

INSTITUT UNIVERSITARI D'ESTUDIS EUROPEUS

Jornades: "Els Impactes de la Constitució
Europea" 13-14 de gener 2005



Working Papers On Line (WPOL)
Núm. 08 / 2005

**Towards a Union of Citizens
and States: Negotiating
Transnational Democracy in
Europe**

Ulrike Liebert

Catedrática de Ciencia Política

Directora del Centre for European Studies (CEus)

Universidad de Bremen (Alemania)

Universitat Autònoma de Barcelona
Edifici E-1
08193 Bellaterra
Barcelona (Espanya)

1. Introduction

When referring to constitution-making, scholars and the media have compared the European Union (EU) at the beginning 21st century to the early modern United States, and have pointed to analogies between the Convention in Brussels and the Convention of Philadelphia.¹ Such historical parallels are suggestive but overlook decisive differences between the tasks of the “Convention on the Future of Europe” that submitted the “*Draft Treaty establishing a Constitution for Europe*” to the European Council in Thessalonica on June 20th, 2003, and those of Madison, Franklin and the other convention members who drafted the constitution of the American Federation in summer 1787. The European experience differs from that of the U.S. notably, not only because of its much larger scale, the greater cultural and linguistic diversity of its 25 member states and 450 million inhabitants, or the unlikelihood of a bloody civil war for imposing federal unity. More importantly, in trying to mould the “contradictory sovereignties of the parts... into a whole”, the challenge of democratic legitimacy plays a pivotal role in Europe.² The U.S. constituent act originated in a pre-democratic century and was therefore flawed by numerous democratic shortcomings.³ The EU Convention, by contrast, was explicitly mandated by the heads of states and governments to improve the efficiency and legitimacy of European decision-making by resolving the democratic deficit in the enlarged Union. Looking back on the 15 months of constitutional debates, the chairman of the Convention, Valerie Giscard d’Estaing, found hardly any other topic on which the positions diverged as much as in relation to democratic legitimacy.⁴ Vice chairman Giuliano Amato framed the task of building a consensus on this issue in a historical perspective: While the 19th and 20th centuries had witnessed the birth of democracy in Europe and its expansion among nation states, he saw the challenge of the 21st century in not only thinking a European transnational democracy, but in constructing it.⁵ Did the Treaty on a Constitution for Europe that was ultimately signed by the heads of state and government in Rome on October 29, 2004, signal that the framers of the European Constitution had successfully coped with this challenge of democracy beyond the nation state?

¹ See Siedentop 2001; Olsen 2002; Mény 2002a; New York Times 14.6.2003, S.1.

² In accordance with the Laeken mandate of December 2002, Yves Mény, at the eve of the Convention, pleaded in “Le Monde”, that the European constitutional project had to cope with the challenge of democratic legitimacy; see Mény: *Constituer l’Europe*; Le Monde, 27.2. 2002, S. 1.

³ In his critical account of the U.S. constitution, Dahl demonstrates that due to historical circumstances, it came to incorporate significant anti-democratic elements, including slavery, exclusions from suffrage; the presidential electoral college system, the unequal representation in the Senate, judicial power; the limited Congressional power; see Dahl 2001: 15-20.

⁴ Valerie Giscard d’Estaing, May 23.-24. 2002.

⁵ Giuliano Amato, final session of the Convention (CONV 853/03, S.6).

Democratic theorists who believe democracy ought to be limited to the national realm, tend to doubt the feasibility of democratic procedures in international institutions and, hence, the possibility of a European democracy.⁶ In their view, the EU lacks the socio-cultural prerequisites for a “government by the people” that are presumed to exist within the national context: a common language, a shared history, culture and identity, a public sphere and a homogenous people or demos.⁷ Some authors even defend the EU’s lack of genuine democratic legitimacy as being practically inevitable and, in addition, normatively desirable.⁸ If democracy beyond the nation state is not thinkable let alone feasible, then the project of a European constitution risks failure as well. Why should citizens when called to ratify the European constitution by referendum in ten member states choose to do so if this would deprive them of the democratic powers by which they are used to influencing decision-making? Moreover, from the perspective of national parliamentary representatives to whom citizens delegate the authority of ratifying the EU Constitutional Treaty in all 25 member states: Why should national party groups yield political competences to European authorities if those authorities escape democratic control?

A growing number of scholars answer the question of whether democracy is feasible across national boundaries and in international organisations positively.⁹ Some authors have argued that the EU was not only in need of a constitution but also capable of building a democratic one.¹⁰ Furthermore, the relevance of this debate about democratic legitimacy in the EU is seen as by no means restricted to the needs of ratification of its constitutional document. Beyond the confines of Europe, too, the EU constitutional experience appears to be of interest in view of expanding the theory and practice of post-national democracy in a regionalising and globalising world. The negotiation of the European Constitutional Treaty can be considered a first historical and political experiment to gain insights into conditions and impediments of post-national democracy at the regional and the global scale.¹¹

⁶ Dahl 1999.

⁷ Von Kielmannsegg 1996.

⁸ Compare Moravcsik 2002; Weiler 2000.

⁹ See Curtin 1997; Abromeit 1998; Jachtenfuchs/Diez/Jung 1998; Beetham/Lord 1998, Schmitter 2000; Mény 2003; Telo 1995; Siedentop 2001; Peters 2004a.

¹⁰ Among the principled advocates of a European constitution are Habermas 2001:7; Peters 2001; Mény 2003; Giegerich 2005; Closa/Fossum 2004a.

¹¹ See Liebert et al. 2003.

This paper takes a closer look at how issues of democratic legitimacy were negotiated during the first two of three stages of constitution-making, in the Convention on the Future of Europe (February 2002 – July 2003), and by the subsequent Intergovernmental Conference (July 2003 – June 2004). The aim of this analysis is to assess the extent to which the framers of the European Constitution have resolved the contentious issues of post-national democracy that were debated in the Convention.

The first section identifies three contentious areas in the constitutional debate which are crucial in this respect, namely the debate concerning input- vs. output based standards of legitimacy; the competing views regarding national vs. supranational sources of democratic legitimacy; and the issue of whether decision-making procedures should continue to privilege consensus or reinforce majority rule. The second part reviews how Convention members and national executives in the IGC, despite the diversity of their institutional ideas, interests and legacies have negotiated and consensually framed the chapter on “democratic life in the European Union”. The third part draws on models of transnational democracy to assess strengths and weaknesses of this construction from the perspective of citizenship participation.

My aim is to demonstrate that although the present constitutional framework of a hybrid, multilayered, semi-parliamentary system offers, in fact, a variety of possibilities for citizens’ participation and representation in EU-politics, many of them are not very effective yet. As a pre-requisite for turning formal citizenship rights and opportunities into practice and, thus, for constituting a citizenry committed to support democratic principles and procedures beyond the nation-state, the process of constitutionalisation once would need to deliberately promote a transnational public sphere.

2. Democratic legitimacy in the EU: contentious standards

To be acknowledged as legitimate, any political authority in any society must be measured against four criteria: its formal legality; its normative justifiability according to its sources; its instrumental justifiability according to its ends and the objectives it pursues; and the modes of its legitimation (see Table 1)¹².

¹² Compare Beetham and Lord 1998: 1ff.

Table 1: Legitimacy Standards of Political Authority

<i>Dimension</i>	<i>Standards</i>
Legality	authority is exercised according to established legal rules and formal procedures
normative justifiability	authority is grounded on societal beliefs about the appropriate sources of authority (input legitimacy), i.e. <ul style="list-style-type: none"> - popular sovereignty - citizens' representation - citizens' participation
instrumental justifiability	authority aims at publicly valued objectives and fulfils performance criteria (output legitimacy), i.e. related to: <ul style="list-style-type: none"> - fundamental rights - social justice - economic prosperity
legitimation	authority achieves explicit consent by the governed and other legitimate authorities, i.e. via: <ul style="list-style-type: none"> - electoral authorisation - recognition by other legitimate authorities - deliberative persuasion

During the three waves of democratisation in the 20th century, democratic principles and procedures have become universally accepted norms for justifying political authority.¹³ Democratically legitimate government in these terms is encapsulated by the formula “government of, by and for the people”, “with the people” (meaning the consultation and participation of the stakeholders), and, in the perspective of deliberative democratic theory, “government by discussion”.¹⁴

In European constitutional debate, the appropriateness of each of these standards of legitimacy as applied to the EU has been a matter of contestation. The meanings of

¹³ See Huntington 1991.

