The National Constitutional Dimension of European Treaty Revision

Evolution and Recent Debates

Bruno de Witte

Walter van Gerven Lectures (2)

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1 Introduction

In the year 1996, Walter van Gerven published an article entitled "Toward a Coherent Constitutional System within the European Union".[1] Those were the years following the Treaty of Maastricht, and the intergovernmental conference that would eventually adopt the text of the Treaty of Amsterdam was about to start. Van Gerven looked beyond the repetitive series of European Treaty revisions, and called for a more ambitious legal reform of the European Union. "If the EU is to be brought closer to the citizens", he wrote, "it must be organized in a much more efficient and transparent manner than it is now. (...) In order to make the EU efficient and transparent, it needs a more coherent constitutional order. (...) The most radical manner to do that would be, of course, to promulgate a comprehensive constitution for the European Union. However, for the time being, that project has proved to be too ambitious."[2]

He was quite right, of course. The Treaty of Amsterdam, soon to be adopted, was far from being a comprehensive constitution for the European Union, and the Treaty of Nice, enacted in the following Treaty amendment procedure in 2000, even less so. Today, however, we are on the verge of having that comprehensive constitution, in the form of the Treaty establishing a Constitution for Europe, which was agreed upon at the European Council meeting of June 2004, and was signed in Rome on 29 october 2004 by the 25 member state governments.

However, this ambitious constitutional document does not, in any way, seek to displace the constitutions of the member states, nor does it integrate them within a multi-level constitutional structure of a federal nature. The national constitutions will continue to exist as the expressions of the independent statehood and national identity of the member states. One of the clearest expressions of this is the fact that the national constitutions hold the key for the entry into force of the new European Constitution.

Indeed, 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 may be presented as a "new beginning" in some ways, but it is also an application of Article 48, that is, an amendment of the EU Treaty (and the EC Treaty). The fact that the EU Treaty and EC Treaty will be repealed once the Constitutional Treaty enters into force[3] does not mean that the amendment procedure is being discarded. At any rate, the entry-into-force provision of the Constitutional Treaty (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. 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 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. They will provide a first and crucial test of whether the new Constitution has indeed achieved what Van Gerven rightly indicated (in his 1996 publication) to be its primary purpose, namely to bring the European Union closer to its citizens.

I will look at this national dimension primarily from a European Union perspective, without examining the actual constitutional rules applicable in each country. 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 Treaty 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;[4] 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[5], in which the international/European law phase is increasingly affected by domestic constitutional law, and vice versa. One could see this as a concrete instance of a broader trend towards the constitutionalisation of international law and the internationalisation of constitutional law. What happens is that 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. This rapprochement of the international and constitutional dimension is what I want to deal with in this paper under the broad title "evolution and recent debates". 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.

2 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.[6] 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.[7] It is only in the course of the 20th 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 intéret à faire au-dehors des traités désavantageux à la Patrie."[8]

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. For instance, neither the Statute of the Council of Europe, nor the European Convention of Human Rights contain such a reference. 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 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 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 by means of a treaty.[9] Indeed, the ECSC Treaty was an unusual treaty for its epoch, as it corresponded to the special hypothesis that had been envisaged by recent constitutional reforms in the three largest countries participating in the ECSC project, France, Italy and Germany. In all three countries, the post-war restoration of democracy had been accompanied by the express constitutional recognition of the fact that effective international cooperation was necessary in order to prevent new wars and to avoid the excesses caused by unbridled State sovereignty. Each of these three new constitutions contained a provision permitting limitations of sovereignty or transfer of sovereign powers to international institutions in disregard of the internal allocation of power between the State organs. 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 for the Maastricht Treaty or at the time of accession), but many countries 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 on the European Union in national constitutional texts.[10]

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 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. In fact, in a case like that of the European Treaties, if governments 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 also for reasons of national constitutional law (and not only for reasons of EU law itself) 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, apart from the exceptions provided in the Treaty itself. For the rest, the member states are free to organise the ratification of Treaty revisions in the way they like, and there is no European harmonisation or control of the procedures they use for that purpose.[11]

