

## EUROPEAN TREATY REVISION: A CASE OF MULTILEVEL CONSTITUTIONALISM

by  
Bruno de Witte, Florence\*

### I. Introduction<sup>1</sup>

‘Citizenship of the Union shall complement and not replace national citizenship.’ This is stated in Article 17 EC Treaty, and is reaffirmed in Article I-10 of the Constitutional Treaty. Can the same thing be said about the constitution as a whole, that is, can it be said that the new European Constitution, signed in October 2004, complements the national constitution of the 25 member states and does not replace them? The text of the European Constitution does not contain any wording of that kind. In fact, and rather curiously, the European Constitution does not deal with its relation with the existing national constitutions in any structured or comprehensive way. Apart from some very specific and unimportant references to national constitutions, there are only three major structural links which the European Constitutional Treaty establishes with the national constitutions, and they are mentioned in three separate parts of the document.

The first and most general link is established in Article I-5, which is appropriately entitled ‘Relations between the Union and the Member States’. It is written there that the Union shall respect the national identities of its Member States which are ‘inherent in their fundamental structures, political and constitutional’. The second link is in the area of fundamental rights. Part II of the Constitution, containing the modified text of the EU Charter of Fundamental Rights, contains several references to the constitutional rights protected in member state law. The third structural reference to national constitutions which one can find in the European Constitution, is in the final Part IV. Both the provision on *entry into force* and the provisions on the future *revision* of the Constitutional Treaty specify that these can, normally speaking, only happen after ratification by all the member states, to be effected in accordance with their own constitutional requirements. The national constitutions thus collectively hold the key to allow the European Constitution to display its legal force, and they will continue to hold the key for any future reforms of the European Union. The generic reference to national constitutional requirements means that

\* Professor of European Union Law, European University Institute, Florence, Department of Law, Robert Schuman Centre.

1 An earlier, and partially different, version of this paper was published as the Second Walter van Gerven Lecture: *The National Constitutional Dimension of European Treaty Revision: Evolution and Recent Debates*, Groningen, Europa Law Publishing (2004).

every one of the 25 member countries is organising the process of approval and revision of the Constitutional Treaty in its own way, with or without the need for special majorities in parliament, with or without the need for prior reform of the national constitution, with or without a popular referendum. This is not a novelty but the confirmation, in the new context of the European Constitution, of a rule that had originally been formulated in 1951 with regard to the entry into force of the Coal and Steel Community Treaty. The historical development and present-day relevance of this 'national constitutional phase' of European treaty making is the subject of this contribution.

The ratification according to national constitutional rules is not just a procedural technique affecting the way in which European treaty reforms come into existence. At a deeper level, it is the continued reflection of the fundamental legal starting-point of the European integration process. European cooperation was not developed in opposition to national constitutional law but within the legal space opened up by those national constitutions, more particularly by the constitutional clauses (present almost in every European country) allowing for the limitation of sovereignty or the transfer of powers to international and/or European organisations. The Treaty revision mechanism is therefore a clear illustration of the multilevel character of European constitutionalism, whereby the European and the national constitutions operate in a system of mutual dependence.<sup>2</sup>

The basic rules of this mechanism are well known. Article 48 of the EU Treaty provides that the amendments to the treaties, determined by common accord of the representatives of the governments of the Member States, enter into force 'after being ratified by all the Member States in accordance with their respective constitutional requirements.' The Constitutional Treaty is clearly conceived as an application of Article 48, that is, as an amendment of the EU Treaty (and the EC Treaty). Accordingly, its entry-into-force provision (Article IV-447) confirms that the Treaty needs to be ratified by the High Contracting Parties in accordance with their respective constitutional requirements before it can enter into force. In fact, this Article IV-447 uses the coded language typical of the law of international treaties ('ratify', 'enter into force', 'High Contracting Parties') and is perhaps the clearest formal confirmation that the Constitutional Treaty is, in the view of its drafters, a genuine international treaty. At the same time, Article IV-447 confirms that the umbilical cord with the national constitutions is not cut. The future of the Constitutional Treaty depends on the use of national constitutional resources. The 25 national constitutions set the conditions under which each country can ratify the new Treaty and thereby hold the key for the success of the European constitutional reform process.

2 The expression multilevel constitutionalism is borrowed from Ingolf Pernice, who elaborated it in a number of his writings, including: I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', *Common Market Law Review* (1999) 703; I. Pernice and F. Mayer, 'De la constitution composée de l'Europe', *Revue trimestrielle de droit européen* (2000) 623.

In this paper, I will look at this national dimension primarily from a European Union perspective. This may seem a rather unpromising perspective. What else is there to say from an EU law point of view apart from what is written in Article 48 EU and Article IV-447 of the Constitutional Treaty: the new treaty must be ratified by each country, but the way they do so is entirely determined by domestic law? Apparently, Article 48 is divided in two watertight compartments: in the first compartment, the legal system of *international law* (in its specific EU Treaty guise) determines how agreement on the text of the revision treaty is reached, and adds that the initial agreement must be followed by successive individual ratification acts;<sup>3</sup> in the second compartment, the *constitutional law* of each member state freely determines what happens in between these two stages, that is, between the time its government has expressed its agreement on the negotiated text and the time at which it confirms to the other parties its willingness to be bound.

