Chapter 4

The Ratification of the European Constitutional Treaty in Italy

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1. RATIFICATION AS A MATTER OF SPEED IN ITALY

In comparison with the heated public debates which have taken place in some Member States, the process of ratification of the Treaty Establishing a Constitution for Europe (TCE) in Italy was quite smooth. In fact, no real public discussion was generated by the media, and even in Parliament the political debate on the TCE was of secondary importance, since the overwhelming majority of the political parties strongly supported the ratification of the TCE. Had the ratification been submitted to a popular vote, the majority in favour of the TCE would probably have been lower, although without doubt the ratification process would have had a positive result. The atmosphere in Italy was that of a general, albeit generic, support for the TCE.

The Government approached the ratification process as a matter of speed: there were no doubts that the TCE had to be ratified, with the main concern for the Government being to complete the process as rapidly as possible. After all, Italy was the host country for the signature of the Treaty in Rome on 29 October 2004, and consequently the Italian Government considered it its duty to ratify the TCE quickly, in order to initiate and encourage good practice that could be followed

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by other Member States. Unfortunately from the Italian point of view, the first Member State to ratify the TCE was Lithuania, who completed the process on 11 November 2004, with Italy missing the opportunity to become the lead country on this matter.

Sadly, not all the other Member States followed the 'good practice' shown by these two states – indeed the TCE was rejected by popular votes in France and the Netherlands. Although the Italian Government's approach to the ratification proved favourable on the European stage, in terms of spreading political goodwill towards the ratification, it has important consequences for the constitutional and legal framework of Italian membership of the European Union. In particular, in the rush to be the first, Italy missed the opportunity to revise and update the interpretation of the 'European clause' provided in Article 11 of the Italian Constitution.

2. ARTICLE 11 OF THE ITALIAN CONSTITUTION AND THE PROCEDURE FOR THE RATIFICATION OF EUROPEAN TREATIES

Whereas many Member States have introduced specific 'European clauses' in their national constitutions, in order to establish the conditions and procedures for participation within the European Communities and the European Union, the Italian Constitution does not contain a specific provision devoted to regulating Italian membership of the EU. The idea of mentioning the process and the project of European unification in an explicit provision of the national constitutional charter was considered during the work of the Constituent Assembly, but eventually the idea of a generic clause allowing limitation of sovereignty prevailed,[1] resulting in the insertion of Article 11 in the Constitution. According to this Article, Italy 'consents . . . to all limitations of sovereignty necessary for a legal order ensuring peace and justice among the nations; Italy promotes and fosters all international organizations devoted to such a purpose.'

This clause was not complemented by a specific European clause either at the time of the Maastricht Treaty, or during the subsequent revisions of the European treaties, such as those introduced by the Treaties of Amsterdam and Nice. Therefore, Italy belongs to the small group of Member States that still lack a specific constitutional regulation of the substantial and procedural conditions for membership of the European Union.[2]

As far as the substantial conditions are concerned, the case-law of the Italian Constitutional Court has provided some instructions through the doctrine of

1. See A. Cassese, 'Art. 11' in *Commentario della Costituzione*, A. Branca (ed.) (Bologna-Roma, Zanichelli, 1975), p. 565.
2. For an insightful overview of the different European clauses included in the national constitutions of the Member States, see M. Claes, 'Constitucionalizando Europa desde su fuente. Las clausolas europeas en las Constituciones nacionales: evolucion y tipologia' in *Constitucion Europea y constituciones nacionales*, M. Cartabia, B. De Witte and P. Perez Tremps (eds) (Valencia, Tirant lo Blanch, 2005), p. 123.

'counter-limits' (*controlimiti*), which was elaborated by the Constitutional Court in the leading cases on the relationship between the European and the national legal system, such as *Frontini*,[3] *Granital*,[4] and *Fragd*.[5] Following this doctrine, while European law prevails over all types of national norms, it cannot infringe the fundamental values protected by the Constitution, including the constitutional fundamental rights. The protection of the core of the Constitution, in particular its fundamental rights and values, which is implicit in the 'counter-limits' doctrine, is generally related to the defence of the last bulwark of national sovereignty. Whilst membership of the European Union requires some limits to national sovereignty, there should be some 'counter-limits', otherwise the *limitation* would turn into a complete *extinction* of national sovereignty.