¹⁴ Vivien Schmidt 2003

democratic norms vary, depending on the theoretical premises chosen, be they liberal, republican, participatory or deliberative standards.¹⁵

Legitimacy issues were at stake in three areas of the European constitutional debate: (1) regarding the question of input- vs. output-legitimacy, (2) relating to national vs. supranational sources of democratic legitimacy and (3) regarding the issue of majority principles vs. consensus procedures.

2.1 Input- vs. output-based legitimacy theories of EU authority

The legitimacy of the EU has been predominantly attributed to its output related performance. Hence, its problem solving capacity is centre stage, at least as long as and to the extent to which these problems are perceived to be most meaningfully tackled at the supranational level. This approach portrays the EU as a largely non-political, technocratic undertaking of national and supranational executives, with only a minor role for citizens and publics. As Fritz Scharpf has pointed out, the EU's problem-solving and decision-making capacity may be a limited source of legitimacy.¹⁶ In fact, already starting with the Maastricht Treaty reform, this strategy provoked criticisms of the European democratic deficit; it mobilised disaffected constituencies, witnessed the decline of twenty years of "permissive consensus" of the public; European political elites saw the rise of eurosceptic attitudes; and they were faced with demands for enhancing input-legitimacy on the EU agenda.¹⁷ Hooghe und Marks have summarised these findings by stating a paradigm change: "European integration has become a high-profile issue in domestic politics capable of rocking governments, jeopardizing party cohesion, and spurring new party-political movements...Something new has been added to the struggle between ideological projects concerning the European political economy: a context for endorsement by the public."¹⁸

Nevertheless, a decisive turn to democratise European governance by incorporating input-based sources of legitimacy did not happen, while the discourse about the "dilemma of democracy" (von Kielmannsegg) gained major currency in EU research. Here, it is pointed

¹⁵ For these three alternative models of democracy for the EU see: Beetham/Lord 1998; Bellamy/Castiglione 1999; Closa/Fossum 2004.

¹⁶ Scharpf 1999:2.

¹⁷ Liebert 1999.

¹⁸ Hooghe./Marks 1999:96f; compare also: Imig/Tarrow 1999.

out that European decision-making increasingly affects member societies while opportunities for citizen participation in decision-making shrink, and state controls of non-state decision-makers continue to diminish. Yet, prospects for European democratic self-governance – and, hence, the strengthening of input legitimacy – are viewed to be hardly sustainable as long as a European identity remained feeble and cross-border solidarities among constituents were scarce.¹⁹

If there is any escape from the democracy-dilemma into which the EU is presumably locked, post-national democratic constitutionalisation arguably is a key to it. First of all, if there is not a homogeneous “European people” to assume the constituent power in European constitutionalisation, Anne Peters has suggested at least three alternative constituent subjects: the European peoples as the associated citizenries of the member states; member state governments; or a “*pouvoir constituant mixte*” composed by peoples or citizens as well as member states.²⁰ Second, for countering the no-demos thesis and the claim of a democracy dilemma characteristic of the EU further, Jürgen Habermas has proposed to re-imagine post-national constitution-building as a chance that “different anticipations stimulate and reinforce each other mutually in a circular process”; hence, the development of European political parties, of a European civil society and a European political public sphere need not necessarily precede constitution-making, but might rather emerge through “synergistic interaction” with it.²¹ Following these suggestions, the European constitutional project can be explored as a social process, as a mode and means of framing European identity and transnational solidarity that has implications for the construction of a constituency.

Reviewing constitutionalisation, thus, as a de- or reconstruction of the alleged democracy-dilemma, the question of legitimacy in relation to constituency inputs becomes centre stage: What are the appropriate sources of political authority that shall be privileged for justifying ordinary EU decision-making? In the scholarly debate, propositions for democratising European governance are a matter of dispute. Some advocate the principle of supranational parliamentary government.²² Others favour direct forms of participatory governance for the

¹⁹ See Offe 2003:269.

²⁰ Peters 2001.

²¹ Habermas 1998:154f.

²² The European Parliament is not necessarily seen as the central site of input legitimacy in European governance deriving from the electoral act, rather it is pivotal due to its consensual procedures and diffusion of power; compare Lord 2002:225.

EU.²³ A third position proposes a framework of “deliberative supranationalism”, based on the non-political expertocracy.²⁴ Finally, proponents of deliberative democracy have stressed the potential of deliberative persuasion for transnational democracy.²⁵

(1) Regarding the viability of supranational parliamentary government in Europe, the right to vote in European parliamentary elections is considered to be the best developed, most visible and relatively most effective of all rights that citizens of the Union enjoy. Regular elections guarantee a level of voter mobilization that exceeds other forms of participation, with the exception of some member states where EU referenda are held.²⁶ However, over the past 25 years, participation rates in the European parliamentary elections sank.²⁷ Critics of an EP-based strategy of input-legitimacy refer to national parliamentary experiences in Europe to point out that as long as at the European level both a party system and a European identity are absent, parliamentary competences should not be expanded further. Hence, the idea of a purely supranational parliamentarianism as the exclusive source of democratic-representative legitimacy would, under the present circumstances given in the EU, not appear viable.

(2) Direct democratic instruments apparently experiences increasing popularity.²⁸ In EU practice, direct forms of participation of private corporations, non-governmental organisations, think tanks, protest movements, and sub state entities have increased their leverage in a growing range of policies, in the domain of community policies as well as in foreign and security policy and in justice and home affairs.

(3) “Deliberative supranationalism” is offered as a third alternative to supranational parliamentary government on the one hand, and participatory democracy, on the other. Its core idea consists in thinking political legitimacy in the European multi-level polity as the product of two different sources of legitimacy: While the nation state remains key responsible and obliged to bear the share of democratic governance, the task of the supra-national level, in the first instance, is to contribute expert and deliberation based legitimacy resources.²⁹

²³ Compare « Rapport sur la Gouvernance Européenne 2003-2004 », SEC (2004) 1153, Brussels, 22. September 2004; Smismans 2004.

²⁴ See Neyer 2004:48-56.

²⁵ Dryzek 2002; Erikson/Fossum 2002; Peters 2001, Curtin 1997.

²⁶ Compare Hix/Tapio/Scully 2003.

²⁷ The participation in EP-elections reached in 2004 a historical low with 46%; compare Blondel/Sinnott/Svensson 1998; Mattila 2003.

²⁸ Compare Abromeit 1998.

(4) The conception of “deliberative” or “discursive democratisation” builds, on the one hand, on the idea that the multiple discourses of civil society are sources of order that may be democratised, including “contentious communications from the margins”; and, on the other, identifies the space for “contestation across discourses in the public sphere as a key component of democracy”.³⁰ Deliberative democracy is designed as a critical alternative to the liberal strategy of transnational democratisation since the latter is found “insensitive to the relative weight of the forces that order international politics”, with government being “extraordinarily weak in the global polity, which means that alternative discursive sources of order are especially important therein”, as Dryzek writes.³¹

2.2 National vs. supranational sources of democratic legitimacy

A second area of contention in the constitutional debate regards the question as to how national and supranational sources of legitimacy relate to each other: Is a democratically legitimate European polity necessarily detrimental to democratic legitimacy of the national polity? The treaty reforms of the nineties successively reinforced the European Parliament.³² This was perceived, however, to compete with national parliaments in a zero-sum game, where a gain in power of the European Parliament would result automatically in losses for national parliaments and vice-versa. This view feeds into the idea that European integration and the principle of national democracy necessarily clash. According to Per Cramer, integration is conducive to the dismantling of territorial boundaries, while a functioning democracy requires limited geographical units – otherwise the political vote of the individual citizen would become meaningless.³³ As an advocate of democratic intergovernmentalism, he holds that national political processes and, hence, member states remain the central sites of democratic legitimacy. Consequently, institutional reforms of the Union are expected to be balanced, to constitutionally respect member states, to strengthen the principle of constitutional sovereignty, and to emphasize mutual constitutional trust. Needless to say, treaty ratification processes should be more than ex-post rituals for confirming the results of non-transparent executive negotiations.³⁴

²⁹ Compare Neyer 2005.

³⁰ Dryzek 2002: VI.

³¹ Id.: 19.

³² Compare Rittberger 2003.

³³ Cramer 2003:24.

³⁴ Per Cramer 2003: 23-4.