And yet, there are indications of a growing constitutional intertwinement<sup>4</sup>, in which the international phase of European Treaty revision is affected by national constitutional actors and procedures, whereas the constitutional phase is being determined, albeit to a modest extent, by rules agreed at the European level. In section 2, I will point out that the traditional EU revision mechanism that has served well during so many years is undoubtedly an international law mechanism, but one that shows particular attention to the national constitutional dimension. In section 3, I will draw attention to the fact that politically, if not legally, the intertwinement between the two phases has been there for a long time, in the sense that actors involved in the national ratification stage have sought and managed to influence the decision-making in the prior international stage. In section 4, I will list the main criticisms made, increasingly in recent years, of the formally strict separation between the two phases. In section 5, I will look at the way in which the recent Convention, and the recently adopted Constitutional Treaty, have sought to address these concerns by proposing a closer integration between the two phases, and finally, in section 6, I will look at one particular issue, namely the unorthodox idea of disregarding the constitutional phase in one or two individual member states if that were necessary for the Constitutional Treaty to come into force.

3 Technically speaking, *ratification* is a unilateral act of *international law*, whereby the competent authority of a state expresses the willingness of that state to be bound by a treaty signed earlier on. However, the term *ratification* is also commonly used to describe the preceding steps under *national constitutional law*, more particularly the parliamentary approval of a treaty. I will also use it in the latter sense in this paper.

4 I am borrowing here an expression used by J. Ziller, 'L'élargissement change-t-il les données du problème?', in Ziller (ed), *L'eupéanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe*, Paris, L'Harmattan (2003) 311, at p.315.

## II. A Constitutionally Sensitive International Treaty Law Mechanism

The two-stage model of Treaty conclusion described by Article 48 EU Treaty, with the signature of the text by representatives of the governments first, and ratification by the contracting parties afterwards, is very common in the practice of international law. The simple reason is that in present day constitutions, the approval by national parliaments is generally required for all international treaties that have some legal relevance.<sup>5</sup> Even the French Constitution of 1958, otherwise marked by the will to reduce the power of the parliament in relation to that of the executive, contains an Article 53 which submits a very wide range of international treaties to the requirement of prior approval of parliament.<sup>6</sup> It is only in the course of the 20<sup>th</sup> century that this involvement of the parliamentary representatives of the people in the treaty-making activities of governments became a regular constitutional feature. For a long time, the conclusion of treaties had seemed to be the natural preserve of governments. Jean-Jacques Rousseau, although not the most anti-democratic of thinkers, wrote as follows:

‘L’exercice extérieur de la Puissance ne convient point au Peuple; les grandes maximes d’Etat ne sont pas à sa portée; il doit s’en rapporter là-dessus à ses chefs qui, toujours plus éclairés que lui sur ce point, n’ont guère intérêt à faire au-dehors des traités désavantageux à la Patrie.’<sup>7</sup>

However, the European founding treaties distinguish themselves from the usual multilateral treaties by the express mention that ratification must happen ‘in accordance with the constitutional requirements’ of the parties. Normally, international treaties do not refer to those constitutional requirements with so many words. The reference may seem legally redundant: since all states are free to organize Treaty ratification according to their own rules, they may and must respect their respective constitutional requirements in doing so. However, the reference to national constitutional requirements is politically significant. It was already inserted in the Coal and Steel Community Treaty of 1951 as a condition for its entry into force (in Article 99), and the reason for this was, probably, that the signatories wanted to underscore the momentous nature of this Treaty and the fact that its

5 See S.A. Riesenfeld and F.M. Abbott, *Parliamentary Participation in the Making and Operation of Treaties* (1994); E. Zoller, ‘Droit constitutionnel et droit international’, in K.D. Kerameus (ed), *XIVth International Congress of Comparative Law Athens 1994 – General Reports* (1996) 577, at pp. 585-589; for a comparative survey of parliamentary involvement in treaty-making, see also the study prepared within the Council of Europe: *Treaty Making. Expression of Consent by States to be Bound by a Treaty*, The Hague, Kluwer Law International (2001) at 57 ff.

6 The peculiar character of Article 53 in the overall context of the 1958 Constitution is noted, for instance, by A. Pellet, ‘Article 53’, in F. Luchaire et G. Conac, *La constitution de la république française. Analyses et commentaires* (1987), 2e. éd., 1005, at p. 1007.

7 J.J. Rousseau, *Lettres Ecrites de la Montagne* (1764). I found the quote in P. Haggemacher, ‘Some Hints on the European Origins of Legislative Participation in the Treaty-Making Functions’, in Riesenfeld and Abbott (eds), *op.cit.*, 19, at p. 20.

approval was a relevant act from a domestic constitutional point of view. At the very least, it can be seen as a clear hint that parliamentary approval would be necessary in all of the contracting states.

The 'constitutional requirements' clause in the ECSC Treaty also echoed the new constitutional provisions, enacted in the post-war constitutions of the three leading member states (France, Italy and Germany), allowing for limitations of sovereignty or transfer of powers to international organizations.<sup>8</sup> The model set in the post-war years by the three leading member states was imitated by the Netherlands and Luxembourg some years later, at a time when these countries had already joined the ECSC (but not yet the EEC). Belgium acted in the same vein but only in 1970. All the other member states, apart from the United Kingdom and Finland, enacted similar clauses either much before or just before their accession to the European Union. Today, some countries have specific clauses in their constitution to deal with the transfer of powers to the European Union (introduced either for the Maastricht Treaty or at the time of their accession), but many countries (also and particularly among the Ten that joined most recently) continue to adopt a generic approach of allowing for transfers of powers, or limitations of sovereignty, for the benefit of international organisations generally speaking. So, even today, after more than 50 years of European integration, there is only a limited amount of specificity of the European Union in national constitutional texts.<sup>9</sup>