As far as the procedural conditions are concerned, it has been debated since the ratification of the Founding Treaties in the 1950s whether the ordinary procedures for the ratification and reception of international treaties, whereby ordinary laws are passed by the Italian Parliament, were equally suitable for the European treaties, considering the specific nature of the European Communities. Two opposing views have been put forward. On the one hand, a part of the political and academic debate has suggested that for the ratification and implementation of European treaties, the ordinary law of Parliament should be replaced by a constitutional law, since such treaties affect the national Constitution. On the other hand, it has been argued that the ordinary law of Parliament suffices to authorize the ratification and implementation of the European treaties, given that Article 11 of the Constitution was to be interpreted as providing a general and overall authorization to limit national sovereignty, which is also valid for all developments of the European integration. At the political level, the latter view was supported by the Government and the majority of Parliament,[6] since approval of a constitutional law for the ratification of the treaties would have required either a two-thirds majority in Parliament, or an absolute majority coupled with a popular referendum. In either case, Italy's participation in European integration would have been jeopardized because, during the 1950s, some important left-wing parties, plus a few on the right wing, expressed strong opposition to the European project. The second view was also adopted by the Constitutional Court in *Costa v. Enel*,[7] where the Constitutional Court affirmed that where the conditions provided in Article 11 of the Constitution are met, Parliament is allowed to approve treaties entailing limitations of sovereignty and to implement them in the Italian legal order, by means of an ordinary law. The same position has been reiterated in the subsequent cases concerning European law.

3. *Frontini*, Decision No. 183 of 1973, [1974] CMLR 372.
4. *Granital*, Decision No. 170 of 8 June 1984, [1984] 21 CMLR 756.
5. *Fragd*, Decision No. 232 of 21 April 1989 [1989] 72 RDI.
6. On the political debates regarding the ratification of the Founding Treaties, see S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana* (Bologna, Il Mulino, 2004), p. 276.
7. *Costa v. Enel*, Decision No. 14 of 1964.

3. THE CONSULTATIVE REFERENDUM OF 1989 ON THE EUROPEAN CONSTITUTION AND THE NEED FOR A CONSTITUTIONAL PROCEDURE

The above discussion about the proper legal instrument for the ratification and the implementation of the European treaties has been subdued for many years. The majority interpretation of Article 11 of the Constitution spread steadily in the legal order, and for decades no doubts were expressed that successive steps furthering European integration could be implemented in Italy by means of a simple ordinary law. Even at the time of the ratification of the Maastricht Treaty, only a few voices[8] questioned the sufficiency of deploying the ordinary legislative procedure to legitimize ratification at the national level of a treaty that gives rise to such dramatic changes in European integration. Whereas all over Europe an important constitutional debate arose about Monetary Union and the European citizenship envisaged by the Maastricht Treaty, in Italy the constitutional impact of the new developments in the European system were underestimated.

However, the limitations of the ordinary procedure came to be noticed when the political institutions started to clearly use the language of constitutionalization of Europe. In fact, in 1989, the Italian Parliament decided to launch a popular advisory referendum in order to test the Italian people's preferences on the idea of approving a Constitution for Europe. During the European Parliament elections in 1989, voters were posed the following question: 'Are you in favour of the transformation of the European Communities into a European Union, ruled by a government responsible towards the parliament? To this end, are you in favour of giving the European Parliament a mandate to write a draft European Constitution to be ratified directly by the competent institutions of the Member States?'[9]

The Italian people showed that they were, by and large, favourable to the constitutionalization of the European Union – almost 88 per cent of the electorate gave an affirmative answer to the questions listed above. One can seriously doubt the real political and legal meaning of that constitutional experiment, since the question posed in the referendum did not refer to any specific constitutional project and, consequently, it was no more than a test of the generic feeling of the Italian people, rather than the expression of a clear political will. However, this precedent is worth mentioning because it reveals that when a constitutional development is at stake in the European Union, the Italian system considers it appropriate to submit the decision to the people.