During the Convention debate democratic intergovernmentalism did not gain much leverage.³⁵ In a minority report, the strengthening of national parliaments is called for within an institutional architecture where European parliamentarianism complements national parliamentary governments. The model of a “Europe of (nation state) democracies” is offered to younger member state democracies which still struggle for their consolidation:

“Observing the growing gap between the EU institutions and the people of Europe and the loss of popular support for the EU as proved by several referenda and European Parliament elections..... Concerned that the Convention on the Future of Europe is not adequately addressing the ”democratic challenge facing Europe”, as described in the Laeken Declaration...We propose to transform the EU into a Europe of Democracies (ED), which shall be a treaty association of free and self-governing European states and an open economic area....The EU shall not have a constitution but should be organised on an interparliamentary basis by means of a Treaty on European Cooperation. ... National parliaments elect the Commission – its own member of the commission, commissioner shall attend the European Scrutiny Committees of the national parliament concerned, power to dismiss their commissioner..... President of the Commission elected by the national parliaments.... decide on the annual legislative programme ... Commission shall act as a secretariat for the Council and the national parliaments. No legislation by the Court....legal activism shall be curbed. ... ED shall not have its own army. Peacekeeping and peacemaking should be mandated by the UN and the OSCE. MS shall decide themselves whether to opt for a common defence through NATO, independent defence, or follow a neutrality policy (CONV 773/03, CONTRIB 347, 30.5.2003).

In the Convention debate on the question of democracy, the supranational “project for the European Union” took the opposite stance.³⁶ This is premised on the view that the EU’s finality is that of a union of states and peoples who integrate in a “*sui generis*” form. To advance along this line, the EU has reached the limits of its operation in those areas where intergovernmental cooperation has become a source of impotence, and political leadership by

³⁵ “*Europe of Democracies*”: A group of 9 convention members – representatives of the UK, Slovakia, the Czech Republic, Ireland, Denmark and the EP supported this position in the Convention debates; see minority report “The Europe of Democracies”, signed by David Heathcoat-Amory, Irene Belohorska, Jan Zahradil, Jens-Peter Bonde, Peter Skaarup, Esko Seppanen, John Gormley, Per Dalggaard und William Abitbol.

single member states the origin of tensions and blockages. Therefore, the new institutional architecture of the EU mandated new forms of civil society and direct citizen participation in European governance (id).

The most far reaching utopian vision pleaded for a value based, republican “Unity of Europe”.³⁷ Accordingly, the EU was called to constitute itself as a “European basic right community” and a “European democracy” with a “republican institutional and procedural order”, a European public sphere, civil society, and “direct democratic instruments”. This was to be constructed as a “space for social security, justice and solidarity”, and a “space for welfare, sustainable development, with a European peace order”. Yet, this did neither require a full-fledged European federal state, nor a final institutional form. However, while direct democratic procedures as well as the European Parliament played an important role in this European democratic order, national parliaments were apparently seen as a superfluous species - they were not even mentioned.³⁸

2.3 Majority vs. consensus democracy

Finally, qualified majority in Council decision-making turned out to be the most divisive issue that drove intergovernmental constitutional negotiations at the Brussels summit in December 2003 into crisis and nearly break-down. Following the British Westminster model, the majority of convention members had identified democracy as a system that concentrates power in the hands of the majority. In their view, majority rule was a specific resource of legitimacy which renders democratic systems capable of reconciling decision-making effectiveness with the majority support.

Theoretically, this position is criticized for not taking into account the minorities who will be prevented from obstructing the will of the majority only if both share a consciousness of a common political destiny. Empirically, comparative democracy research has

³⁶With its communication “A project for the European Union” (CONV 448/02) the European Commission challenged the EU Convention to deepen the project of a European supranational democracy as a precondition for strengthening the EU for its domestic and foreign policy tasks.

³⁷See the proposal tabled by Johannes Voggenhuber, Austrian EP member in the Convention (CONV 499/03; CONTRIB 2002).

³⁸Cf. the contribution by Duhamel, van Lancker, Berès, Berger, Carnero Gonzales, Pacotti u.a. “Das Europa, das wir brauchen – Mindestanforderungen an einen neuen Föderalismus” (CONTRIB 368, CONV

demonstrated that majority democracy is neither the general rule nor does it necessarily outperform alternative forms of consociational democracy. Even countries which come close to the ideal type of majority democracy, such as the United Kingdom, have introduced minority protections, for instance regional devolution. In the practice of modern western democracy, the patterns of concentrating vs. dividing political power vary largely. More importantly, majority democracy is less likely in societies with complex lines of political conflict where consociational forms of consensus building appear more adequate.³⁹

Those opponents of majority decision-making in the EU, who advocated a Europe of national democracies, insisted that all decisions by the EU/EC were to be legitimised by all people in all member states; thus pleading for unanimity as the key decision-making rule in the Council of Ministers. Otherwise, they argued, it was hardly possible to legitimise EU/EC-decisions for the population of a member state that was defeated by majority vote.⁴⁰ Taking issue with this view, those in favour of majority voting in the Union argued that the maintenance of the national veto would render the European Union incapable of effective and democratically legitimate decision-making. Was it democratically legitimate to give the smallest member state the right to block the decision-making of the European Union that meanwhile comprised the majority of the continent? If the European polity was constructed as a majority system it could be prevented from decision-making deadlock and, at the same time, safe-guard its democratic input-legitimacy.⁴¹ Some members made a case for reconciling majority voting procedures in the Council and legitimacy principles based on parliamentary procedures: The loss of influence that national parliaments suffered as a consequence of the expansion of majority votes in the Council should be compensated by strengthening the European Parliament.⁴² In parliamentary debates, the pro and contra of legislative proposals could be publicly discussed, thus making Community decision-making transparent and democratically legitimate.⁴³

813/03, 16. Juni 2003); the common contribution by the French socialist and the German social democratic delegations in the European Parliament "Core elements of a European constitution" (10.12.2002).

³⁹Vgl. Lijphart 1999.

⁴⁰This tendency can be identified in the 1994 decision of the German Constitutional Court on the Maastricht Treaty; see Giegerich, in this volume.

⁴¹See König 1997; compare critical discussions of the issue of majority rule in Pollak and Cichocki, in this volume.

⁴²This position was articulated by Jürgen Meyer, representative of the German Bundestag in the Convention; communication in a public lecture, Bremen, September 18th, 2003.

⁴³Giegerich, in this volume.

3. Negotiating democratic legitimacy in the Constitutional Treaty

In the debate preceding the Convention, the heads of state and governments had made obvious that they were divided on which finality for the EU to advocate - democratic intergovernmentalism or a federalist conception.⁴⁴ The Convention debate on the future of Europe offered an arena for articulating these different visions of democracy in Europe more broadly and more intensely than in any other case of EU treaty reform before. The question whether and why Europe needed a constitution was no longer in the centre of this debate. Instead, the Convention became a laboratory of a new European democratic politics, with struggles about diverse ideas of national vs. supranational, majority vs. consensus, representative vs. participatory vs. deliberative democratic legitimacy. In their deliberations, advocates of a “Europe of the democracies” found themselves clashing as well as engaging with protagonists of a supranational, of a participatory or a representative democracy. How did the members of the Constitutional Convention and the Intergovernmental Conference then resolve the question that Philippe Schmitter has succinctly put: “How to democratize the European Union (...). And why bother?”⁴⁵

To answer this question, one must first stress the importance of the procedures of deliberation and consensus-building. Thus, by taking the construction of the EU’s constitutional arrangements, at least partly, out of the hands of the member state executives as well as of the European Court of Justice, the Convention set an example for how to democratise transnational constitutionalisation. Bearing in mind the strongly diverging positions on the principles of democratic legitimacy that were considered appropriate for the EU, it came as a surprise that the Convention presidency, at one of its last plenary sessions, reported to have reached a “broad consensus”. After sixteen months of deliberations, Valéry Giscard d’Estaing presented a unified Constitutional Treaty draft to the European Council at its Thessalonica meeting.⁴⁶ He praised the draft as a “result of the common attempts to reach a balance

⁴⁴ Dabei machte der britische Premierminister deutlich, dass die Quellen demokratischer Legitimation bei den Mitgliedstaaten lägen; der deutsche Außenminister plädierte dafür, die funktionale Gemeinschaftsmethode im Rahmen eines europäischen Bundesstaates zu demokratisieren; Frankreichs ehemaliger Premier Jospin lehnte dies ab, während sich der französische Staatspräsident für eine Demokratisierung der Union durch Parlamentarisierung - sowohl durch Stärkung der nationalen als auch des europäischen Parlamentes - aussprach. Vgl. Kapitel 2 von Carsten Schabacher, “Die Reformdebatte der Staats- und Regierungschefs in der Sackgasse”, in diesem Band.