The entry-into-force clause of the Coal and Steel Community was there to stay. The reference to the national constitutional requirements was repeated each and every time the European Treaties were amended and supplemented, including – as we saw – in the Constitutional Treaty itself. It was debated, on some occasions, whether the member state governments might decide to forego the parliamentary approval requirement and enact some limited Treaty changes through an agreement just between themselves, without going through the cumbersome national ratification phase. There is some support for this idea in international law. Article 39 of the Vienna Convention on the Law of Treaties allows the contracting parties to a treaty to modify that treaty at any stage by common agreement. In doing so, they are not bound to follow the same procedure as that followed when they concluded the first treaty, nor are they even bound to follow the procedure for revision set out in the first treaty if they all agree to follow a different procedure than the one provided for. This is the 'freedom of form' rule of international treaty law. Thus, as far as international law is concerned, a treaty that came into force after parliamentary

8 In France, paragraph 15 of the preamble of the Constitution of the Fourth Republic (1946); in Italy, Article 11 of the Constitution of 1948 (which still acts as the constitutional basis of EU membership today); in Germany, Article 24(1) of the Basic Law of 1949 (supplemented since 1993 by a provision referring more specifically to the European Union).

9 See the comparative survey, on this point, by C. Grewe and H. Ruiz Fabri, 'La situation respective du droit international et du droit communautaire dans le droit constitutionnel des Etats', in *Droit international et droit communautaire, perspectives actuelles* (Société Française pour le Droit International, Colloque de Bordeaux), Paris, Editions A. Pédone (2000), 251. The European Union is probably given the most detailed and prominent place in the Austrian Constitution (Articles 23a to 23f of the *Bundesverfassungsgesetz*).

approval in all the contracting states could be modified by an agreement that is not made subject to such constitutional approval. This is a good example of the deliberate ignorance, by international treaty law, of the national constitutional law dimension. However, this option was never seriously considered in the context of the European Union. The governments were well aware that if they decided to overrule the procedure of Article 48 and adopt amendments without submitting them to national ratification, they would act in violation of their own constitutional law rules, that require parliamentary approval for all, or listed categories of, international agreements and do not leave to the government a free choice as to whether it will submit the agreement to parliamentary approval or not. So, it is primarily for reasons of national constitutional law that the EU member state governments are bound to follow the two-stage revision procedure set out in Article 48 EU Treaty and may not depart from it, except when the Treaty itself prescribes a simplified revision procedure for some of its provisions.

### *III. The Political Impact of the Domestic Phase on the International Phase of Treaty Revision*

The strict legal separation between the international phase of negotiation on European Treaty revision, and the constitutional phase of approval of the results of that negotiation, which I emphasized in the previous section, does not entirely correspond to the political practice. That practice is marked by the fact that institutions and actors who play an important role in the ratification phase occasionally use that capacity to exercise some influence during the first phase as well. Their indirect influence during the negotiation process derives from the veto power or interpretative influence which they may exercise *after* the conclusion of the negotiations and is a particular expression of the fact that treaty negotiations are, in the language of international relations theory, ‘two-level bargaining games’ in which the international actors are constrained by their domestic politics.<sup>10</sup>

The first of these domestic players in the European IGC game are the *opposition parties* of most member states. Their views must be taken into account due to the need for special majorities in Parliament to approve important treaties and/or to

10 The ‘two-level games’ model was first described by R.O. Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’, *International Organization* (1988) 427. For a comparative case-study of the role of domestic ‘veto players’ in the ratification process of the Amsterdam Treaty, see M. Stoiber and P.W. Thurner, ‘Der Vergleich von Ratifikationsstrukturen der EU-Mitgliedsländer für Intergouvernementale Verträge: Eine Anwendung des Veto-Spieler Konzeptes’, *Arbeitspapiere –Mannheimer Zentrum für Europäische Sozialforschung* Nr.27, 2000.

approve the constitutional changes that have to precede such approval.<sup>11</sup> In some cases, the parliamentary majority groups may themselves prove to be unreliable.<sup>12</sup> Other relevant actors are the *sub-state governments and assemblies* of Germany and Belgium who possess a collective (in the case of Germany) or individual (in the case of Belgium) veto right at the ratification stage, and who are therefore able to weigh on the negotiations so as to insert, or avoid insertion, of certain provisions.<sup>13</sup> In fact, representatives of these two countries' sub-national governments are also directly present at the negotiation table, as part of their country's delegation.

IGC negotiators have also become increasingly concerned about the reception of the revision treaty by their *public opinion* at home. This is most obvious in the countries where a referendum must be called for reasons of constitutional obligation or political tradition; the most prominent example is Denmark where holding a referendum on European Treaty revisions has become a customary constitutional rule whose effects are highly unpredictable and which, therefore, considerably constrains the Danish representatives' room for maneuver during negotiations. Paradoxically, though, this may increase their leverage on their partners, since the Danish negotiators can argue that the proposed revision will not be ratified in Denmark unless the Danish positions are sufficiently accommodated.<sup>14</sup>

The governments of some member states must also give a thought, when sitting at the negotiation table, to their *constitutional courts*, who may declare the revision treaty to be wholly or partly incompatible with the national constitution as it stands. Declarations of unconstitutionality occurred for the Single European Act (in Ireland), for the Treaty of Maastricht (in France and Spain), and for the Treaty of Amsterdam (in France again). These constitutional decisions did not only, in the short term, require a constitutional revision to allow for ratification of the respective Treaties, but also set a long-term parameter of constitutionally acceptable Treaty

11 The degree to which opposition party support is needed depends on the content of the revision Treaty (special majorities in national parliament may or may not be required) and on the composition of the parliament at the time of ratification. In the case of the Amsterdam Treaty, the governments needed additional parliamentary support for approval of the Treaty from non-government parties in no less than nine out of fifteen member states (M. Stoiber and P.W. Thurner, 'Der Vergleich', cit., at 31).