From this perspective, the precedent of 1989 might suggest that the common interpretation of Article 11, allowing the ratification and implementation of the European treaties through an ordinary legislative procedure, does not necessarily

8. See M. Luciani, 'La costituzione italiana e gli ostacoli all'integrazione europea' (1992) *Politica del diritto*, 557.
9. The referendum was instituted by Constitutional Law No. 2 of 1989. For a critical review of that experience, see B. Caravita, 'Il referendum sui poteri del Parlamento europeo, riflessioni critiche' (1989) *Politica del diritto*, 319.

apply when the new steps in European integration have a major constitutional impact on the national legal order. That is why, all things considered, even in Italy the ratification of the TCE of 2004 could and should have been carried out by means of a constitutional procedure,[10] which demands qualified majorities in Parliament and, in certain cases, even a referendum. On the contrary, the TCE was promptly ratified in Italy in April 2005 by an ordinary parliamentary law (Law No. 577).

4. THE MAIN ISSUES IN THE PARLIAMENTARY DEBATE

As far as the parliamentary debate is concerned, the first key element to be highlighted is the strong agreement of most political parties on the TCE. Both the left-wing parties and the right-wing coalition were, on the whole, in favour of the prompt ratification and implementation of the Treaty. Only two parties expressed severe criticism on the Treaty. On the one hand, *Rifondazione Comunista* criticized the Treaty for the lack of adequate social guarantees for workers; on the other hand, the *Lega Nord* shared all the arguments of the *souvereinistes* against the TCE. The latter also criticized the procedural choices made by the Italian Parliament for the ratification, and advanced a proposal of a popular referendum in the wake of the French, British and Dutch examples.

The two parties against the TCE, however, were not able to convince the other parliamentarians, nor were they able to shift the votes against the proposal of ratification. Thus, eventually the Law on Ratification of the Treaty Establishing a Constitution for Europe was supported by an overwhelming majority in both Chambers,[11] by and large exceeding the simple majority necessary for approving an ordinary law. It would be interesting to note that the number of supporters of the TCE by and large exceeded even the threshold that would have been required if the Parliament had chosen the more appropriate constitutional procedure of Article 138. The ratification of the TCE by means of a constitutional law would not have met political obstacles in the Italian Parliament.

The Law was accompanied by two acts of political relevance. In two 'resolutions on the agenda',[12] the Italian Parliament expressed its serious concern about the hot issue of there being no reference to the Christian roots of Europe in the TCE; a similar concern was also expressed with regard to some articles of the Charter of Fundamental Rights, in particular as regards the provisions concerning the right to life and the right to marry. As to the Christian roots of Europe, the Italian Parliament called on the European institutions to revise the TCE, in order to introduce an explicit reference to Christianity. As to the right to life and the right to marry, the

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10. For a more detailed discussion of this issue, see M. Cartabia, 'Ispirata alla volontà dei cittadini e degli Stati d'Europa' (2005) *Quaderni costituzionali* 1, 9.
11. In the Chamber, 436 voted in favour and 28 against; in the Senate 217 voted in favour and 16 against.
12. Chamber, Resolution on the Agenda 9/5388/1 and 9/5388/3 of 25 January 2005; Senate Resolution on the Agenda 9/3269/1 of 6 April 2005.

Italian Parliament requested that the Charter of Fundamental Rights be interpreted in such a way as to respect the national traditions and in particular Italian traditions.

Indeed, both the question of the Christian roots and the questions concerning the right to life (such as abortion, euthanasia and assisted fecundation), as well as the right to marry (e.g. civil unions, same sex marriage), have been under the spotlight of public debate in Italy. That is why upon the entry into force of the TCE, the problem of whether those rights have been properly interpreted by courts entitled to apply the Charter of Fundamental Rights will resurface; the match will then be shifted from the political to the judicial arena.