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**“The European Constitution and contemporary constitutionalism”**

**Between a Treaty with Constitutional Authority and the Authority of a  
Constitution**

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At this point, almost everything seems to have already been said about the Treaty creating a Constitution for Europe and yet, paradoxically, discussions have not settled in any way its intrinsic juridical nature. Regarding this most crucial issue, opinions have shifted from one extreme to the other, passing through all the possible intermediary positions. To wit, the Treaty creating a Constitution for Europe has been in turns characterized as a rather uneventful revision of former treaties<sup>1</sup>, suspected of attempting to constitute more than just the basic groundwork for a new legal order,<sup>2</sup> and accused of being a “treaty masquerading a constitution.”<sup>3</sup> Just like in the halcyon times, when jurisconsults and later glossators of Roman law who could no longer find a place in the known legal categories for a new legal item would simply call it *sui generis*, the Treaty creating a Constitution for Europe has been considered from the very onset a “hybrid”<sup>4</sup> legal product, with legal and meta-legal effects<sup>5</sup>, in part foreseeable, since intended<sup>6</sup> or inherent<sup>7</sup>, in part non-intended and yet to be discovered during the process of implementation.<sup>8</sup>

The very title of the document illustrates the ambiguity of its intentions, as well as the major difficulties its authors have encountered during the drafting process. The compromise in legal terminology resulting from the association of two legal concepts which exclude each other not because they are opposed, but because they reflect two distinct legal realities, characterised by different legal regimes, may be considered as the outcome of a drafting and adoption process as original as the normative content of the legal document which represents its result.

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<sup>1</sup> O. Pfersmann, “The new revision of the old constitution,” *International Journal of Constitutional Law*, (*I-CON*) 383 (May 2005).

<sup>2</sup> J-M.Ferry, “Face à la crise, quelles perspectives pour l’Union Européenne”, *Politique étrangère* n°3/2005, p.511. For a somewhat similar analysis reaching the opposite conclusion D.Grimm, “Integration by Constitution,” *I-CON* 193 (May 2005).

<sup>3</sup> J.H.H.Weiler, “On the power of the Word: Europe’s constitutional iconography,” *I-CON*, May 2005, p.173.

<sup>4</sup> *Idem*, *passim*.

<sup>5</sup> D.Grimm, *supra* note, *passim*, arguing that socially integrative effects cannot be expected from a legal text in general, and even more so from an international treaty.

<sup>6</sup> For instance, the simplification of the EU legal framework.

<sup>7</sup> Deepening European integration has led to an increase in the EU competences and increased EU control on national policies that have become “comunitarised”. At the same time, enlargement of the EU has led to a rapid transition from unanimity vote to majority decision-making procedures.

<sup>8</sup> M.Kumm and V.F.Comella “The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union,” *I-CON* (May 2005), p.473. The authors argue that a plausible interpretation of article I-6 of the Constitution leaves room for national courts to set aside EU law on national constitutional grounds in cases where the national constitutional identity is at stake (according to article I – 5 of the Constitution).

The present paper will not attempt to square this theoretical circle<sup>9</sup>, but only to identify those peculiarities of the Treaty creating a Constitution for Europe which may justify its special legal regime in the Romanian legal system.

## **I. A treaty with relative constitutional authority**

If words are to still have any kind of meaning in this world, to a lawyer, the Treaty creating a Constitution for Europe resembles somewhat remotely a constitution and yet, substantively, it is not a constitution, at least not in the common legal acception of the term. It does not look like a Constitution<sup>10</sup>, it does not read like a Constitution<sup>11</sup>, it does not apply like a Constitution<sup>12</sup>, hence it is not a Constitution. Indeed, the modern<sup>13</sup> sense of the word ‘constitution’ refers to a totally different thing than the one we are observing in the EU setting. Namely, as it is commonly acknowledged, the term applies to: (i) a fundamental law; (ii) adopted by a constituent power, mandated to establish general rules for the organisation and the exercise of state-power inside a political entity, an entity that it may even, in turn, *constitute* and; (iii) which sets the basis for an efficient and entirely autonomous legal system. The Treaty creating a Constitution for Europe fulfils none of these criteria and, despite some characteristics which render it different from previous treaties of the European Union, it remains a convention concluded between States which are still -even though perhaps partially- sovereign.

### **A. A Treaty with Relative Constitutional Authority**

To call a treaty ‘constitution’ can be either a terrible challenge to (positivist) legal theory or a terribly boring “*constat de faits*.” As it has been repeatedly stated by various authors who took their inspiration from reality, the Treaty creating a Constitution for Europe can be considered a Constitution in the same way in which any treaty is constitutive of an international organization and in a similar way any kind of private association, for instance bowling clubs, have ‘constitutions’ in day-to-day life. However, the Treaty creating a Constitution for Europe cannot be considered a fundamental law of the land against its own express provisions (articles I – 5 and 6), no matter the legal or even constitution-like authority it can be derived from those provisions.