12 Thus, in the UK, anti-Maastricht rebels inside the governing Conservative Party made parliamentary ratification of the Maastricht Treaty very difficult; see D. Baker, A. Gamble and S. Ludlam, 'The Parliamentary Siege of Maastricht 1993: Conservative Divisions and British Ratification', *Parliamentary Affairs* (1994) 37.

13 On the Belgian case, see P. Bursens, 'How Multi-Level are IGCs? The Belgian Federation and the 2000 Conference', *Regional and Federal Studies* (2002) 181. On the German case, see R. Hrbek, 'Die deutschen Länder und das Vertragswerk von Nizza', *Integration* (2001) 102 (on the IGC of 2000), and R. Hrbek, 'Die deutschen Länder und der Verfassungsentwurf des Konvents', *Integration* (2003) 357 (on the 2002/3 Convention).

14 See D. Beach, 'Negotiating the Amsterdam Treaty: When Theory Meets Reality', in F. Laursen (ed), *The Amsterdam Treaty. National Preference Formation, Interstate Bargaining and Outcome*, Odense University Press (2002) 593, at 607: 'The Danish government entered the IGC with its hands effectively tied by domestic factors, allowing the Danish government to play a two-level game, credibly arguing that unless Danish positions in key areas where fulfilled, Denmark would be unable to ratify the Treaty in the coming referendum.'

reforms which government representatives at subsequent IGCs constantly have to keep in mind. The same effect was achieved by rulings of the German constitutional court and the Danish supreme court on the Maastricht Treaty which, while not having held that Treaty to be unconstitutional, have nevertheless fixed constitutional limits to later Treaty changes.

It should be acknowledged, though, that the IGC negotiators in the past have not always been fully aware of the implications of their work for the constitutional balance at the European or national level. Despite the gradual increase of the impact of domestic institutions and actors during the first phase, the revision mechanism still looked more like a succession of two scenes with different actors and different dynamics.

To what extent did this change with the Constitutional Treaty? One would expect, given the composition of the Convention, that the national ratification phase would have cast a deeper shadow on the drafting phase than at any previous occasion, but there is not very much evidence of this (while waiting for further studies of the political dynamics of the Convention). One anecdotal example is something that happened at a very late stage of the Convention. The final draft submitted by the Praesidium to the Convention's plenary was contested by the French governments' alternate member Pascal Andréani for failing to ensure that trade policy relating to cultural services would continue to be subject to unanimity. She warned that without a return to unanimity on this point, 'this constitution will stand no chance of being ratified in France'.<sup>15</sup> It is not clear whether Ms Andréani's threat referred to the parliamentary ratification in France or to the outcome of a possible referendum, but her words were heeded and a formula protecting cultural diversity in the context of trade was found in the final text of the draft Constitutional Treaty, as adopted by the Convention.<sup>16</sup>

#### *IV. The Problems of the Separation between the European and National Phases*

##### 1. Democracy Deficit

Ex-post approval, particularly in the case of multilateral agreements such as the European Treaties, is a blunted weapon. It does not allow for the contestation of specific clauses of the treaty but only for the wholesale approval or rejection of the treaty. Rejection by national parliaments has, in practice, not been an option in the case of the European Treaties ever since the Defence Community was stopped in its tracks by the French National Assembly in 1954. Rejection by a popular vote, when it happened in Denmark and Ireland, was considered intolerable by the other member states and was countered by symbolic modifications and a repeat-referendum.

<sup>15</sup> I take the quotation from P. Norman, *The Accidental Constitution. The Story of the European Convention* (2003), at p.289.

<sup>16</sup> Article III-315, paragraph 4.

In a sense, the impotence of national parliaments is made worse in the case of the European Treaties, when compared to other international agreements, because reservations are not allowed. Reservations are an instrument allowing national parliaments to express their conditional acceptance of an agreement that their government negotiated: while not entirely repudiating the document agreed by the government, they express their disagreement with a particular clause, or series of clauses, that become the object of a reservation in the act of ratification submitted by the government to its partner states. In the absence of this option, all that the national parliaments can do is to make it clear to their governments beforehand that they should not accept certain things during the negotiations, or that they should build in certain quasi-reservations in the text of the Treaty, if necessary in the form of a derogation or opt-out clause for the country concerned. A good example of this technique is the Protocol on Denmark attached to the Treaty of Amsterdam, which organised an opt-out of Denmark from the newly communitarized immigration and asylum policy. The Danish government claimed that the 'Edinburgh exemptions' which Denmark had obtained following the failed first referendum on the Maastricht Treaty, should remain intact under the Amsterdam Treaty because otherwise the referendum would be lost once again.<sup>17</sup> In the absence of the possibility of lodging a reservation, Denmark was allowed an 'opt-out' which was formally adopted by all the member states acting together, but was in fact tailor-made for, and drafted by, the Danish government.

## 2. Fragility

Once the intergovernmental bargaining has led to the adoption of a Treaty text revising the earlier Treaties, every single government must set out to deliver an act of ratification, after having received the constitutional green light at the domestic level. Each government must fight, in almost total isolation, to convince its own parliament and its own public opinion of the benefits which the revision treaty may bring to the country. The self-contained nature of the national ratification processes is also denoted by their lack of synchrony. Thus, Luxembourg ratified the Maastricht Treaty already on 24 August 1992, whereas Germany, the last of the twelve member states to do so, ratified only on 13 October 1993. As is well known, purely internal dynamics or relatively minor political incidents can bring down the whole patiently constructed edifice. Whereas the failed Danish and Irish referendums are well-known, the many 'near-misses' tend to be forgotten.