3 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.[12]

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 approve the constitutional changes that have to precede such approval.[13] In some cases, the parliamentary majority groups may themselves prove to be unreliable.[14] 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.[15] 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 manoeuvre 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.[16]

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 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 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 all 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). The German *Länder* were as usual very active and declared themselves relatively satisfied with the impact they had had on the drafting of the Convention's text.[17] Another more anecdotal example relates to an event 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 Pascale 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".[18] 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 adopted by the Convention, and was confirmed by the IGC.[19]

4 The Problems of the Traditional Separation between the Two Phases

4.1 The 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 national parliaments to contest specific clauses of the treaty but only allows them to approve or reject the treaty in its entirety. 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. As for rejection by a popular vote, when it happened in Denmark and Ireland, it was considered intolerable by the other member states and was countered by "soft" modifications of the original agreement, and a repeat-referendum.

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 have, so far, never been 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 reservations 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 derogations or opt-out clauses for the country concerned in the text of the Treaty. 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 communitarised 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.[20] 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.

4.2 The 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.

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 60th ratification.[21] It is therefore accepted, in international law, that many treaties remain "limping" for many years after their adoption.[22]

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.

5 The Reforms Made (and not Made) by the Constitutional Treaty

In the light of the problems associated with the national ratification phase of Treaty revisions, one could have expected the recent Convention, and the follow-up ICG, to have taken a critical look at this phase as part of their complete overhaul of existing EU primary law. However, little or no change in the existing situation results from the Constitutional Treaty.[23]

The Convention itself was, of course, a bold experiment in modifying the Treaty amendment procedure, even though it did not formally change the existing procedure but merely came in addition to it. Yet, the experiment related to the first, European, phase of Treaty revision and had only a secondary cross-referential connection with the second stage. One could see the Convention experiment, among other things, as an effort to address the two problematic aspects mentioned above – the democracy deficit and the excessive fragility – through the massive involvement of members of national parliaments 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, 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 have been, and will be, attained.

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 Treaty? In my view, the answer is yes. In the same way as Article 48 EU Treaty 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.[24] 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."[25] 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 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.[26] 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.

Other innovations would have been possible, without affecting the basic rule of Article 48 EU Treaty. 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).[27] 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.

Whereas the *entry into force* of the Constitutional Treaty remains unreformed, 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 apply-

ing 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*. The Praesidium had raised 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."[28] 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 inserted by the IGC just behind the *ordinary revision procedure*, as Articles IV-444 and IV-445.[29] Only the former of these clauses affects the national ratification stage and introduces a genuine measure of flexibility in Treaty revision.[30] 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. In the same way, 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 all, without the need for constitutional ratification of these changes by all the member states separately.[31]

However, each of the 25 (perhaps by then 28) 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 dependency on national constitutional organs remains. 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,[32] whereby "X" stood for an unspecified number higher than one. However, the single parliament veto appeared in the "post-Naples" document of December 2003[33] 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,[34] 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.[35]

6 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.[36]

References to this question could also be found in documents emanating from the European Parliament and the European Commission. In the *European Parliament*, a 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."[37]

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.[38] 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.[39] 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.

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 Treaty. 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?"[40]

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 Treaty, 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 No. 30 *on the ratification of the Treaty establishing a Constitution for Europe* (to be annexed to the Final Act of the IGC)[41]:

"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 inventive solutions, exactly as it did after the failed Danish and Irish referendums earlier on (although the solutions would not necessarily be the same this time). Those solutions will have to be based on respect for the constitutional identity of each of the member states. There is, for the time being at least, no other way forward for the European integration process.

Notes

1 W. van Gerven, "Toward a Coherent Constitutional System within the European Union", *European Public Law* 1996, pp. 81-101.