#### ***A. What the Constitutional Treaty Is Not***

The legal act subject to our present scrutiny can be considered a fundamental law in the colloquial-denotative sense. The ‘vulgarization’ of this term met with some success in the UK, where, during the public campaign in support of the EU Constitution project, the assertion was self-assuredly made that “every bowling club has a constitution.”<sup>14</sup> This did not of necessity

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<sup>9</sup> Even the European Commission itself seems reluctant to provide elements for an answer. To wit, in a *Memorandum* addressed to its internal legal services, the Commission advises the use either of the full title “Treaty establishing a Constitution for Europe” or of the abbreviated form “Constitution,” as the legal documents calls itself, without any further comments on the legal nature or fate of the document.

<sup>10</sup> The form and structure of the document are somewhat similar to those of national constitutions adopted after the first wave of European constitutionalism (end of the XIX-th century). Its volume, nonetheless, particularizes it.

<sup>11</sup> The preamble is identical to those of preceding treaties, the content of the “Constitution Treaty” simply codifies, for the most part, the body of existing *acquis*, future revision is left, in essence, at the latitude of Member States, whereas the closing provisions are those characteristic of all treaties.

<sup>12</sup> Article I-6 provides for the primacy of the EU law within its specific area of competence and not for its general supremacy over the national law.

<sup>13</sup> H.Dippel, “Modern constitutionalism, an introduction to a history in need of writing”, *The Legal History Review* Vol. 73, Nos. 1-2, 2005, at p.164.

<sup>14</sup> Weiler, *supra* note, at p.181.

determine a more favorable reception by the public, but it did allow for debates to be pitched at a higher, broader level of generality.

After all, any legal act sets a certain number of rules and this is what the respective constitutions of bowling clubs and the European Union do have in common.

At a more technical level, nonetheless, one could notice that the phrase “A Treaty establishing a Constitution for Europe” indicates the fact that we are faced with a legal framework for human action. The setting of coordinates for human activities can be realized both by consensual and by normative acts. The prescriptive element alone is insufficient to identify the actual legal nature of the document. In other words, the treaty is qualified as a ‘constitution’ because it provides the main juridical rules applicable to the international organization it creates. Yet, in and of itself, this is not a revolutionary development, for at least three reasons. Firstly, at the terminological level, the situation is not new, as other international organizations rest on legal foundations that are labeled as ‘constitutions’ but are in fact international treaties in the purest possible definition of the instrument.<sup>15</sup> Secondly, any international treaty which lays the groundwork for an organizational structure is ‘constitutive’ of that entity; in this sense, the term is used in its functional meaning. Thirdly, the European Union and –respectively- the European Communities have always had a Constitution, at least if one is to believe the European Court of Justice in Luxemburg, according to which the ‘constitutional charter’ of the EC/EU originated in its founding treaties.<sup>16</sup>

Yet, all these three ways of perceiving-approaching our legal document indicate one and the same thing, namely that the Treaty establishing a Constitution for Europe is not a Constitution in the proper sense of the word, but rather a founding legal document of an international organization, namely an international treaty. This treaty can receive the ‘constitution’ epithet due to the fact that its role within the normative system it creates resembles the role of a constitution within the legal system of a state. Otherwise, a constitutional treaty becomes a *contradictio in se*.

This legal act was adopted by a self-styled Constitutional Convention, yet one that did not represent an authentic constituent power (*pouvoir constituant*) in the proper meaning of this term. The suggestive force of the illustrious precedent, the American Constitutional Convention in Philadelphia, was a decisive factor in choosing the label as such. But rhetoric cannot make do for the lack of legitimacy inherent in the procedure. Thus, unlike the Philadelphia Convention, its European Union counterpart did not include all the members of the legally *envisioned* community (a fact that would have been, at any rate, objectively impossible). Neither was it authorized during a selection process instituted for the purpose of designating, within this new political entity, the representatives of the European *demos*. Nobody could be blamed, however, for this ‘original sin.’ Quite simply, in 2003, no *demos* existed and no ‘European moment’ was in sight.<sup>17</sup> Therefore, no political entity could be created *ex nihilo*, so that its hypothetical representatives could in turn be called upon to set structural rules for an efficient and autonomous new legal system.

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<sup>15</sup> For instance, the International Organization for Migration (IOM) or UNESCO.

<sup>16</sup> The Court of Justice has constantly asserted, ever since 1986, that the founding treaties of the Communities are in effect a genuine European constitution (cf. *Parti écologiste 'Les Verts' v European Parliament*, Case 294/83).

<sup>17</sup> B.Ackerman, “Constitutional Politics/Constitutional Law” in *Yale Law Journal*, Vol. 99, No. 3, Dec. 1989, p.453. Ackerman explains the importance (with respect to political-constitutional integration and the building of a common identity) of the synchronization between the formal adoption of a constitutional document and the existence of a “constitutional moment” within the respective polity.