<sup>17</sup> F. Laursen, 'Denmark: The Battle for a Better Treaty', in Laursen (ed), *The Amsterdam Treaty*, cit., 71, at p.81. The preservation of this opt-out mechanism caused difficulties again in the IGC on the Constitutional Treaty. Once again, the Danish government obtained much comprehension from its partner governments by arguing that the referendum on the Constitutional Treaty would otherwise be lost (see R. Cangelosi, 'Le conferenze intergovernative e il ruolo dell'Italia: dall'Atto Unico alla conclusione della CIG del 2003', in L.S. Rossi, *Il progetto di Trattato-Costituzione. Verso una nuova architettura dell'Unione europea*, Milano, Giuffrè (2004) 9, at p.52).

It is by no means unusual for universal treaties to be subject to parliamentary approval in all participating states. The danger of excessive rigidity is, however, often countered by the fact that those treaties provide for their entry into force after a certain number of parties have ratified, with the other states having the option of joining the first group later on in the life of the treaty. So, for example, the Montego Bay Convention on the Law of the Sea entered into force after 60 ratifications had been lodged (12 years after its signature), the Vienna Convention on the Law of Treaties required 35 ratifications for its entry into force, which happened 11 years after signature, and the Rome statute on the International Criminal Court came into force after 4 years, upon the 60<sup>th</sup> ratification.<sup>18</sup> It is therefore accepted, in international law, that many treaties remain ‘limping’ for many years after their adoption.<sup>19</sup>

This option is not feasible, though, for the European Treaties. This is not just because they are treaties about an international organization, since it is perfectly possible to set up international organizations with flexible membership arrangements. However, European revision treaties deal with an international organization which already exists, comprising member states who have existing rights and obligations. Allowing for the partial ratification of a revision treaty (such as the Constitutional Treaty) would lead to different circles of members, some bound by the new rules and others by the old rules. The EU institutions could not function under the new rules and the old rules simultaneously, so the revision must necessarily apply to all states or to none of them. There is no flexible intermediate option available.

#### V. *The Reforms which the Constitutional Treaty Made and Failed to Make*

The establishment of the 2002/3 Convention was the boldest experiment, so far, in modifying the Treaty amendment procedure, even though it did not formally change the existing procedure but merely came in addition to it. The Convention mechanism, although it came at a preliminary stage in the revision process, cross-referred to the final ratification stage. It sought to address the two problematic aspects mentioned above – the democracy deficit and the excessive fragility – through the massive involvement of members of national parliament in the Convention. To the extent that the two national MPs from each country sent to the Convention would be truly representative of the views of the other members of their assemblies, they would allow for a meaningful input of those national parliaments prior to the final agreement on the revised text (thus avoiding the *fait accompli* situation of earlier Treaty revisions) and the resulting Treaty would also, logically,

18 I take these figures from P. Tavernier, ‘Comment surmonter les obstacles constitutionnels à la ratification du Statut de Rome de la Cour Pénale Internationale’, *Revue trimestrielle des droits de l’homme* (2002) 545, at pp. 547-8.

19 The expression is used, and the phenomenon described, by A. Aust, ‘Limping Treaties: Lessons from Multilateral Treaty-Making’, *Netherlands International Law Review* (2003) 243.

meet with greater goodwill among the national parliaments when these were called to approve it afterwards (thus making the revision procedure less fragile). It remains to be seen whether these positive effects of national MP involvement will be attained.<sup>20</sup>

The fact that the Convention experiment was introduced without any explicit basis in the existing Treaties leads on to the question whether experiments could also have been agreed, at the European level, in relation to the constitutional ratification phase. Would it have been permissible, for the drafters of the Constitutional Treaty, to provide for *additional* requirements for entry into force beyond what is stated in the last sentence of Article 48 EU? In my view, the answer is yes. In the same way as Article 48 EU does not exclude recourse to the preliminary mechanism of the Convention, it can be argued that it does not exclude either the enactment of supplementary rules for entry into force, as long as no country is forced to agree to that entry into force outside its normal constitutional rules. Therefore, the Convention could also have proposed supplementary conditions for the entry into force of the Constitutional Treaty such as, for instance, the requirement that the Treaty should be approved by a Europe-wide popular referendum taking place on the same day in all member states.<sup>21</sup> In a contribution to the Convention submitted on 31 March 2003, a large number of members of that Convention had in fact proposed that the Constitutional Treaty be approved in binding referendums to be held everywhere on the same day. They added that 'those member states whose constitutions do not currently permit referendums are called upon to hold at least consultative referendums.'<sup>22</sup> Further canvassing for this idea happened through a European Referendum Campaign that submitted, at the very end of the Convention's work, a petition for a Europe-wide referendum that was signed by no less than 97 members of the Convention. There were basically two reasons underlying this movement of opinion: one 'noble' reason, namely that the adoption of a Constitutional Treaty is a momentous decision affecting all the citizens of the European Union and requiring their collective approval, and one 'pragmatic' reason, that such a Europe-wide referendum would minimize the role of domestic considerations which frequently bedevil national referendums on Europe. However, the idea was not introduced into the Convention text, basically because the Praesidium chose to ignore it.<sup>23</sup> The Praesidium and, later on, the IGC were too timorous (or too optimistic about the continued feasibility of purely national ratification procedures) to adopt this idea.

20 For a first discussion of the role of national parliamentarians, as a group, in the Convention, see J. Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism', *European Law Journal* (2003) 45, at p. 60 ff.

21 For earlier discussion of this option, see A. Auer et J.-F. Flauss (éd.), *Le référendum européen*, Bruxelles, Bruylant, 1997 (particularly the contributions by A. Auer, A. Epiney and J.V. Louis).

22 CONV 658/03, CONTRIB 291 (submitted by 15 full Convention members and 20 alternates from a whole range of political parties).