⁴⁵ Schmitter 2000.

⁴⁶ (CONV 797/1/03). This text that was presented to the Council Summit in Thessalonica included part I, II and IV of the “Draft Treaty on a Constitution for Europe” (CONV/03) – the “first draft of a European Constitution”, on which the concluding plenary session of the Convention on July 10th, 2003 in Brussels reached an “extensive consensus” (Giscard d’Estaing; CONV 853/03: 7).

between different expectations and sensibilities of the convention members”.⁴⁷ In fact, out of 105 members, two thirds of them parliamentary, one third with government affiliation, only five chose to support the minority report with intergovernmental inspiration (CONV 814/03, S.4).⁴⁸ Hence, the Convention draft can be safely said to safeguard “the balance between member states and the European institutions”.⁴⁹ This remarkable success notwithstanding, the subsequent IGC left only about three quarters of the draft text intact, and it changed provisions in more than 80 areas, as many as 39 at the request of the British government.⁵⁰

A second finding is that the framing of the Treaty on a Constitution for Europe⁵¹ is a far cry from the position held by some academics that the lack of democratic legitimacy of the European Union was nonexistent or needed to be defended.⁵² Instead, it clearly seeks to respond to the mandate established by the European Council in Laeken entitled “More democracy, transparency and efficiency in the European Union”.⁵³ The Convention members shared a broad consensus that the legitimacy of the Union derived from its democratic values, objectives, competencies and instruments, as well as from democratic, transparent and efficient organs to which member state parliaments were expected to make a contribution. It was therefore plausible to most that the European Union had to better take the expectations of the citizens into account, and that it had to better grant more rights for participation, control and accountability in European decision-making to civil society and, in

⁴⁷ (CONV 814/03, S.1).

⁴⁸ 93 of the 105 Convention members had signed the concluding document by July 23, 2003, thus confirming the success of the method of consensus-building.

⁴⁹ The Convention draft Treaty did not contain revolutionary changes but only modification for strengthening the “rule of law” principle, clarified the relationship between the powers, improved rights and opportunities for participation, among them the incorporation of the Charter of Fundamental Rights; making the Union more transparent – by rendering the legislative function of the Council public – and increasing accountability, by the election of the Commission president, expanded qualified majority, made national parliaments the guardians of subsidiarity, established the Citizens’ initiative and the exit option for member states.

⁵⁰ Compare Falke, Synopsis, in this volume. British Foreign Minister Jack Straw, in his intervention in the House of Commons observed with satisfaction that the IGC had introduced changes in 80 areas of the Convention draft, with 39 of which originating in British initiatives. See House of Commons, “White Paper on the Treaty for a European Constitution”, September 9th, 2004
[http://www.fco.gov.uk/Files/kfile/White%20Paper Treaty%20establishing%20a%20Constitution%20for%20Europe.pdf](http://www.fco.gov.uk/Files/kfile/White%20Paper%20Treaty%20establishing%20a%20Constitution%20for%20Europe.pdf) (Date: 30.11.2004)

⁵¹ “Treaty on a Constitution for Europe”, 29. October 2004 (CIG 87/04; ADD1)

⁵² Compare Moravcsik 2002:605

⁵³ The Laeken Declaration includes three questions related to the issue of democratic legitimacy posed to the members of the Convention: First, how to strengthen the democratic legitimacy and transparency of the three EU organs in the framework of a “clear, effective, democratically controlled community approach”; second: the role of member state parliaments in strengthening the democratic legitimacy in the EU and the question which initiatives could be taken to develop a European public sphere; finally, third, the “democratic challenge” of how “the citizens, specifically the young, could be brought closer to the European institutions”; Laeken Declaration on the Future of the European Union, December 15th, 2001, S. 21.

particular, to young people.⁵⁴ Furthermore, Convention members considered a necessity to improve the strong link between legitimacy and efficiency”.⁵⁵ In view of the overdeveloped constitutional powers of governments and the “relatively meagre” democratic self governance in the EU⁵⁶ the title “The democratic life in the Union” obviously seeks to redress this imbalance.

As a result, the 2004 Constitutional Treaty provides a comprehensive, but hybrid framework for enhancing the legitimacy of the EU. This includes the clarification and rationalisation of the legal structure and procedures and the strengthening of its input-legitimacy as well as of its decision-making efficiency and effectiveness. It seeks to bring citizens into the former Union of states, offering them opportunities for participation and representation in a multi-layered, semi-parliamentary system that aims at balancing the expansion of the majority with the protection of consensus procedures. This construction rests on three pillars:

- (1) Replacement of the intergovernmental European Union by a “Union of citizens and states”;
- (2) Opportunities for participation and representation in a multi-layered semi-parliamentary polity;
- (3) Reconciliation of majority-rule and consensus procedures.

3.1 From an Intergovernmental Union to a Union of Citizens and States

A first contentious issue in the debate over a legitimate European polity grew out of the asymmetry between its output and input based sources of democratic legitimacy. To enhance the democratic legitimacy generated at its input side, the present legal order of the EU offers basically two options: The European Council can be strengthened, since it incorporates the indirect legitimacy derives from the governments that are democratically elected in member states; or the European Parliament can be reinforced, as it carries the authority delegated to it by the citizens through the act of voting. If the member states aim at working together in a framework of European governance that deeply intervenes in their internal social fabrics and risks provoking resistances and counter movements, then they obviously need to become more responsive to their citizens and publics:

⁵⁴ CONV 14/02, S. 5

⁵⁵ CONV 60/02, S. 6

⁵⁶ Mény 2002 :11.

“Europe does not listen sufficiently to its citizens. Citizens do not feel capable of holding those accountable who are in positions of power and decide for Europe. The fact that the EP is elected on the basis of universal suffrage, that the Ministers around the council table represent their governments, and that the members of the European Commission are nominated by their governments and are accountable to the European Parliament, cannot redress the impression, that Europe is insufficiently democratic.” (CONV 14/02, p.2).

Democratic input legitimacy, therefore, needs to be conceived as a matter of responding to citizens’ expectations and depending on the participation and control rights that civil society and young people enjoy in European decision-making processes (id., p.5).

A formula for responding to such demands was found in the replacement of the “Union of States” by a “Union of Citizens and States”. This dual construction acknowledges that the intervention of the Community/Union of states in the internal affairs of the member societies demands a union of citizens, with strengthened rights and opportunities for participation and representation. The attempt to reconcile both is not without tensions, as Joscha Schmierer – a staff member of the German Foreign Minister, Joschka Fischer, has stressed:

“The legitimation and lines of decisions of the Union of States and Union of Citizens must be so mutually limited that neither the decision making ability nor the legitimacy of the EU shall suffer from the unavoidable dual structure.”⁵⁷

To redress an overemphasis upon the role of the states in previous treaties, the Constitutional Treaty strengthens the legal rights at hand of the much weaker Union of citizens. As a guiding principle, Art. I-1 VVE on the “Founding of the Union” names the “will of the citizens and states of Europe to commonly constitute their future.” Their union places “the person at the centrepiece of its action, in that it establishes the Union citizenship and founds a space of freedom, security and law.” All Union citizens obtain the right to participate in the democratic life of the Union, which combines principles of representative democracy with elements of a participatory democracy. More specifically, the union of citizens is based on the following provisions regarding

⁵⁷Schmierer in this volume.

- Union citizenship which complements state citizenship for all nationals of member states without replacing it (Art. I-10 Abs. 1 VVE);
- Basic rights of Union citizenship which includes specific rights and duties, among them active and passive electoral right in local and European parliamentary elections in member states (Art. II-99, Art. II-100 VVE), the right of complaint at the European ombudsman (Art. II-103 VVE); the right to petition (Art. II-104 VVE), rights of free movement and residence in all member states;
- The prohibition of discrimination for reasons of nationality (part 2, title II);
- Equality as a European value, in particular equality of women and men, (Art. I-2 VVE); the Union commits itself to respect in all its activities the principle of equality of citizens” (VI/I-45).
- The European Parliament as a representative of Union citizens (Art. I-20 Abs. 2 VVE);
- The newly established popular legislative initiative for which a minimum of one million citizens is required (Art. I-47 Abs. 4 VVE) ⁵⁸;
- The right of access to all documents of the Union (Art. I-50 Abs. 3 VVE);
- Union wide political parties that contribute to forming and articulating the will of Union citizens;
- The freedom of citizens to work in and move across all states (Art. II-75 Abs. 2-3 VVE);
- Transeuropean networks of telecommunication necessary to use the internal space (Art. III-246 VVE).