A discussion on these issues is not warranted here, as the differences between the European constitutional convention and a genuine constituent power have already been largely debated in the literature.<sup>18</sup>

The Constitution Treaty abrogates all precedent founding treaties and constitutes itself as a foundation for the Community legal order but changes nothing in the legal regime of the instituted normative system; it merely confirms it. The European legal order, though an overall efficient juridical system, is not an entirely autonomous one. To put it more precisely, the EU legal system does produce legal effects, yet the rules on which these effects depend are not internal to the system. Member States are the authors of the founding and enabling treaties of the EU. Thus, legal subjects external to this legal system retain “competence over competences” (*Kompetenz-Kompetenz*) and can always modify the rules of the game, without being themselves regulated by these rules. Therefore, the particular feature of these founding treaties -i.e., that of establishing a legal framework for the organization and functioning of this supranational entity-, a feature based on which the Court of Justice characterized the respective treaties as a “Constitutional Charter for Europe,” is a necessary but not sufficient rule of constitutional recognition. Other than its fundamental law character, another defining characteristic of a constitution, indeed its *differentia specifica* from other kinds of legal acts instituting derivative juridical orders, is its completely autonomous character. National state-level constitutions do establish “competence over competences,” since their juridical regime, including their own ‘rules of change,’ is regulated by their text and depends ultimately on the will of the same legal subjects whose conduct is being regulated, i.e., the individual legal subjects, the citizens of those states. The possibility of citizens to change at any given time the ground rules of the political game, to alter any element in the construction of the state, and hence to manifest themselves as the ultimate decision-makers of and over their community, is the most important feature of a constitution.<sup>19</sup> This Treaty does not confer such a competence either to the European citizens, who are being granted fundamental rights but recognized (in fact) no power, or to the EU, its primary object of legal regulation. As in the case of the founding and modifying treaties of the EU, decisional attributions regarding the overall juridical regime of the Community legal order remain within the purview of Member States, the entities by whose agreement the supra-national organization was instituted.

The conventional nature of the Treaty renders it altogether different from a constitution in the legal sense of the term (i.e., a unilateral juridical act through which the legal possessor of power within a polity manifests its general will).

The legal act under our present scrutiny does nothing other than to reiterate the particular legal nature of the Union; it does not succeed in overcoming this *status quo*. A European Constitution cannot exist outside a European *demos* conferring mandate upon a European constituent power, within a European polity, to create a new European juridical order. This Treaty is, to sum up, not a Constitution.

### ***B. The Characteristic Features of the Treaty establishing a Constitution for Europe***

What is the Treaty, nonetheless? From the perspective of a positivist lawyer, it represents nothing more than an international treaty, a convention concluded among a number of states agreeing on common rules of conduct between themselves, having thus established a new

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<sup>18</sup> D.Grimm, *supra* note, p.193 et sequitur, U.Halter, “Pathos and Patima: The Failure and Promise of Constitutionalism in the European Imagination,” *European Law Journal*, n°1/2003, p.14 et sequitur.

<sup>19</sup> In this regard (even though perhaps slightly redundantly), we could refer to the famous text of Art. 16 in the 1789 French Declaration: „Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution.”

juridical entity. As opposed to previous EC/EU treaties, this present instrument manages to codify preexistent norms and practices in a more systematized form.<sup>20</sup>

Yet words also have a meta-legal, symbolic meaning. Insofar as a legal reading of this document can be enriched with and by such connotations, the Treaty marks the transition from a simple ‘common market’ to ‘political union’ in Europe. Even though it does not lay the foundations for a juridical order, the Treaty does strive to offer solutions for some problems identified at the European level, problems regarding both the political legitimacy of the supranational entity and decision-making and institutional difficulties.

The Treaty brings forth a few elements of novelty, which concur to confer upon it a character of undeniable originality and distinctiveness over similar preceding documents.<sup>21</sup>

As it has already been noted, the Treaty establishing a Constitution for the European Union does resemble a state-level fundamental law.<sup>22</sup> Its structure, which includes a preambulatory chapter, identifying the founding values and objectives of the Union and a second one, codifying the fundamental rights of European citizens, is reminiscent of the particular form embraced, at the beginning of modern constitutionalism, by the fundamental laws of the nineteenth-century states. Nevertheless or notwithstanding, the following chapters find no correspondent in classical constitutional texts. At this juncture, the formal parallelism is discontinued. Besides, the actual physical volume of the document makes any comparison hard to maintain, so that one is compelled to take notice of the reality that any similarities with state constitutions can only be illusory.<sup>23</sup> However, the formal aspect is not without relevance, as it does actually constitute a major achievement of this legal text. Within the ambivalent structure of the document, one can find, even though at different levels of success, the first elements of juridical systematicity and codification.<sup>24</sup>