23 A. Lamassoure, *Histoire secrète de la Convention européenne* (2004), at p. 412.

Other innovations would have been possible, without affecting the basic rule of Article 48 EU. For instance, it would have been possible for the member states to agree (either in the text of the Treaty or in a separate declaration) to start and/or finish their parliamentary ratification on the same dates, or even to provide for a joint meeting of national parliaments (or rather, for logistical reasons, of their European Affairs committees).<sup>24</sup> It would also have been possible for the IGC to decide that the agreement reached at the European Council in June 2004 should be submitted to the prior approval of all national parliaments *before* turning it into a formal Treaty. Such a move would, admittedly, have made it more difficult to reach a 'package-deal' agreement but, on the other hand, it would have allowed for a moment of additional reflection and, above all, it would have reflected the allegedly innovative constitutional nature of the Treaty. But nothing of this kind happened. The Constitutional Treaty fully reaffirms the requirement of national ratifications in all the member states for the entry into force of the Constitutional Treaty, and leaves it entirely to the member states how to produce those ratifications. This also means that the full brunt of reflecting the constitutional character of the new Treaty has to be taken by those *national* constitutional procedures. For instance, one could argue that the member states should revise their own constitutions if they want to take the Constitutional Treaty's innovative nature seriously.

Whereas the *entry into force* of the Constitutional Treaty remains unreformed (subject to the discussion that I will mention in the next section), the Treaty does introduce some changes as regards its future *revisions*. The requirement of national ratifications in all states is maintained in principle for future revisions, and the umbilical cord linking the European Treaty to the national constitutions is thus maintained for the indefinite future. The common accord to be reached in an intergovernmental conference (preceded normally by a Convention), and the separate ratifications to be delivered by each country, will remain central features of the revision process also for the future. The European Union's rules of change will therefore continue to be much more rigid than those applying to any national constitution, but also more rigid than those applying to the founding instruments of other, less integrated, international organizations.

However, there will be greater variety in this rigidity, because of the inclusion of what became known in the Convention and IGC jargon as the *clause passerelle* and which is more accurately termed, in the final version of the Treaty, the *simplified revision procedure*. In fact, one of the original reasons to start the whole process of reorganization of the Treaties was that the identification of an essential constitutional nucleus within the Treaties might facilitate the acceptance of

24 See for instance A. Lamassoure, *op.cit.*, at p. 220: 'Le seul moyen d'éviter le cycle interminable et hasardeux des ratifications nationales est de rassembler le même jour en un même lieu des délégations des Parlements nationaux.'

simplified revision mechanisms for the less-essential provisions.<sup>25</sup> The issue was included among the many ‘questions’ of the Laeken Declaration. The Praesidium of the Convention was very cautious on this point, but it did raise the possibility of ‘a streamlined amendment option (Council acting unanimously, after consultation of the European Parliament, without ratification by national parliaments) for certain provisions of Part Three which do not affect the objectives, values or competences of the Union.’<sup>26</sup> The Italian Presidency of the IGC proposed some concrete options to achieve this, and these survived, albeit in a diluted form, in the final text of the Treaty.

There are in fact two distinct simplified procedures, contained in two separate Treaty articles that were provisionally numbered, in the concluding document of the IGC, as Article IV-444 and Article IV-445, so as to put them just after the *ordinary revision procedure*. Only the former of these clauses affects the national ratification stage and introduces a genuine measure of flexibility in Treaty revision.<sup>27</sup> Article IV-444 provides that in all those areas and cases where Part III of the Treaty provides that the Council has to act by unanimity, a European Council decision (itself taken by unanimity and subject to the approval by the European Parliament) will be enough to remove the unanimity lock in a particular case or area and allow the Council to act henceforth by qualified majority. Similarly, the European Council will be able to introduce the ‘ordinary legislative procedure’ (that is, codecision) in all the areas and cases in which Part III provides for a different (normally, more intergovernmental) procedure. In other words, a further deepening of integration will, to some extent, be possible without the need for setting up an IGC and, above

25 The link between reorganization of the Treaties and the introduction of differentiated revision procedures was clearly made in the report to the Commission of the ‘Three Wise Men’ in 1999, prior to the Nice IGC: *The Institutional Implications of Enlargement*, Report to the European Commission of R. von Weizsäcker, J.L. Dehaene and D. Simon, [http://europa.eu.int/igc2000/repoct99\\_en.htm](http://europa.eu.int/igc2000/repoct99_en.htm).

26 CONV 728/03, p.10.

27 The other simplified revision procedure, that of Article IV-445, is not directly relevant here. It will apply to any changes of Title III (‘Internal Policies and Action’) of Part III of the Constitution on condition that they do not modify the competences of the EU. Its scope of application is thus very broad, but its simplifying effect is extremely modest. It derogates from the requirement of convening an IGC but maintains the requirement of a unanimous European Council *and* the requirement of ‘approval’ by all states (which, presumably, will mean approval by the national parliaments). Therefore, this simplified procedure does not affect the national phase directly. More generally, it does not seem to make things much simpler (the requirement of convening an IGC is, as such, not a burdensome factor – the rigidity is caused by the unanimity requirement and not by the formal nature of the meeting).

all, without the need for constitutional ratification of these changes by all the member states separately.<sup>28</sup>

However, each of the 25 (or more) states will retain a veto power in two different forms: first, because of the requirement of a unanimous European Council decision to walk over the *passerelle*, and secondly, because each national parliament will be able to stop any such simplified revision decision by simply expressing its opposition within the six months preceding the revision. So, also in this simplified revision procedure, the umbilical cord with national constitutional organs has not been cut. The difference is that national parliaments, instead of being required to give their positive approval to proposed amendments, will have the option of expressing their negative opinion, by vetoing a proposed amendment. The original version of the simplified revision mechanism that was submitted by the Italian Presidency provided that revision could be stopped if 'X' national parliaments would express their opposition,<sup>29</sup> whereby 'X' stood for an unspecified number higher than one. However, the single parliament veto appeared in the 'post-Naples' document of December 2003<sup>30</sup> and has remained there ever since. It was put there on the insistence, above all, of the British government. At an earlier stage, the European Scrutiny Committee of the House of Commons had declared that the idea that parts of the Treaty would be amendable without national ratification was unacceptable,<sup>31</sup> and the British government followed this opinion, in a modified version, by making sure that each national parliament would preserve a veto power in all cases.

