2005.

Constitution as the document repealing the earlier Treaties and establishing the "new" European Union, the successor of the existing EC/EU. Another, *political* reason for the attention drawn to this choice is a matter of opportunity, as a support by the public for the European Constitution in some Member States will likely be reached by referendum rather than by narrow parliamentary majorities required for the approval. The *legal* reason is of a special attention, as it reflects the procedural basis provided by the national constitutional rules for decision-making on the issue.

The public voting is often presumed to bring immediately more legitimacy to the ratification, whereas the opposite view is qualified as an absence of democratic commitment. Instead, the focus on the timing of referendum prevails. For instance, the relevant political forces in the Czech Republic support the public voting, but differ in its timing: the governing coalition prefers the date of the general election in June 2006, whereas the opposition insists on the end of 2005.<sup>18</sup>

Such a simplified evaluation gives evidence of the lack of discussion that should clear the substance of the question, i.e., the general criteria for turning a dividing line between revision issues which will be (also in the future) subject to the ratification by a referendum and which will not be.

## *II. European dimension of the problem*

The relevant legal criteria determining the political choice could be identified, as follows:

- the level of democratic legitimacy of the approval, required by the changes of primary European law, delivered through the European Constitution;
- the status of the European Constitution under the national constitutional law;
- the practice established during ratification of the Treaty on Accession or earlier revision EC/EU Treaties;
- the obligatory (imperative) or facultative (optional) position of the public voting in respect of an automatic or would-be initiated procedure;
- the binding or non-binding (consultative) nature *vis-a-vis* the Parliament;
- the minimal threshold of referendum or the minimal yes-votes, if any;
- the launching of an information campaign as a formal precondition for organizing the referendum;

18 The country is possibly to be the last Member State to seek ratification. This delay is, a.o., due to the ambition of the Government, trying - repeatedly since 1998 - to introduce the institution of a general referendum on country-wide topics (excluding only a short list of institutional issues, taxation and some others). If its attempt would have failed again, an *ad hoc* bill concerned only with the voting about the European Constitution is to be submitted to the Parliament as a draft Constitutional Act (see *infra*).

- the availability of review of conformity of the European Constitutional with the national Constitution;
- the public institution entitled to decide on the choice.

By signing the European Constitution, the High Contracting Parties stipulated to take appropriate institutional and timely measures, enabling to express their commitment to be bound by the Treaty. This stipulation obliged the States-Parties, i.e., all the respective state authorities, not only the Governments, to certain activities, but not to guarantee the outcomes resulting from the measures taken; there is no liability for non-ratification under the international and European law, etc. The behaviour of the States - after the European Constitution was signed - must be *bona fide*, it cannot act against the Treaty or endanger the consensus reached.<sup>19</sup>

There is not an obligation of the Member State under European law to prefer referendum as a way of approving the Treaty, if „the respective constitutional requirements“ make it possible. On the other hand, referendum would be in line with the *citizen-centred* new basic Treaty of the European Union, „reflecting the will of the citizens and States of Europe ...“(Article I-1(1)). The fundamental arguments „pro“ or „contra“ referendum as the means of ratification of the European Constitution must be derived from the national context - constitutional law and practice.

### III National dimension of the problem

The parliamentary (representative) democracy is the very established traditional form of government in all the Member States, operating as the general rule of approval, the use of which can be suspended only by an express constitutional exception. An exception, under the *Czech* Constitution, can be enforced by a constitutional act, first, designating “the conditions under which the people may exercise state authority directly” (in principle on any type of subject-matter).<sup>20</sup> International treaties, as a rule, are approved by a *simple majority* of the Deputies and Senators present in either Chamber,<sup>21</sup> even when the treaty, concerning individual rights and duties,<sup>22</sup> will form a part of the legal order and have priority over the national legislation.<sup>23</sup>

Second exception may be installed as a means of ratification of the treaty instituting the transfer of certain powers to an international organization, replacing the consent given by a *three-fifths majority* in each of the Chambers of the Parliament<sup>24</sup> (“*European*” referendum). Then, there are two exceptions available: a general (for