Commentators also noted the relevance of Article I-59, which provides for unilateral withdrawal from the Union.<sup>25</sup> This possibility is not only a novelty in Community law, but a *novum* for international public law as well. The recognition of a discretionary right to ‘secede’ contradicts, to a degree, the federalist positions over the EU legal nature. Not only does it confirm once more the fact that the EU does not have a “competence over its own competences” (but rather depends in this respect on the will of its members), this possibility also contradicts another development reflected in the Treaty, i.e., that towards a deeper integration level among the existing Member States. To wit, it is apparently paradoxical that a European Union which extends so significantly (insatiably, one could even say) with respect to the number of states comprised by it, would make provision with such ease for a potential numerical reduction. On a closer look, however, it could be considered that Article I-59 offers a pragmatic solution for the tension which results out

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<sup>20</sup> Some commentators (e.g., J-M.Ferry, supra note, *passim*) have noted that the Constitution Treaty is a codification simplifying the legal framework of the EU. In our opinion, even though the inclusion of all foundational legal rules of the EU in one single document can be regarded as a better codification, the sheer volume of the final text renders the ‘simplifying’ epithet rather specious.

<sup>21</sup> The term EU is used here as a proxy for the supranational entity European Communities/European Community/European Union.

<sup>22</sup> A.Wiener, *Evolving Norms of Constitutionalism in Europe: From ‘Treaty Language’ to ‘Constitution*, Jean Monnet Working Paper n°5/04. For an analysis in Romanian law, see, I. Muraru, S.Tănăsescu, „Drept constituțional,” All Beck, 2005, București, p.12-14.

<sup>23</sup> The text of the Treaty in English is 66497 words-long. By comparison, the US Constitution and the UN Charter count 4600 and, respectively, 8890 words (Cf. J.H.H.Weiler, supra, p.174-175).

<sup>24</sup> But cf. J.B.Liisbeg, *The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?*, <http://www.jeanmonnetprogram.org/papers/06/060101.html>.

<sup>25</sup> V. Constantin, “Est-ce que la Constitution européenne doit contenir des dispositions sur le retrait volontaire de l’Union,” in *Uniunea Europeană între reformă și extindere – comparație între abordarea unui stat membru și viziunea unui stat candidat*, works of the Colloquium organized by the French-Romanian College of European Studies in Bucharest, September 11 and 12, 2003, published by All Beck, p.19 et sequitur.

of combining these two phenomena. The enlargement to a significant number of Member States among which a deeper but geometrically variable integration takes place risks posing real problems both to those states and to the EU. From the perspective of the Member States, the solution offered by Article I-59 could be effective in two ways: either the states, not being able to tolerate any longer a higher degree of integration and/or enlargement, would choose to exit the enterprise, much too ambitious for their own purposes, or, dissatisfied with the slow pace of integration or the narrow frame of enlargement, states could exit this structure with a view to founding another organization, numerically smaller but integration-wise more efficient. The former hypothesis builds on prior EU developments.<sup>26</sup> The latter one reminds theories already advanced, regarding the possibility of some states meeting with situations which could make them “more equal” than others,<sup>27</sup> and exploiting this circumstantial advantage on their own.<sup>28</sup> As far as the EU is concerned, Article I-59 ensures its viability even in the hypothesis that its component parts would be faced with an unsurpassable impasse: international public law provides for bilateral treaty extinction by virtue of unilateral denunciation, whereas the withdrawal of a signatory member from a multilateral treaty does not affect the validity of the latter legal act.

The Treaty also comprises other provisions which, albeit they do not mark a cleavage with the past of the EU as a supranational organization, do bear witness of the continent-wide success of the integration phenomenon. Some of the highest achievements of this treaty regard the enlargement of the EU.<sup>29</sup> Equally relevant, the meta-political objective emphatically announced by the Preamble to the document, namely, “creating an ever closer union among the peoples of Europe,” determined a different approach towards the necessary institutional reforms. The fact that, in the Council, most decisions must be taken by qualified majority and not unanimously, the ‘elevation’ of the Parliament to the status of a co-legislator, and the more complex and more original revision procedures are all so many proofs attesting that integration is no longer confined to economic aspects, but also regards, ever more, political ones as well.

That being said, even the most strenuous defenders of the EU and its alleged ‘constitutionalization’<sup>30</sup> are compelled to reach a rather skeptical conclusion: “Not matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, and distinct political communities.”<sup>31</sup> As the ‘transcendental’ level necessitated by a metamorphose of the EU into an altogether different entity (than a supranational one) has not yet been reached,

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<sup>26</sup> This is the case of Denmark with respect to the Maastricht Treaty.

<sup>27</sup> The expression was coined by J.H.H.Weiler, who observed that “All member states are equal but some are more equal than others.” Building on various working hypotheses, *i.e.*, the situations in which various combinations of Members States would reject the European Constitution, Weiler advances possible solutions adapted to each of the foreseen situations: “A rejection by the U.K. alone will, when all is said and done, amount to an act of British self-exclusion. A rejection by France, alone, will mean that the constitution must be re-negotiated. A rejection by the U.K., Ireland, and Denmark would not thwart the constitution. Add one or two members of the old guard to the rejection bloc and the constitution sinks. Imagine a rejection by Poland alone: the constitution lives. Add the Netherlands, and it dies.” (*supra note*, at p. 179).