Despite the preservation of a single-parliament veto power, this reform would be a meaningful shift, putting the responsibility for actively approving an amendment on the shoulders of the member state representatives in the European Council – not unlike what happens in some federal states, where the approval of constitutional reforms is given by the 'territorial chamber' in which the member state interests are represented rather than by the member states' parliaments or populations directly.<sup>32</sup>

It is regrettable, though, that the Constitutional Treaty has not been more daring in respect of future revisions. In particular, the option of providing for a Europe-wide referendum to approve future Treaty changes was not seriously discussed. In contrast with the introduction of such a referendum for the approval of the present

28 This mechanism of 'autonomous Treaty revision' exists already today for some specific provisions of the EC Treaty and its protocols, but its scope would be greatly extended by Article IV-444. On the existing cases of autonomous revision, see *Reforming the Treaties' Amendment Procedures*, Second report on the reorganisation of the European Union Treaties submitted to the European Commission on 31 July 2000, Florence, European University Institute, at p. 19 and ff. Further cases were added by the Treaty of Nice: see K. Lenaerts and M. Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy', *Common Market Law Review* (2002) 1217, at p. 1230.

29 CIG 52/03 ADD 1 of 25 November 2003, p.38.

30 CIG 60/03 ADD 1 of 9 December 2003, p.49.

31 House of Commons European Scrutiny Committee, 24th Report of Session 2002-03, *The Convention on the Future of Europe and the Role of National Parliaments*, at p.19.

32 On the various modes of member state involvement in constitutional revisions in federal states, see T. Groppi, *Federalismo e costituzione. La revisione costituzionale negli stati federali*, Milano, Giuffrè (2001).

Constitutional Treaty (which, as discussed above, could only have come *in addition* to the constitutional procedures of each country), a Europe-wide referendum could have been introduced as a *substitute* for the traditional ‘constitutional requirements’ clause for future revisions. Setting the conditions for the approval of such a referendum would be a delicate task (should one allow it to be approved even with the population of one or more states voting against?), but nothing could have been worse, for the future of the European integration process, than the reconfirmation of the perennial ‘national constitutional requirements’ clause.

#### VI. *Overruling Constitutional Requirements in the Name of Democracy and European Integration?*

The final issue I want to address is one that has caused quite some political debate already, and will arise again, inevitably, if something ‘goes wrong’ in the course of the ratification process of the Constitutional Treaty. Already during the Convention, the argument was openly made that the majority of states should be able to go ahead with a Treaty revision even in the absence of some countries’ ratification. Whether because of the large increase of national ‘veto players’ after accession, or because the ambitious nature of the Constitutional Treaty seemed likely to cause greater parliamentary or popular opposition in one or other country, the fact is that we have witnessed a powerful current of opinion advocating a circumvention of the rigid amendment rules fixed by Article 48 EU Treaty. The argument is that one should not allow one or a tiny number of countries to take the others – and the European integration process – hostage through their failure to ratify a document that was approved by a vast consensus within the Convention. Giscard d’Estaing himself was quoted (by the *Financial Times*, 11 November 2002, p.4) as holding the following view:

‘The probability is that of 25 or 27 member states [after EU enlargement] 23 would accept [the constitution] and two or three will refuse. (...) We have to abrogate the treaties that exist. If a country says that it does not like the new treaty, there’s no existing structure for them to cling to, they cannot seek refuge in the old agreement.’

So, in his view, the enactment of an ambitious constitutional treaty would be some kind of *refoundation* of the project of European integration rather than a *revision* of the existing Treaties. He reiterated this view more recently, stating ominously that if a large majority of the citizens of Europe and of the member states approve the Constitution, problems will arise for the states that refused to ratify it, and not for the Constitution itself.<sup>33</sup>

References to this question could also be found in documents emanating from the European Parliament and the European Commission. In the *European Parliament*, a

33 V. Giscard d’Estaing, ‘Vite, la Constitution de l’Europe!’, *Le Monde*, 10 July 2004.

motion for a resolution presented by *rapporteur* Jean-Louis Bourlanges in the course of the Convention's work proposed the following:

'The ratification procedure should be revised with a view to ensuring that a small minority cannot block the ratification of the future constitutional treaty – for example, ratification could be secured by a dual qualified majority comprising at least three-quarters of the Member States representing at least three-quarters of the Union population – even if, in return, specific forms of cooperation must be negotiated with any Member State which does not ratify the Treaty.'<sup>34</sup>

However, this particular paragraph of the motion for a resolution was deleted by a vote of the plenary in its December 2002 session, and the resolution as adopted by the European Parliament did not refer at all to the question of entry into force of the Constitutional Treaty.<sup>35</sup> This sequence of events shows that, even within the pro-integrationist European Parliament, the 'refoundation theory' meets with strong opposition.