The constitution reflects “the will of the citizens and states of Europe to build a common future”. It thus establishes the EU as a political system of governance on which the member states confer competences to attain objectives they have in common. By symbolically acknowledging the centrality of citizens as constituents of the Union, the constitution also progresses in clearing up the issue of who is the constitutive subject of the Union. First of all, the normative anchor of the European constitutional order cannot be citizenship of the Union because this is derived from member state citizenship and established through the creation of the Union itself. Secondly, it can neither be

⁵⁸ According to the newly enacted regulation on "citizens' initiatives" (art. I-47 para. 4 VVE), a request of at least one million citizens from a substantial number of member states can compel the Commission to submit suitable suggestions on topics which, in the opinion of citizens, require legal action of the Union to implement the constitution. The requirements of such a special procedure as well as the conditions of citizen initiatives shall be concretised in a European law.

exclusively nor primarily the member states because the Union is expressly founded on “the will of the citizens and states of Europe to build a common future”. Thirdly, the constitutional text does not bind the fate of the union on the citizens and states who lack the will to constitute a common future. Instead, it identifies the citizens and states of Europe who desire to integrate as the constitutive subject of the union. In that the constitution thus answers the question as to who is considered the subject of a democratically legitimate union, it resolves the controversial “treaty or constitution” as a false alternative: Citizens and states are equally constitutive of this Union, complementing and completing one another.⁵⁹ The formula coined by the preamble that the European Union is founded not only on states but also on citizens can be seen as having high symbolic value. As John Erik Fossum writes, it might turn into one of the anchors of a “constitutional patriotism” that is compatible with the “deep diversity” characteristic of the European Union.⁶⁰

3.2 Representation and participation in a hybrid, multilayered semi-parliamentary polity

A second theme in the constitutional debates concerning an appropriate strategy for reinforcing the input-based legitimacy of European governance poses the question as to how much weight representative, in contrast to participatory, procedures and standards should have. The consensus found by the Convention and the agreement negotiated by the intergovernmental conference confirm as their lowest common denominator little more than the constitutionalisation of already established formal norms as well as informal practices regarding both representative and participatory principles and procedures.

Regarding the first, in no less than six plenary debates, the Convention discussed how to integrate better national parliaments into the activity of the Union without bringing them unduly into competition with the European Parliament:⁶¹ Convention members were divided, however, as to whether primarily national parliaments or the EP needed to be empowered in order to promote the Union’s effectiveness and legitimacy (id., p.7).⁶² There was general agreement on the ideas that national parliaments needed support in their “crucial role in safeguarding democratic legitimacy in Union activities” (CONV 97/02, p. 8), and that the

⁵⁹ Compare Fossum 2004:389-406.

⁶⁰ Compare id.

⁶¹ See plenary meetings of 6./7.6.2002; 28.10.2002; 27./28.2.2003; 17./18.3.2003; 5./6.6.2003; 11./13.6.2003.

widening of their participation would not only benefit the democratic legitimacy of the Union, but would also bring the Union closer to its citizens. Working group IV “Role of member state parliaments” emphasized in its final report the multilayered conception of European governance, in the framework of a double – transnational and national democratic system of divided authority, with diverse power centres. Because of the deep roots that the EU had in its member states, the national parliament was acknowledged as one of the most important mechanisms for reaching Community aims, in addition to but not in competition with the European Parliament: Both served the same aims, but had different tasks (CONV 353/02, p.2), since the sources of democratic legitimacy were to be found in the EU’s responsiveness to citizen requests and public acceptance, as Convention president Giscard d’Estaing pointed out.⁶³ In all events, the Convention came up with a novel frame that identified the sources of democratic legitimacy in the Union with the representative functions of both, the European and national parliaments.

Beyond the symbolic acknowledgement of citizens enshrined in the preamble, the Constitutional Treaty strengthens European citizenship in practice by enhancing the role of member parliaments and of the European Parliament in EU legislation. With its aim to correct the legal federalism inherent in the dynamics of the European Union, the Convention wants to avoid the perils of a supranational parliamentary government or federal state superimposed on national democracies, on the one hand, as well as the return to a “Europe of national democracies”. The solution consists in empowering the European Parliament in its legislative and elective competences, strengthening national parliaments in their monitoring capacity and using both as building-blocks of the multi-layered institutional architecture of the Union of citizens and states. Since the Convention expects national parliaments to contribute to the democratic legitimacy of the Union and to bring the Union closer to the citizens, it assigns them the task of controlling the principle of subsidiarity through the review of legal initiatives in the Union, and empowers them to bring action before the European Court of Justice.⁶⁴ Thus, national parliaments become anchors of the European Union in the member states and important factors in guaranteeing the democratic legitimacy of the acts of the Union.⁶⁵ The

⁶² The plenary meeting was devoted to the theme “Effectiveness and Legitimacy of the EU in exercising its tasks” (23./24.5.2002)

⁶³ Convention session, 23.-24.5.02, p.9.

⁶⁴ Compare “Protocol on the role of national parliaments in the European Union ” and “Protocol on the Principles of Subsidiarity and Proportionality”, Add. 1 zu CIG 87/04, 29. October 2004

⁶⁵ CONV 97/02, p. 8

parliaments of the member states and the European Parliament are not to enter into competition, since both have the same goal, although different tasks.⁶⁶

Secondly, the Convention provides EU organs with a participatory framework for civil societal consultation and participation. This is based on three elements: “Transparency as the basis for public life” (preamble), the “principle of participatory democracy”, and “open, transparent and regular dialogue (of the organs) with the representative associations and civil society”⁶⁷. Thus, the Convention constitutionalises established practices of the European Commission to organise consultations of the concerned parties in order to guarantee the coherence of the acts of the Union. (Art. I-47 Abs. 2-3 VVE). Additionally, the transparency principle determines that the European Parliament and the Council in their legislative functions meet publicly (art. I-50 Abs. 2 VVE). It stipulates that the organs and mechanisms of the union regulate the transparency of its activities in "special regulations regarding access of the public to their documents" (Art. III-399 VVE).⁶⁸ According to the article on the status of churches and secular societies it is provided that the Union will maintain an "open, transparent and regular dialogue" with them as well (art. I-52 Abs. 3 VVE).

Aiming at a European Commission with a strong democratic legitimacy, the Constitutional Treaty establishes that the heads of states and governments as well as the European Parliament participate in electing the Commission presidency (Art. I-27 Abs. 1 VVE). The Constitutional Treaty re-values the European Parliament as a co-legislator together with the Council (Art. I-20 Abs. 1 VVE). While the Treaty of Nice involved the parliament in only 45 (21,33%) of the subjects under the joint decision procedure, the Constitutional Treaty signed in 2004 broadens the number of joint decision procedures to 84 (27,72%). These advancements notwithstanding, in all events the IGC negotiations also increased the number of areas without any participation of the European Parliament to 111 – while the Convention had succeeded in reducing that number from 98 to 90.⁶⁹

⁶⁶ CONV 353/02, p.2

⁶⁷Including regional and local regional administrative bodies.

⁶⁸The organs provide for a high degree of transparency, while various civic organisations enable active participation in the union "(CONV 369/02/Titel VI, kind. 34, p. 15). Further, Art. 36 established the rule of openness for the advice of the European Parliament and Council in the field of legislation. Art. 36 also firmly established a unified right to vote in European parliamentary elections. Compare Casini 2003.

⁶⁹Compare Maurer 2004:4.

The concept of “multi-layered, semi-parliamentary governance”⁷⁰ is suggested here to capture the novel construction of a Union of Citizens and States which is not and shall not become itself a state. Rather, the Union roots itself into the parliamentary member democracies, while at the same time enhancing supra-national parliamentary competences, with the aim to check and balance directly participatory governance by representative mechanisms in different phases of the decision-making cycle. Multi-layered, semi-parliamentary governance blends national and supranational, participatory and representative resources of democratic legitimacy found in Europe at the member state level as well as at the European level. Representative and deliberative bodies enhance the parliamentarisation of participative governance conducted by the Commission, and of the intergovernmental decision-making mode controlled by the Council. As a result of the Convention deliberations, Union citizens nevertheless have better chances of understanding and recognising the new European constitutional arrangement, compared to any Treaty text, up to the present.