<sup>28</sup> In the beginning of the `90s, Jacques Delors, then-President of the Commission, was advancing the theory of integration “in concentric circles,” according to which a few states, objectively more economically advanced, could have become the ‘engines’ of integration, whereas the other Member States could have followed course at a slower pace.

<sup>29</sup> J-M.Ferry, *supra* at p.512.

<sup>30</sup> For a criticism of the excessive usage of the ‘constitutional(ism)’ phraseology in Community law, see S.Tănăsescu, „Sur la possible constitutionnalisation du droit communautaire”, AUB n°1/2004, p.1 et sequitur. Also relevant, V.Constantinescu, „Des racines et des ailes”, in *Au carrefour des droits – Mélanges en l’honneur de Louis Dubouis*, Dalloz, Paris, 2002, p.315 et sequitur. For a different interpretation of the process of European law ‘constitutionalization,’ see M.P.Maduro, „The importance of being called a Constitution: Constitutional authority and the authority of constitutionalism,” *I-CON*, May 2005, p.332.

<sup>31</sup> Weiler, *supra note* at p.187.

the Treaty, irrespective of its peculiar characteristics, is nothing more than an international treaty establishing an international organization and a correspondingly specific legal order.

## **II. The Legal Status of the Constitution Treaty in Romanian Law**

Yet another feature, this time a particularity regarding two states solely (Romania and Bulgaria), can be added to the aforementioned particular characteristics of the Treaty. Throughout the drafting and adoption process, the Treaty establishing a Constitution for Europe has been vividly debated within the 25 EU Member States. It did not meet with the same level of interest in Romania and Bulgaria, which were, at the time, only Candidate States. This attitude could be explained, to a certain degree, as resulting from momentary political priorities, but it can also be ascribed to legal-technical considerations regarding the temporal application of legal norms. Poring into the respective Romanian and Bulgarian accession treaties seems to indicate that such option was not a wise one, given that Romania and Bulgaria implicitly –albeit prematurely– adhered to the Treaty establishing a Constitution for Europe, when they ratified the accession treaties.

Under these circumstances, one could pose the legitimate question whether the particular characteristics of the Treaty could justify its implicit and premature ratification (B), given that, in the Romanian legal system, the interactions between domestic and international law had anyway already given birth to an almost baroque internal legal architecture (A).

### **A. The Incorporation of International Treaties in the Romanian Legal Order**

Before the 2003 amendments to the Romanian Constitution, the relationship between internal and international law had been regulated by the provisions of Articles 11 and 20. Article 11 of the Constitution<sup>32</sup> was considered in doctrinal commentaries the legal illustration of a dualist conception, starting from the idea that ratification of international treaties was fully within the scope of state discretion.<sup>33</sup> As argued in the very first commentary of the 1991 Constitution, due to the fact that an international treaty would be ratified by formal legislation, its clauses would be incorporated in the domestic legal order only inasmuch as they were compatible with the fundamental law.<sup>34</sup> Otherwise, either the treaty would need to be ratified under reservations, or the Constitution would need to be amended accordingly. This interpretation made clear the position occupied by international treaties within domestic law. Given that they were ratified by Parliament, their legal force was consequently subordinate to that of the Constitution.

However, the prevalent application of international over domestic law was recognized in the field of human rights-related norms. Article 20 has been the object of numerous doctrinal controversies and debates, related in particular to the legal force which had been acquired by the respective treaties within domestic law.<sup>35</sup> The dominant position, closely followed by the

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<sup>32</sup> Articolul 11, in the 1991 (original, pre-amendment) form of the Constitution reads: “The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to. Treaties ratified by Parliament, according to the law, are part of national law.” (Authorized translation to be found on-line, on the website of the Chamber of Deputies, [http://www.cdep.ro/pls/dic/site.page?den=act1\\_2&par1=1#t1c0s0a11](http://www.cdep.ro/pls/dic/site.page?den=act1_2&par1=1#t1c0s0a11))

<sup>33</sup> R.M.Besteliu, A.Ciobanu-Dordea, “Tendințe noi în ceea ce privește raporturile între dreptul internațional și dreptul intern,” *Revista de Drept public*, n°1/1995.

<sup>34</sup> M.Constantinescu, I.Deleanu, A.Iorgovan, I.Muraru, F.Vasilescu, I.Vida, *Constituția României – comentată și adnotată*, Monitorul Oficial, București, 1992.

<sup>35</sup> Article 20 in the 1991 Constitution provided: “Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence.”

institutional and judicial practice, asserted that the fundamental law determined “competence over competences.” Consequently, the Constitution can at most be interpreted and enforced in a manner compatible with the provisions of domestically ratified human rights treaties, but could not be invalidated by those norms. With respect to the rest of the normative system, international human rights treaties are not supreme but do have priority over and thus preempt the application of internal legislation with which they enter into conflict. At any rate, international treaties do not have a direct effect within the domestic legal order; the expression of will by the people’s representatives is a constitutionally necessary validating filter.