The Draft Constitution presented on 5 December 2002, commonly known as 'Penelope' – which emanated from the Commission but was emphatically presented as *not* being the Commission's official opinion – contained an elaborate proposal to facilitate the entry into force of the Constitutional Treaty.<sup>36</sup> Indeed, this is certainly the most sophisticated construction ever made in order to circumvent the unanimity rule for Treaty revision. The Penelope document proposes that the adoption of the Treaty on the Constitution (as they call it) be accompanied by the simultaneous adoption of a separate short treaty called *Agreement on the Entry into Force of the Treaty on the Constitution of the European Union*. The sole purpose of this additional agreement would be to facilitate the entry into force of the Constitutional Treaty. The additional agreement, although adopted at the same time, would be ratified first, so that it could pave the way for the Constitutional Treaty. That Treaty would only enter into force one year after the additional agreement. The purpose of this delay is to allow each single member state, when ratifying the additional agreement, to express a choice between either accepting the content of the Constitutional Treaty, or (while not accepting it) leaving the European Union if the Treaty is accepted by three-quarters of the member states. If, at the end of the transitional year, it appears that at least three-quarters of the states have indeed made the positive statement of acceptance, then the Constitutional Treaty enters into force between them and the other states comply with their earlier commitment of leaving the EU, while starting negotiations with the EU on the organisation of their future relations.

34 *Report on the typology of acts and the hierarchy of legislation in the European Union* (rapporteur: Jean-Louis Bourlanges) of 3 December 2002, Motion for a resolution, point 5.

35 Amendment tabled by S.-Y. Kaufmann MEP and adopted by 266 in favour, 236 against and 4 abstentions (see *Agence Europe* 19 December 2002, p.4).

36 *Penelope* can be found on [http://europa.eu.int/futurum/documents/offtext/const051202\\_en.pdf](http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf). For a presentation of the document and a series of comments, see A. Mattera (dir.), *Penelope – Projet de Constitution de l'Union européenne*, Paris, Editions Clément Juglar (2003). See, in particular, the contribution by its leading author: F. Lamoureux, 'La Constitution "Pénélope": une refondation pour en finir avec les replâtrages', at p.11.

However, the rub with this ‘gentle exit strategy’ is that, as the Penelope study accepts, the preliminary agreement should itself be agreed upon and ratified by all member states before it can enter into force and effectively replace the current revision procedure of Article 48 EU. It seems quite likely, though, that a member state opposed to the *content* of the Constitutional Treaty will also refuse to ratify an agreement that is designed to facilitate the *entry into force* of that Constitutional Treaty, particularly if that could imply that it would be ‘kicked out’ of the European Union. Therefore, the Penelope group also included a last resort clause: if by a given date, the preliminary agreement had been ratified by at least five-sixths of the member states (so, presumably, 21 out of 25 states), then it would enter into force for all, disregarding the normal ‘overall ratification’ rule. So, when all is said, the Penelope Study *does* affirm the need to adopt the ‘constitutional rupture’ approach, that is, the right for the overwhelming majority of states to move ahead with a Constitutional Treaty even against the opposition of up to four countries.

The political argument in favour of this option is quite straightforward. It is based both on an invocation of the majority principle and on the historical necessity of European integration. To borrow Alain Lamassoure’s words:

‘Quatre cent cinquante millions de citoyens européens voulant participer à la Constitution vont-ils s’arrêter parce que quatre cent mille Maltais ne veulent pas en être?’<sup>37</sup>

From a legal perspective, it is true that the Vienna Convention on the Law of Treaties allows for some of the parties to a treaty to decide to modify that treaty among themselves without the participation of the other original state parties (a so-called *inter se* modification). However, this is only allowed if that modification does not affect the rights that the non-participating states draw from the original treaty. This is obviously not the case for the Constitutional Treaty whose enactment unavoidably affects and modifies the existing rights of all the EU members. Therefore, under the current rules of Article 48 EU, all the member states must give their agreement to the changes and the ‘last resort’ clause in the Penelope plan is in breach of current EU law. In addition, more directly related to the topic of this paper, there is a major problem of *national constitutional law* with this construction. If they would agree to the text of a Preliminary Treaty as proposed by the Penelope group, the member state governments would agree by anticipation that the existing Treaty revision procedure (Article 48) might be replaced by an ad-hoc revision procedure (the one provided by the Preliminary Treaty) without the approval, possibly, of their own parliament. This would be in breach of each state’s constitutional requirement of a parliamentary approval for all significant international treaties (there is no doubt that the Preliminary Treaty would be a significant treaty).

The only trace of this debate in the eventually agreed text is the intriguing Declaration nr 30 *on the ratification of the Treaty establishing a Constitution for Europe* which was annexed to the Constitution in the Final Act of the IGC)<sup>38</sup>:

37 A. Lamassoure, *Histoire secrète de la Convention européenne* (2004), at p.374.

*de Witte*

‘The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.’

At one level, this Declaration only states the obvious, namely that the European Council deals with any serious problem arising in the path of European integration. But the fact that this Declaration is made must mean more than that – namely, at least in the mind of some of its authors, that the European Council will be called to interfere, in one way or another, in the national ratification process. Does it mean that the European Council could take a decision overriding the missing national ratification(s) and make the Treaty come into force without universal national ratification? Nothing, it seems to me, could legally justify such a clear breach of Article 48 EU Treaty (and of the constitutional law of the country with ‘difficulties’). So, the Declaration can only mean that the European Council would have to come up with an inventive solution, exactly as it did after the failed Danish and Irish referendums earlier on. That solution would not necessarily be of the same nature this time. Indeed, there is a broad range of legal scenarios that could unfold if one or more member states failed to ratify the Constitutional Treaty.<sup>39</sup>

38 The Declarations can be found in OJ 2004, C 310, at p. 420 ff. This Declaration corresponds, practically word for word, to what the Convention itself had proposed in an annex to its Draft Treaty.

39 See Jo Shaw’s contribution to this volume.