However, in this framework of European multi-layered governance, the inclusion of regional parliaments with legislative powers as control mechanisms for subsidiary and early information through the Commission remains still a desired but as yet unachieved objective.⁷¹

3.3 Balancing majority rule and consensus procedures

Yet, the cause of the near failure of the IGC 2003-4 was not the asymmetry between the range of the matters of decision delegated to the Council and the growing extent (roughly halved) of those areas where the European Parliament participated in of joint decision making. The crisis of the summit of 13 December 2003 at Brussels was not due to legitimacy deficits of a top-heavy executive system of governance. The most divisive theme in IGC negotiations proved to be the issue of Council decision-making procedures itself. The Convention had planned a substantial expansion of the areas under qualified majority rule, compared to those under unanimous decision-making.⁷² Moreover, it stipulated that the system of weighted voting in the Council Decision from 1 November 2009 onwards should be replaced with a “double

⁷⁰ With this term, I draw on Anne Peters' suggestion; see Peters 2003.

⁷¹ Compare CONV 798/03, p.3.

⁷² The Maastricht Treaty (1993) provided for qualified majority (unanimity) in Council decision-making in 99 (65) of all cases; the Amsterdam Treaty (1999) changed this share to 105 (91), the Treaty of Nice (2003) raised it to 137 (82) respectively. The Convention constitutional draft of 2003 broadened qualified majority further to 175 (82) cases; see Maurer in note 77, p. 3.

majority”.⁷³ The preamble sought to legitimate this concentration of power in the hands of Council majorities through “majority democracy” invoking a citation from Thucydides: “*Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.*”⁷⁴

On this point the Convention provoked stubborn resistance by two IGC members. In fact, the governments of member states with intermediary population strength - Poland and Spain – vetoed the new system since they expected to lose influence in this most powerful institution of the European Union. These fears may have been partly unfounded: In fact, the experience of the EU-15 taught that only about 25% of all majority decisions were not unanimous. Anyway, with the Spanish elections in March 2004 and after the Socialist Party had taken the government, the way was free for the IGC to negotiate a middle ground.

The Constitutional Treaty that the IGC finally accepted for ratification does not return to the status quo ante, the Nice Treaty provision on Council voting. The compromise that is found expands the unanimity procedure⁷⁵ and raises the requirements for qualified majority in the European Council.⁷⁶ Even more importantly, the Constitutional Treaty that is submitted for ratification drops the symbolic reference to majority democracy in the preamble. Considering the theses developed by Arend Lijphart, the Constitutional Treaty can be said to be less majoritarian and more consensual and, hence, to arguably better fit the characteristics of the European multinational society.⁷⁷

Yet, the fact that, in the new constitutional order, the European Parliament remains excluded from numerous decisions taken by the Council⁷⁸, and, in particular, from a large range of

⁷³ The Draft Constitution of the Convention defined the qualified majority for Council decisions as a majority of the member states representing at least 60% of the population of the Union. The Treaty of Nice also foresees that starting from 1 January 2005 each member of the Council can demand an examination of the representativity of Council decisions in the sense of at least 62% of the population.

⁷⁴ Quoted after Thucydides II, 37; Compare Preamble of the Convention draft.

⁷⁵ The number of subjects decided under unanimity increases from 78 to 92, while, on the other hand, the number of majority procedures is extended from 175 to 182.

⁷⁶ Qualified majority in Council decision-making requires at least 55% and 15 of the member states which must represent at least 65% of the population of the EU (art. I-25 Abs. 1 VVE).

⁷⁷ See: Lijphart 1984; Schmidt 2000.

⁷⁸ The following decisions continue to be made exclusively by unanimous decisions of the Council without co-decision making by the European Parliament: Strategic interests of the Union in the Common Foreign and Security Policy; implementation of the common security and defence policy; implementation of common defence; guidelines over the voluntary exit from European Union membership; strategic guidelines for the area of freedom, security and justice; the ESDP; operations of the Union as to "international situations" and missions within the range of the ESDP; recommendations in the context of structured co-operation; the language regime of the organs; see Maurer 2004.

areas under qualified majority⁷⁹, must be accounted for critically. For the most part, in areas where decisions are made by Council unanimity, its members can be expected to be held accountable by their national parliamentary institutions. However, the Council is also empowered to take qualified majority decisions in important policy fields where the EP remains excluded. Here, especially if citizens are impacted directly, the framers of the constitution deprive the European polity of crucial modes of normative justification and legitimation. From the point of view of democratic legitimacy, the constitutional achievements are valuable for striking a balance between majority and unanimity elements in decision-making. Still, by not taking parliamentary prerogatives fully into account, the Constitutional Treaty undercuts widespread and influential public beliefs about what constitutes legitimate authority: The idea that parliament, empowered by citizens' voting, acts as an appropriate source of authority on their behalf; and the connected view, that parliament establishes one of the crucial public spheres for a form of democratic deliberation that allows for contestation across diverse social discourses.

4. Strengths and weaknesses of the European transnational democracy

To date, no precedence of a democratically legitimate regime can be found in practice to have expanded beyond national boundaries and embraced international organizations. In an attempt to structure the burgeoning debate on post-national democratic theory, Tony McGrew has discerned four “re-imaginings” of democracy that are rooted in distinctive theoretical traditions and have been projected onto the supranational realm⁸⁰: “democratic intergovernmentalism”⁸¹, “radical republican democracy”⁸²; “cosmopolitan democracy”⁸³;

⁷⁹ Under Council majority decision making without parliamentary codecision the following subjects are included: removal from office of the minister of foreign affairs; regulations over advisory mechanisms; guidelines for the guarantee of a balanced progress of the single internal market; fundamentals of economic policy; public and closed recommendations regarding the dismantling of excessive budgetary deficits of a member state; mutual assistance; Points of view in international financial mechanisms; employment policy recommendations of the member states; Common actions and positions in the common foreign and security policy, aside from military and defense policy; the European agency for armament, research and military abilities; international agreements; see Maurer 2004.

⁸⁰ McGrew 2003.

⁸¹ The liberal-internationalist image of transnational democracy privileges a state centric, reformist, pluralist notion of democracy premised on rule of law and civil rights, procedural standards for taking and legitimising public decisions, especially national elections and formal representation; with transparency and accountability provisions conceived in relation to national governments. Effective problem-solving is the domain of supranational governance, with intergovernmental Conferences and procedures of national ratification (McGrew 2003: 11ff.).

⁸² Radical, republican notions of transnational democracy emphasize bottom up ideas of direct and substantive democracy, as a “plurality of diverse, overlapping and spatially differentiated self-governing, communities of

and “deliberative (discursive) democracy”⁸⁴. Each of these is grounded on a different set of legitimacy standards (see Table 2).

Table 2: Legitimacy Standards of Transnational Democracy

<i>Model</i>	<i>Legitimacy standards: legal, input, output and legitimation</i> ⁸⁵
democratic	1. rule of law and civil rights
inter-	2. National elections and formal representation
governmen-	3. effective supranational problem-solving
talism	4. Intergovernmental Conferences; procedures of national ratification
radical	1. challenging the rule of law and national sovereignty
republican	2. active citizenship and effective representation, taking inequalities into account; multiplicity of self-governing collectivities from local to global
democracy	3. public good, community values, collective identity
	4. constitutionalism by direct democracy and self governance
cosmopolitan	1. human rights and rule of a cosmopolitan democratic law
democracy	2. participation of progressive transnational social forces; double - transnational and territorial - democratization
	4. heterarchical (non- hierarchical) system of divided authority, with diverse power centres shaped by democratic law

fate’ and multiple sites of power”; they dismiss the need for ,sovereign’ or centralized structures of authority; they acknowledge the need to ensure the effective representation of the people in the political process, while challenging the rule of law. Input legitimacy rests on active citizenship and effective representation, taking structural inequalities into account; on a multiplicity of self-governing and self-organizing collectivities from the local to the global scale. Output legitimacy is measured in terms of public good, community values, collective identity (McGrew 2003: 16ff.).

⁸³The agenda of “cosmopolitan democracy” aims at reconfiguring the constitution of global governance and world order, an international community of democratic states and societies, based on democratic associations, localities, nations, regional organisations and global regimes, building on the existing institutional and political conditions of the liberal international order – rule of law and human rights – and advocating a “double democratisation”, by reinvigorating democracy within states and extending it to the realm between and across states (Held 1995: 234, cit. after McGrew 2003: 18).