2 W. van Gerven, *op.cit.* at pp. 93-94.

3 Article IV-437 of the Constitutional Treaty. This is the new number used in CIG 87/04 of 6 August 2004, which is expected to correspond to the numbering of the final version of the Treaty. All Article numbers of the Constitutional Treaty mentioned in this paper are those of CIG 87/04.

4 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.

5 I am borrowing here an expression used by J. Ziller, "L'élargissement change-t-il les données du problème?" in: J. Ziller (ed), *L'européanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe*, L'Harmattan, Paris 2003, pp. 311-331, at p. 315.

6 See S.A. Riesenfeld and F.M. Abbott (eds), *Parliamentary Participation in the Making and Operation of Treaties*, M. Nijhoff, Dordrecht/Boston 1994; E. Zoller, "Droit constitutionnel et droit international" in: K.D. Kerameus (ed), *XIVth International Congress of Comparative Law Athens 1994 – General Reports*, Kluwer Law, Boston 1996, pp. 577-593, at pp. 585 ss.; 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*, Kluwer Law International, The Hague 2001, pp. 57 ss.

7 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 and G. Conac (eds), *La constitution de la république française. Analyses et commentaires*, Economica, Paris 1987, 2nd edition, pp. 1005-1058, at p. 1007.

8 J.J. Rousseau, *Lettres Ecrites de la Montagne*, 1764. I found the quote in P. Haggenmacher, "Some Hints on the European Origins of Legislative Participation in the Treaty-Making Functions" in: S.A. Riesenfeld and F.M. Abbott (eds), *op.cit.*, pp. 19-42, at p. 20.

9 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).

10 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), Editions A. Pédone, Paris 2000, at p. 251.

11 Except perhaps in the extreme case where a member state government would ratify in clear disregard of its own constitutional law, e.g. by failing to lay the treaty before the parliament; see discussion of this point by J. Wouters, "National Constitutions and the European Union", *Legal Issues of European Integration* 2000, pp. 25-91, at pp. 75 ss.

12 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, pp. 427-460. 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.

[13] 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", *op.cit.*, at p. 31).

[14] 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, pp. 37-60.

[15] It seems that Chancellor Kohl's sudden reluctance to agree to proposed shifts from unanimity to qualified majority voting, in the final days before the Amsterdam summit, was due to pressure from the German *Länder*. In the next IGC, in 2000, the *Länder* had originally threatened with a veto if the negotiators would not take on board some of their claims (see M. Borchmann, "Regierungskonferenz 2000 – Länder nesteln an der Notbremse", *Europäische Zeitschrift für Wirtschaftsrecht* 2000, at p. 161). In the end, the *Länder* settled for a commitment, from the side of the federal government, to try to put the issue of "delimitation of powers" between the EU and the member states on the agenda for a next round of Treaty reform. This result was achieved in the Declaration on the Future of the European Union annexed to the Treaty of Nice (OJ 2001, C 80/85, point 5, first indent). It is doubtful whether, in the absence of the important powers of the *Länder* at the ratification stage, the competence issue would have become as prominent as it did during the drafting of the Constitutional Treaty.

[16] 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, Odense 2002, at p. 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 were fulfilled, Denmark would be unable to ratify the Treaty in the coming referendum."

[17] See R. Hrbek, "Die deutschen Länder und der Verfassungsentwurf des Konvents", *Integration* 2003, pp. 357-370.

[18] I take the quotation from P. Norman, *The Accidental Constitution. The Story of the European Convention*, EuroComment, Brussels 2003, at p. 289.

[19] Article III-315, paragraph 4.

[20] F. Laursen, "Denmark: The Battle for a Better Treaty" in: F. Laursen (ed), *The Amsterdam Treaty, op.cit.*, 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 (ed), *Il progetto di Trattato-Costituzione. Verso una nuova architettura dell'Unione europea*, Giuffrè, Milano 2004, pp. 9-69, at p. 52).

[21] 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, at pp. 547-548.

[22] The expression is used, and the phenomenon described, by A. Aust, "Limping Treaties: Lessons from Multilateral Treaty-Making", *Netherlands International Law Review* 2003, pp. 243-266.