19 The Vienna Convention on the Law of Treaties, Article 18).

20 Article 9 paragraph 2 CzConst.

21 Article 39 paragraph 2 CzConst.

22 Article 49 CzConst.

23 Article 10 CzConst.

24 Article 10a paragraph 2 and Article 39 paragraph 4 CzConst.

an unlimited number of votings) and "one shop" (*ad hoc*). In both cases the three-fifths majority for passing the bill (constitutional act) on referendum will be necessary.<sup>25</sup>

Prior to a decision of the Czech Parliament on the way of giving an approval for ratification of the European Constitution, it should have to be cleared, whether the European Constitution is an international treaty "instituting the transfer of certain (additional) powers" to the Union and, therefore, necessitating the qualified approval (3/5 majority or referendum), or not. Such a material qualification seems to be easy: Besides the direct transfers of competence in new areas (even when very limited in scope) like punctual harmonization of criminal law (Article III-271), there are some other innovations in the European Constitution, the impact of which for the execution of powers at national level may be equal to their transfer - QMV instead of unanimity in the Council of Ministers, the changed balance in the ordinary legislative procedure in favour of the European Parliament, the fundamental rights with direct affect in the Czech legal system when the Union law will be implemented there, etc. Therefore, the only right answer to this preliminary question is that the ratification of the European Constitution necessitates *a qualified approval*.

Although the European Constitution will have a prominent legislative impact on national law, the Czech Parliament, watching on the consistency of the legal order, will decide on the way of approval not only as a simple law-maker. It will be acting rather in its quality of an empowered (derived) Constitution-maker, filling up the space let open by the original *pouvoir constituant*. Therefore, it cannot rely on considerations of utility, which determine its current political business, but it has to respect the general principle of subsidiarity in the execution of power and its application in the specific circumstances of the case: which of the both - the Parliament or the people - would provide the ratification of the European Constitution with a more adequate legitimacy based on a reasoned opinion? These preconditions should have to be well balanced and keep the Parliament at a restrained position, because there is no remedy against the Parliament's ruling.

The restrictive approach to referendum in the mean of ratification of specific international treaties (entailing the transfer of sovereign powers) is justified also by the *constitutional custom*, developing since the ratification of the *Treaty on Accession* to the European Union. This was quite exceptional international instrument, requiring the top level of democratic legitimacy. Therefore, the first nation-wide ("European"-type) referendum in the short history of the Czech Republic was held in June 2003.<sup>26</sup> Are there any exceptional circumstances now, comparable with this case, which should justify the implementation of referendum as an exception again?

25 For more details see: *J.Zemanek*, Impact of EU Accession on the National Legal Orders of New Member States: Czech Republic, in: *The Hopes and Fears of New Member States and (Pre)candidate Countries*, documents from the Conference of the T.M.C.Asser Institute, The Hague 2004 (in print).

26 ConstAct no. 515/2002 Coll., on Referendum on the Accession of the Czech Republic to the European Union, was „*ad hoc*“ act.

The grammatical interpretation of the constitutional rule on ratification doesn't answer the question: both ways of giving consent seem to be equivalent. *Ratio constitutionis*, favouring parliamentary voting as the general rule for ratification, calls for a convincing justification.

The initial political intention of the Member States<sup>27</sup> was to make a further step in adaptation of the Union to the changing environment of the European integration, meeting also challenges brought by the recent enlargement (better division and definition of competence; simplification of the Union's instruments; more democracy, transparency and efficiency; a.o.). Not a revolutionary transformation, but an open-ended revision of the Union (consolidation and codification agenda) was intended.

This mandate was over-fulfilled. Neither the scope of new powers, attributed by the Member States to the Union, nor the heading "Constitution", but some structural contents make the Treaty eligible for ratification with a high level of legitimacy. The changed rules for legislative procedure with the full involvement of the European Parliament as the representative body of the Union *citizens* (even when not represented in a quite fair, equal way) rather than the extension of the QMV in the Council (see above) is to be assessed as an immense qualitative "added value".<sup>28</sup> The European Constitution strengthens much the new, "*citizens pillar*" of the Union, besides the existing "states pillar". These arguments support the ratification by a referendum: "let the citizens themselves decide on their participation in the democratic life of the Union".