⁸⁴The image of a deliberative transnational democracy is defined by a transnational civil society dialogue that has control over the terms of political discourse and the operations of governance; by the right of all-affected to a voice in public decisions which impinge on their welfare or interests; by a transnational public sphere that safeguards democratic deliberation, non-domination, participation and public deliberation (Dryzek 2002).

⁸⁵ For the definitions of these four modes of legitimacy, see Table 1, above.

deliberative	1. transnational civil society dialogue and control over the terms of
(discursive)	political discourse and the operation of governance
democracy	2. Right of all-affected to a voice in public decisions which impinge on their welfare or interests
	3 transnational public sphere of democratic deliberation, non- domination, participation and public deliberation

In light of these different images, what does the European constitutional project contribute to putting post-national democratic theory into practice?

The discussion in the previous three sections offers the bases for answering this question. Thus far, it has been pointed out that the consensus built by the Convention and renegotiated by the IGC has erected a hybrid construct of democratic legitimacy. Lacking a more intriguing term, this was described as multi-layered, semi-parliamentary governance. Bearing in mind the heterogeneous traditions and diverging institutional practices of old and new, large and small, national and multinational nation state democracies that define part of Europe's rich diversity, this outcome can be valuable in so far as it promises to secure the consent of the various constituent parts. For enhancing democratic legitimacy beyond the nation state, the Constitutional Treaty encapsulates a consensus that is unprecedented in so far as it establishes a comprehensive common denominator for democratic life in Europe. In this respect, the Convention has made a remarkable difference. Measured by the standards of transnational democratic theory, the European construct of a transnational democracy reveals strengths, but also crucial weaknesses:

(1) The European Constitutional Treaty configures a hybrid construct of a transnational democracy that incorporates elements of democratic intergovernmentalism:

- It adopts the principle of "constitutional tolerance" (Weiler) towards representative parliamentary government that is established in almost all member states;
- It keeps Intergovernmental Conferences and national ratification procedures as the decisive mode of treaty reform;
- It extends the rule of law and civil rights, by incorporating the Charter of Fundamental Rights;

- It does not depart from the prevalence of national elections and forms of representation in European institutions;
- It aims at enhancing effective supra- and transnational problem-solving.

(2) At the same time, this construction rests on essentials of a cosmopolitan model of democracy, namely:

- It adopts constitutionalism and the rule of law as a framework for constructing a multilayered, dual and heterarchical democratic system;
- It encompasses multiple sources of sovereignty, including citizenship.

It is questionable whether this blend of different democratic principles can be expected to effectively shape democratic life in the future of Europe? In fact, the constitutional construct outlined so far appears to be flawed by weaknesses that might contribute to perpetuate the democratic deficits of the status quo. To substantiate this contention and identify these flaws, I will adopt the point of view of deliberative democracy, especially during the first two stages of constitution-making, the Convention and of the IGC:

(3) European political elites -while merging two dominant discourses of transnational democracy: democratic intergovernmentalism and cosmopolitan democracy- have undervalued requirements set by the standards of deliberative democracy. While the Convention has experimented with deliberation as a new and valuable mode of treaty reform, it largely missed the opportunity of 16 months to enhance truly public transnational deliberation, let alone institutionalise a stronger European public sphere.

In fact, the Convention sought to incorporate consultations with civil society into its proceedings,⁸⁶ thus opening the until then exclusive process of constitutionalisation – the domain of the European Court of Justice, national Courts and the Governmental Conferences – to the dialogue of civil society. But - disclaimers to the contrary - the Convention debates of the 105 representatives from 15 member states and 13 applicant states were effectively open and transparent for only a small proportion of the public interested in European politics, and

⁸⁶Consultations were held in four arenas: First, a "forum", which stood open to non-governmental organisations (CONV 112/02). Second national constitutional debates, initiated by national representatives at the convention. Third, eight contact groups for various parts of civil society. Fourth and finally, a plenary meeting with "hearings of civil society" (24./25.6.2002). These chances were extensively used by civic organisations such as regions and regional administrative bodies, university circles and think tanks, as well as environmental and development organizations, human rights and women's groups.

the mass media were hardly adequate in translating these deliberations for national mass public audiences. Lack of opportunities to participate was lamented by organizations from the new applicant states⁸⁷, in relation to the Youth Convention which was transformed into an “elite project”⁸⁸; by women’s organisations and the EU- gender research⁸⁹ as well as by broad national public media. Yet, albeit largely elitist and a form of “constitutionalisation without the public”, the convention method outperformed the intergovernmental conference, as a catalyst of transnational constitutional debate.⁹⁰

Needless to stress, the fate of the third stage of the European constitutional experiment is in all events not wholly determined by the extent to which the European political elites satisfied the standards of deliberative democracy in the Convention. Most importantly, it depends on whether the European constitution can be communicated effectively to the publics during the ratification processes themselves. Whether the Constitutional Treaty will contribute to the democratic legitimacy of the Union, will depend, in the final analysis, on its legitimation, hence, on the extent to which it will achieve the consent of citizens and their representatives in member states. Toward that end, the Constitutional Treaty needs to pass in ten out of twenty five member states popular referenda. Here, the attempts of communicating the European Constitution to the public face serious challenges. At the beginning of 2004, the quality of public support for the Constitutional project was not overwhelming:

- 77% of the surveyed citizens in the EU-25 supported a European constitution,⁹¹
- yet, they felt badly informed about the future European Constitution: Thus, for example, 60% of the interviewed persons did not know, that the draft constitution provides citizens with the right to legislative initiatives. The surveyed persons would rank media through which they wished to be informed about the European Constitution as follows: national television with 65%, followed by the national press (43%); the regional media (28%), brochures (28%), the internet (23%) and public meetings (13%).⁹²

⁸⁷ CONV 112/02; p.2

⁸⁸ See Wehlitz 2003.

⁸⁹ See Mateo Diaz 2003.

⁹⁰ See Meyer 2003 and Packham 2003.

⁹¹ Germany 83% in favour (14% against); Poland: 72% (18%); UK: 51% (30%); Sweden: 58% (26%). In total, the Constitution is supported overproportionately by men (+5%), by the 40-54 years-age group, compared to 15-24, more by the educated, employed, urban population (Eurobarometer No. 159, January 2004).

⁹² See Eurobarometer No. 159, Januar 2004.

Regarding the multiple sites of constitutional ratification debates in member states, theses and anti-theses, accusations and defences, hopes and fears, distortions and lies are playing themselves out.⁹³ While some protest that deteriorations due to the new European Constitutional Treaty will outweigh by far the advances,⁹⁴ others expect that it will result in the reduction of democratic deficit.⁹⁵ Considering these contradictory interpretations it is difficult for the lay citizen to distinguish between truth and hyperbole. At least, the text of the Constitutional Treaty with its 349 pages and 448 articles and supplementary annexes submitted for ratification offers better conditions for checking rivaling claims than any of the more opaque and voluminous EC/EU-treaties of the past.

5. Conclusion

This paper seeks to demonstrate that the EU in its process of redefining its constitutional arrangement has moved beyond liberal democratic intergovernmentalism and that it has embraced substantive ideas of a cosmopolitan strategy of democratisation. Furthermore, in an unprecedented process of transnational deliberation political elites have re-configured the European polity by constructing a multilayered system of semi-parliamentary governance. This construct appears always less *sui generis* the more it approaches the standards of democratic legitimacy known from the nation state. Yet, to put the formal norms into practice and to effectively democratise EU governance, the framers of the new European Constitution need to pass further significant tests. Whether the mode of constitutional deliberation that the Convention experimented with might be enhanced and could be opened up to citizens as participants of mass publics and whether it could truly reflect and interact with civil societal discourses, depends on the will of political and media elites and is therefore an open question. So far, the framing of the European Constitutional Treaty has offered more opportunities for transnational public debate and civil society participation than any treaty reform in the past. Still, assessed against the template of a transnational deliberative democracy, European constitutionalisation has still to live up to its promises and potentials. If it continues to leave both behind, active citizens and a democratic public sphere, the

⁹³ National and transnational constitutional debates involve, among others, think tanks, parties and parliaments, mass media, research institutes and civic associations, the European Commission and Parliament, European party federations, and internet sites.

⁹⁴ With his "seven objections" Roland Vaubel adheres to the views of the "European Constitutional Group", as well as the "Free-market Foundation" (Stiftung Marktwirtschaft). Compare Vaubel 2004; Schick/Holtz 2004.