Following the 2003 constitutional revision, Articles 11 and 20 were modified. An additional section was added to Article 11,<sup>36</sup> spelling out what the commentators of the original text had already anticipated, namely that ratification of a treaty whose provisions would run counter to the Constitution could only follow a formal amendment of the fundamental law. In other words, the Constituent led the dualist argument through to its logical conclusion, showing that the national parliamentary screening of international acts determines direct consequences in the internal legal order and that only the derived constituent power is competent to authorize the insertion in the domestic order of provisions that contradict expressly the already expressed will of the sovereign people.

Following the same logic, Article 20 was also modified, through the addition of a final clause to its last section, in application of the *mitior lex* principle.<sup>37</sup> Hence, the priority of human rights treaties would be recognized only insofar as the Romanian fundamental law does not comprise more favorable provisions. This new provision confirmed doctrinal opinions affirming the domestic legal primacy of the Constitution, irrespective of the differing positions of normative acts ratifying human rights treaties.

Considering the fairly well-articulated mechanism which had regulated the inter-relationship of domestic and international law within the Romanian legal order, as well as the fact that EU founding treaties are *sui generis* international acts, it would have been better if their incorporation into the Romanian normative system had followed pre-existing rules.

The derived constituent power of 2003 decided otherwise.

The 2003 constitutional revision added to the fundamental law a special title on Euro-Atlantic integration. Article 148 regulates normative and institutional aspects regarding the relationship between Romania and the EU and represents a ‘blanket delegation,’ a ‘general Community-related clause’ delegating attributions from the state level to a supranational organization.<sup>38</sup>

According to the first section of this article, the ratification of the Romanian accession treaty undergoes a procedure which renders it atypical and distinct from the exercises of will by both the legislator and –respectively- the constituent power. Thus, the law ratifying the accession treaty<sup>39</sup> is, both formally and substantively, a *sui generis* law, adopted in a joint sitting of both Houses of Parliament, by a qualified two thirds majority of the number of deputies and senators.

This is not a constitutional law in the proper sense of the term, since it does not fit the category, either formally or substantively.

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<sup>36</sup> “If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.”

<sup>37</sup> “Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, *unless the Constitution or national laws comprise more favourable provisions.*” (emphasis added)

<sup>38</sup> Initially used in the realm of descriptive social sciences, the concept of *supranationalism* has, of more recent times, become a part of legal analysis as well. (Cf.F.Mayer, *The European Constitution and the Courts*, Jean Monnet Working Paper n°9/2003, <http://www.jeanmonnetprogram.org/papers/03/030901-03.html>.)

<sup>39</sup> Legea nr.157/2005, published in M.Of. nr.385/6.05.2005.

In respect of its normative content, it is certainly a law ratifying an international treaty rather than one seeking to amend the fundamental law. If the normative content of the international act to be ratified would comprise provisions contrary to the Romanian Constitution and a modification of the latter would thus be needed, according to Article 11 of the revised Constitution, the ratification procedure would need to be suspended and an amendment procedure ought to be initiated. This procedure would result in a legal act distinct from the law ratifying the accession treaty.

Regarding the formal criterion, that of the procedure for adopting this exceptional ratification law, even though the qualified majority provided by Article 148 is the same as that needed for the adoption of a constitutional law, namely two thirds, the numbers differ in these two situations. In the former case, the majority refers to the compounded number of deputies and senators; in the latter one, to two distinct fractions of two distinct numbers (of senators and deputies, respectively). Besides, given the existence of mediation as a potential step in the revision process, a similitude of the two procedures cannot be claimed. In the hypothesis of the failure of mediation during an amendment process, a vote of three quarters of the total number of deputies and senators would be needed to settle the divergencies between the two Houses of Parliament. Therefore, at least from the standpoint of the formal conditions to be fulfilled, and referring only to the legislative procedure, insofar as a comparison could be made, the ratification law is inferior, with respect to its legal force, to constitutional laws.

Also in respect of the formal requirements to be met, i.e., the majority needed to adopt the different kinds of laws composing the Romanian normative system, the ratification law can be distinguished from both organic and ordinary legislation, inasmuch as the required quorums based on which the respective majorities are computed differ from each other: in the first case, the quorum is formed of the total number of all parliamentarians, whereas in the latter it comprises of distinct, House-specific, numbers. If we seek, nonetheless, to compare the absolute figures resulting out of the calculation of the majorities necessary to adopt the various types of legislative acts in relation to the number of senators (143) and deputies (328), it results that the law ratifying the Romanian accession to the European Union needs a higher number of favourable votes –in absolute figures- than organic and ordinary laws. From this comparison we can conclude that the ratification law has a higher legal force than these two other types of legislation. If we add to this purely formal criterion the substantive one regarding the respective natures of the social relations which are being legally regulated, we can safely conclude that the transfer of attributes of sovereignty and the exercise of state powers in association with other states prevails over the respective normative domains of organic or ordinary legislation.