[23] For more general comments on the debate in and around the Convention and the IGC about the adoption and revision of the Constitutional Treaty, see P. Jeronimo, "Adoption and Entry into Force of the Constitution for Europe" in: J. Ziller (ed), *L'européanisation*, *op.cit.*, pp. 173-204; B. de Witte, "Entrata in vigore e revisione del Trattato costituzionale" in: L.S. Rossi (ed), *Il progetto*, *op.cit.*, pp. 101-122.

[24] For an earlier discussion of this option, see A. Auer and J.F. Flauss (ed), *Le référendum européen*, Bruylant, Bruxelles 1997 (in particular the contributions by A. Auer, A. Epiney and J.V. Louis).

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

[26] A. Lamassoure, *Histoire secrète de la Convention européenne*, Albin Michel, Paris 2004, at p. 412.

[27] See for instance A. Lamassoure, *Histoire secrète*, *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."

[28] CONV 728/03, p.10.

[29] CIG 87/04. This is preferable, from the point of view of constitutional drafting, to the approach taken in the Draft Treaty proposed by the Convention, which had put the simplified rules of change in Part I (Articles 22 and 33), thereby conveying the wrong impression on the reader of Part IV that the general revision clause of Article IV-7 (since renumbered as Article IV-443) would be the only one available.

[30] As for Article IV-445, it derogates from the requirement of convening an IGC for certain amendments, but maintains the requirement of a unanimous European Council *and* the requirement of ratification by all states. 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).

[31] 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 pp. 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, pp. 1217-1253, at p. 1230.

[32] CIG 52/03 ADD 1 of 25 November 2003, p.38.

[33] CIG 60/03 ADD 1 of 9 December 2003, p.49.

[34] 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.

[35] 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*, Giuffrè, Milano 2001.

[36] V. Giscard d'Estaing, "Vite, la Constitution de l'Europe!", *Le Monde*, 10 July 2004.

[37] *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.

[38] 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).

[39] *Penelope* can be found on 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*, Editions Clément Juglar, Paris 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.

[40] A. Lamassoure, *Histoire secrète*, 2004, *op.cit.*, at p. 374.

[41] To be found, for now, in CIG 87/04 ADD 2 of 6 August 2004. The Declaration corresponds, practically word for word, to what the Convention itself had proposed in an annex to its Draft Treaty.

The Leuven Centre for a Common Law of Europe

Mission Statement

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Mission Statement

The objective of the Leuven Centre for a Common Law of Europe (Leuven CCLE) is to focus research efforts of the Faculty of Law of the Katholieke Universiteit Leuven (K.U.Leuven) on legal developments that are common to the whole of Europe. A tradition of forty years of research in the field of comparative and European Community law serves as an excellent starting point for the activities of Leuven CCLE.

The area's of interest are: (i) the law of the European Union and developments in European human rights and humanitarian law (ECHR law), (ii) the national legal systems of the European countries in a comparative context and in their interaction with European Union law and (iii) the interplay of European (Union) law with international law.

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The Walter van Gerven Lectures are organised by the Leuven Centre for a Common Law of Europe in honour of Walter van Gerven, emeritus professor at the Katholieke Universiteit Leuven and former Advocate-General at the Court of Justice of the European Communities.

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Professor De Witte delivered the second Walter van Gerven Lecture. Bruno De Witte is professor of European Union Law at the European University Institute (EUI) in Florence, Italy, where he holds the joint chair in European Law of the Law Department and the Robert Schuman Centre for Advanced Studies. Bruno De Witte obtained his law degree at the Katholieke Universiteit Leuven in 1978. He was awarded his PhD in Law of the EUI in 1985, and was Associate Professor in the Department of Law at the EUI until 1989 when he was appointed Professor of Law at Maastricht University. He holds his current position at the EUI since March 2000. His main research interests are institutional law of the European Union – including among others the relations between EU law and ational law and between public international law and EU law – protection of fundamental rights and protection of minorities.

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