The evaluation of political, budgetary and legislative impacts of some other innovations brought by the European Constitution at the national level as well as of the new "European" agendas of the national parliaments call rather for the ratification by the Parliament's voting.

It seems, some kind of a *combined approval* could be a balanced solution: not exclusive alternatives, but double procedure consisting of both - the consultative referendum, focusing on the core issues of the people's sovereignty, *and* the three-fifths majority voting of the Parliament, focusing on the rest issues and confirming the public vote. The act of Parliament passed by a simple majority would suffice to enact the referendum. There is an objection, that the non-binding nature of referendum could undermine the motivation of the electorate to participate, which would question the real legitimacy of the public voting.

The balanced decision on the way of approval should be facilitated by the decision of the Czech Constitutional Court on the Treaty's conformity with the constitutional order prior to its ratification.<sup>29</sup> The respective procedure at the Constitutional Court with such an effect may be initiated only by a Chamber of the Parliament after the European Constitution would have been submitted to its approval by the Gov-

27 Laeken Declaration on the Future of the European Union, OJ C 80/85-86, 10.3.2001.

28 See the opinion of the French Conseil Constitutionnel from 19.11.2004, no. 2004-505 Dc., arguing in favour of the amendment of the French Constitution.

29 Article 87 paragraph 2 CzConst.

ernment.<sup>30</sup> Instead, the Czech Parliament has already started debates on the referendum bill(s) without an official submission of the European Constitution for approval.

Apart from the legal justifications, political factors could dominate. The Czech Constitution offers an opportunity to find a solution, when one of the alternatives becomes - for political reasons - non-applicable. It seems, such a situation occurred in the Czech Republic. The topics of the European Constitution are not discussed in a rational way, only misleading intentional disinterpretations and reckless approach disregarding the citizens' interests occupied the public domain, the "national" and "supranational" is opposed. *The European Constitution is too important for the society to leave its approval on politicians only!*<sup>31</sup>

In such a polarized atmosphere the referendum on the European Constitution might turn to the voting about the trust in the Government. Therefore, the well-based information campaign will be indispensable. The experience and knowledge acquired during the campaign on the accession can help.

#### *IV. Final remark: European Constitution in the full form?*

The European Constitution is an international *treaty with some material constitutional substance*. So far its ratification on the state-by-state basis is justified. Equality of the states (1 state 1 vote) means lack of equality of their citizens, represented in a disproportionate way in more v. less populous states. Therefore, a.o., the Union becomes under the European Constitution the "constitutional community", first, of the Member States, whereas the Union as the "community of citizens" and the democratic legitimacy of the execution of its powers remains incomplete.

The real European "Constitution" would need to obtain the "*full format*", providing it with the democratic legitimacy sourcing in the constituency, going across the Member States. There are two options (or their combining in addition): the approval of the "Constitution" by the Member States and by the European Parliament, elected on equal footing in all Member States,<sup>32</sup> or by the Member States and by the EU-wide referendum. Such a way of European ratification of the "Constitution" does not seem to be manageable.

30 Act no. 182/1993 Coll., on the Constitutional Court, § 71a section 1a); other initiators - a group of out-voted MPs or the President of the Republic - may do it only after an approval.

31 Both, the Czech (SC&C Agency) and European (Eurobarometer) research of public opinion disclosed recently some good support (55-60 %) of the public in favour of the referendum on the European Constitution.

32 The European Constitution speaks only about „direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States“ (Article III-330).

There are constitutional concepts, advocating another, non-decision-maker-based legitimacy (“nicht urheberorientierte Legitimitätsbegründung”).<sup>33</sup> The constitution supplies legitimacy to the exercise of competence not because of its top position in the hierarchy of laws, but rather through and to the extent, to which it is successful in meeting the aims of its making. The state-centred approach to legitimacy of the European “Constitution” is no more adequate to the mutual complementarity of both - supranational and national - levels of constitutionalism. The advancement of the material European Constitution will test this thesis.

33 *T.Herbst, Legitimation durch Verfassungsgebung, Nomos 2003.*