The above factual analysis naturally results in the conclusion that the legal act by which Romania joins the Union has within the Romanian legal system a force inferior to the Constitution and to constitutional laws but superior to organic and ordinary laws. Nonetheless, the law by which Romania has acceded to the Union remains essentially a treaty ratification law, which could have followed the generally applicable procedure for such legislation, especially as this procedure had already been perfected by the 2003 amendments.<sup>40</sup>

The different path followed by the 2003 derivative constituent power creates an almost baroque normative act structure, comprising: (i) the Constitution and constitutional laws, whose supremacy over all other normative acts was confirmed by the 2003 amendments; (ii) the accession law and the laws ratifying revisions of the constitutive treaties, according to Article

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<sup>40</sup> Due to reasonable considerations of editorial limitations, the (not at all uninteresting or unsequential) issue of constitutional review of international treaties under the revised 2003 Romanian Constitution will not be treated here. In this respect, it should be remarked nonetheless that the constitutional screening mechanism is still at an inchoate stage of development (as noted by the Venice Commission for Democracy through Law, [http://www.coe.ro/pdf/CDL-AD\(2002\)021-e.pdf](http://www.coe.ro/pdf/CDL-AD(2002)021-e.pdf)).

148, Sections 1 and 3 of the amended Constitution; (iii) organic laws and laws ratifying international treaties, with the proviso, regarding the latter, that, if they comprise human rights-related norms, they prevail, enforcement-wise, over the former normative category; (iv) ordinary laws and laws ratifying international treaties, with the proviso, regarding the latter, that, if they comprise human rights-related norms, they prevail, enforcement-wise, over the former normative category; (v) emergency ('constitutional') government ordinances; (vi) ('ordinary') government ordinances, etc.

We could conclude from the above arguments that the Treaty establishing a Constitution for Europe will acquire, in the Romanian system, the legal regime set forth by Article 148 Section 3 in the revised Constitution, namely, it will be incorporated following prior parliamentary debate.

Nonetheless, the legislator of 2005 decided otherwise.

### **B. An Implicit and Premature Ratification of the Treaty establishing a Constitution for Europe**

EU accession is a politically, legally, and institutionally complex process. From a legal benchmark, the closest *legal proxy* for the accession process is not the convention (which results out of consensual negotiations) but the contract, since the candidate state will have to obey, upon accession, a pre-established legal framework in whose definition it played no active part. This reality is translated legally into the harmonization obligation we are accustomed to call by the name of "*acquis communautaire*." Harmonization represents a relatively long process of legislative adoption, adjustment, and abrogation, by which Candidate States seek to reach a high degree of compatibility between domestic legislation and the *acquis*. Unfortunately, due to the attitude of some of the Romanian authorities, some questions must be raised with respect to the local understanding of the scope of domestic obligations throughout this process, as harmonization acquires, more and more, the character of a wholesale transfer of the *acquis*. Sometimes the process is distorted to the point of caricature, as legal texts are simply translated from secondary Community law into domestic legislation (irrespective of whether the translated legal acts had or not originally been normative acts).

Beyond the various and more or less legitimate state practices regarding the *acquis*, the important fact deserves to be well-noted that Candidate States have a modest leeway in this process.

One of the few variables still within the purview of Candidate States is fixing the precise moment by reference to which the legislative harmonization process can be considered final, during accession negotiations. In other words, Candidate States can establish, in agreement with the European Commission, the deadline by which the *acquis* must be harmonized with internal legislation. This date has the role of a yardstick only in respect of the accession negotiations. Naturally, within the EU, the process of adopting new norms of secondary European law will continue, whereas Member States will have to constantly adjust their legislation accordingly. For candidate states, the obligation of accelerated legislative harmonization regards only a part of the *acquis*, namely that already adopted by the institutions of the Union up to the accession-related point of reference. Legal norms of Community law adopted after this moment are no longer the object of the harmonization process undertaken in view of the accession obligation.

This legal regime applies to secondary European law, as, with respect to the founding treaties of the EU, negotiations between candidate states and the supranational organization are finalized with the adoption of the accession act. Accession is legally closed by a treaty modifying the original treaties of the EU, and which, in order to be operative, needs to be ratified by all Signatory Parties, i.e., all the Member States and the former Candidate States. This is yet another example confirming the fact that the EU depends on the will of its member states and that the

accession act represents the result of a negotiation undertaken on an equal footing by equally sovereign states.

The Romanian Accession Treaty has a particularity which cautions a more careful scrutiny. Thus, by the Accession Treaty, Romania made in fact two alternative decisions, among which choice rests on a contingency over which the Romanian state has no control whatsoever. The Romanian accession will have the legal significance of ratifying the founding European treaties unless the Treaty establishing a Constitution for Europe does not enter into force prior to the date of accession. Alternatively, if on the date of accession the Treaty is already operative, the Romanian state will be taken to have ratified this (rather than the prior) constitutive treaties of the European Union.

Such an alternative expression of will begs the following question: when did Romania actually negotiate the accession to the Treaty establishing a Constitution for Europe?

It is true that Romanian representatives took part in the debates of the European Convention, but these representatives had only been granted observer status. They could only express opinions and had no decisional competences whatsoever. The adoption of the final text of the Treaty was made without their votes being cast, which in fact means that the will of the Romanian people over the text adopted was left unexpressed. If within the member states debates on the legitimacy of both this document and the EU as such are being carried, these debates are all the more necessary in Romania, where the ratification of the document went unobserved.

It is equally true that in the precise period of time when, in the member states, debates regarding the Treaty had reached their high water-mark, the attention of the Romanian public was focused on the domestic Constitutional amendment process. One of the main purposes behind the 2003 constitutional revision process was the adaptation of the legislative framework, and more particularly of the Constitution itself, to the needs of EU integration. The two processes of constitutional revision took place in parallel, both figuratively and literally. Whereas the Treaty sought to propose solutions to the various challenges regarding the legitimacy of the Union, the Romanian constitutional amendments only operated an adaptation to a changing political and legal context, statically recording the context, without taking account of the transformations. To wit, Article 148 in the revised Constitution is illustrative of this stagnant conception of the EU and attitude with respect to the relationship between domestic and Community law. Thus, the constitutional provision regarding the precedence of “mandatory community regulations” over “the opposite provisions of the national laws” did not take account of the provision of Article I-6 in the Constitution Treaty.<sup>41</sup> Article 148 in the amended Romanian Constitution explicitly sets forth three conditions, based on which this precedence is operative: (i) the community regulations must be mandatory-which does not include all secondary law; (ii) they must take precedence only over the opposite provisions of domestic legislation (not all domestic legislation, and only ‘opposite’ as opposed to simply ‘incompatible’ national law provisions); and (iii) “in compliance with the provisions of the accession act” (which act, however, says nothing of the matter). By comparison, Article I-6 provides for a general precedence, of all Community regulations, whether primary or secondary in nature, over the entire normative system of a member state, albeit only “in exercising competences conferred on the Union.”

It is clear that Romania vouched to apply the Treaty as soon as the latter would enter into force, outside any authentically democratic debate over this treaty. The premature ratification of the Constitution Treaty is not expressly provided in the accession treaty but can be derived by way of interpretation (which renders this ratification implicit). The final clause of the first section in Article 2 of the Romanian accession treaty expressly provides that, should the Treaty

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<sup>41</sup> See the commentary on Article 148 in M.Constantinescu, A.Iorgovan, I.Muraru, S.Tănăsescu, „Constituția României revizuită”, editura ALL Beck, 2004, București, p.328-35.

establishing a Constitution for Europe not become operative by the day of the accession, Romania will become a part to this treaty on the date when the latter enters into force.<sup>42</sup> It is true that ratification seems to be conditional, as it depends apparently on the entry into force of the Treaty establishing a Constitution for Europe prior to the actual date of the Romanian accession. On closer analysis, it can be observed, nonetheless, that this condition only regards the temporal succession of the two treaties, and not the binding legal effects of the 'European Constitution' in Romania. Ratification of the Constitution Treaty by Romania already took place once the accession treaty was ratified, yet the actual entry into force of these two treaties in Romania will take place in a decisional sequence that can no longer be controlled by the Romanian state.

In other words, the Treaty establishing a Constitution for Europe would have been inserted into the internal legal order of the country without having passed through the democratic filter of parliamentary debates, even though its compatibility with the provisions of the fundamental law would not have been analyzed and without any possibility or occasion for the Romanian public to become informed of all this.

The premature character of such ratification is all the more obvious as Romania agreed to adhere to a treaty with respect to which both future fate and final version are uncertain. Objective reality, validating Professor Joseph Weiler's prior '*Realpolitik* assessment' of the situation, has shown that the rejection of the Treaty in France and the Netherlands has rendered its entry into force (by the initially foreseen deadline) uncertain and, at any rate, has cast serious doubts on the present version of the document. Romania adhered to an international agreement which is as of yet not valid legally and uncertain normatively.

It is hard to specify what features of this treaty could justify this peculiar preferential juridical treatment in domestic law. It is, however, certain that the numerous doctrinal reservations expressed with respect to this document are reasonable caveats, whose legitimacy ensues precisely from this preferential treatment.

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<sup>42</sup> According to Article 1, Section 2, of the EU Accession Treaty, Romania and Bulgaria become parties to the Constitution and the EURATOM treaties, as amended. This provision needs to be read in conjunction with those of Article 2, according to which, should the Treaty not be in force by the accession date, Romania and Bulgaria become parties to the founding treaties of the Union, as amended; in this latter situation, Articles 1, Sections 2 to 4 would apply from the (subsequent) date of the entry into force of the Constitution Treaty.