⁹⁵ See, among others, Emmanouilidis 2004; Mény 2003:57ff.

European constitutional project, despite its many achievements, risks remaining one piece of paper more.

References:

- Abromeit, Heidrun (1998): *Democracy in Europe: Legitimising Politics in a Non-State Polity*, New York: Berghahn Books.
- Banchoff, Thomas/Smith, M.P. (Hg.) (1999): *Legitimacy and the European Union: The Contested Polity*. New York, Routledge.
- Beetham, David/Lord, C. (1998): *Legitimacy and the European Union*, London and New York: Longman.
- Bellamy, R./Castiglione, D. (1999): *Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Community*, in: Archibugi, / Held/Köhler (Hg.): *Re-imagining Political Community*, Cambridge: Polity Press.
- Blondel, J./Sinnott, R./ Svensson, P. (1998): *People and Parliament in the European Union: Participation, Democracy and Legitimacy*, Oxford: Clarendon Press.
- Casini, Paola (2003): *European Governance, Citizen's Rights of Access to Documents and the Role of Archives*, in: *Archives and Manuscripts. The Journal of the Australian Society of Archivists*, Vol. 31, 2/2003:23-38.
- Closa, Carlos/Fossum, John Erik (2004a): *Constitution-Making and Democratic Legitimacy in the EU*, in: dies. (Hg.): *Deliberative Constitutional Politics in the EU*, Oslo, ARENA Report No 5/04:1-20.
- Closa, Carlos/Fossum, John-Erik (Hg.) (2004b): *Deliberative Constitutional Politics in the EU*. ARENA Report No 5/04.
- Cramer, Per (2003): *A European Constitution, or not?*, in: *The Post-Laeken Process in an Academic Perspective*; Working Paper Series 3:1, Centre for European Research, Göteborg University, April 2003.

- Curtin, Deirde (1997): *Postnational Democracy: The European Union in Search of a Political Philosophy*,
The Hague.
- Dahl, Robert A. (2001): *How Democratic is the American Constitution?* New Haven &
London:
Yale University Press.
- Dahl, Robert (1999): Can international organizations be democratic? A skeptic's view, in:
Shapiro, I./
Hacker-Cordón, C. (Hg.): *Democracy's Edges*, Cambridge:Cambridge University
Press:19-36.
- Dobson, Lynn/Follesdal, Andreas (2004): *Political Theory and the European Constitution*.
Routledge:12-29.
- Dryzek, John S. (2002): *Deliberative Democracy and Beyond. Liberals, Critics,*
Contestations. Oxford, Oxford University Press.
- Emmanouilidis, Janis A. (2004): *Historisch einzigartig, im Detail unvollendet – eine Bilanz*
der Europäischen
Verfassung. Centrum für angewandte Politikforschung; Bertelsmann Stiftung.
Reform-Spotlight 03/2004.
- Eriksen, Erik O./Fossum, John E./Menendez, A.J.(Hg) (2004): *Developing a Constitution for*
Europe.
London: Routledge
- Eriksen, Erik O./Fossum, John Erik/Menéndez, Agustín José (Hg.) (2003): *The Chartering of*
Europe. Baden-Baden: Nomos.
- Eriksen, Erik O./Fossum, John E. (2002): *Democracy through Strong Publics in the European*
Union?, in:
Journal of Common Market Studies 40/3:401-24.
- Eriksen, Erik O./Joerges, Christian/Neyer, Jürgen (Hg.) (2003): *European Governance,*
Deliberation and the Quest for Democratization, Oslo: Arena Report No. 02/2003.
- Fossum, John E. (2004): *Still a Union of deep diversity? The Convention and the Constitution*
for Europe, in:
Eriksen/Fossum/Menendez (Hg.): *Developing A Constitution for Europe*, London:
Routledge:389-406.
- Fossum, John E. (2005): *Conceptualising the EU's social constituency*, in: *European Journal*
of Social Theory, vol. 8,no. 2.

- Giegerich, Thomas (2005): Continuous Controversies: The Debate on the European Constitution, in: Liebert/Falke/Maurer (Hg.): Post-National Constitutionalisation in the Enlarging Europe, Baden-Baden.
- Grimm, Dieter (1995): Does Europe Need a Constitution?, in: European Law Journal: 282-302
- Habermas, Jürgen (2001): Warum braucht Europa eine Verfassung?, in: Die Zeit, 28.6.2001:7.
- Habermas, Jürgen (1998): Die postnationale Konstellation und die Zukunft der Demokratie, Frankfurt a.M: Suhrkamp.
- Hix, S./Tapio, R./Scully, R. (2003): Fifty Years On: Research on the European Parliament, in: Journal of Common Market Studies, vol. 41, no. 2:191-202.
- Vgl. Hooghe, Liesbet: Europe Divided? Elites versus Public Opinion on European Integration. In: European Union Politics, 4/3 2003, S. 281-304.
- Hooghe, Liesbet/ Marks, G. (1999): The Making of a Polity: The Struggle over European Integration, in: Continuity and Change in Contemporary Capitalism. Cambridge Studies in Comparative Politics, Cambridge: University Press.
- Huntington, Samuel (1991): The Third Wave: Democratization in the Late Twentieth Century, London.
- Imig, D./Tarrow, S.(1999): Contentious Europeans: Protest and Politics in an Emerging Polity, Lanham, Md.: Rowman& Littlefield.
- Jachtenfuchs, M./Diez,T./Jung, S. (1998): Which Europe? Conflicting Models of a Legitimate European Political Order, in: European Journal of International Relations 4:409-445.
- Joerges, Christian/Mény, Yves/Weiler, J.H.H. (Hg.) (2000): What Kind of Constitution for What Kind of Polity?
The Robert Schuman Centre for Advanced Studies at the European University Institute, Florence,
Harvard Law School, Cambridge MA
- Kielmannsegg, Peter Graf (1996): Integration und Demokratie; in: Jachtenfuchs, M./Kohler-Koch, B. (Hg.): Europäische Integration. Opladen.
- König, Thomas (1997): Europa auf dem Weg zum Mehrheitssystem, Opladen.
- Liebert, U./Falke, J./Maurer, A. (Hg.) (2004): Postnational Constitutionalism in the Enlarging Europe:
Foundations, Legitimacy, Prospects, Baden-Baden: Nomos.

- Liebert, U./Falke, J./Packham, K./Allnoch D. (Hg.) (2003): *Verfassungsexperiment. Europa auf dem Weg zur transnationalen Demokratie?* Münster, LIT-Verlag.
- Liebert, Ulrike (2003): *Transformationen europäischen Regierens: Grenzen und Chancen transnationaler Öffentlichkeiten*; in: Klein et al.: *Bürgerschaft, Öffentlichkeit und Demokratie in Europa*, Opladen: Leske + Budrich: 75-100
- Liebert, Ulrike (1999): *The Return of the Public. Gender Politics in the European Union*; in: *European Societies*, no. 2.
- Lijphart, Arend (1999(1984): *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven/London: Yale University Press.
- Lord, Christopher (2002): *The New European Parliament*. In: Perrineau/Grunberg/Ysmal (Hg.): 223-238.
- Lord, Christopher/Magnette, Paul (2002): *Notes Towards a General Theory of Legitimacy in the European Union*, Working Paper 39/02.
- Mattila, Mikko (2003): *Why Bother? Determinants of voter turnout in the European election*, in: *Electoral Studies*, 22/2003:449-468.
- Maurer, Andreas (2004): *Die Regierungskonferenz 2003/2004. Die neuen Handlungsermächtigungen der Organe*, Berlin, Stiftung Wissenschaft und Politik, Juli 2004.
- McGrew, Tony (2003): *Transnational Democracy: Theories and Prospects*. Paper presented at Conference "Democracy and Globalization", University of Aalborg, May 2003.
- Mény, Yves (2003): *The Achievements of the Convention*, in: *Journal of Democracy*, Vol. 14, No. 4, October 2003:57-70
- Mény, Yves (2002): *De la démocratie en Europe: Old Concepts and New Challenges*, in: *Journal of Common Market Studies*, Vol.41, No.1:1-13.
- Moravcsik, Andrew (2002): *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, in: *Journal of Common Market Studies*, Vol. 40, No. 4:603-24.
- Neyer, Jürgen (2005): *Europa ohne Pathos. Überlegungen zum Verfassungsvertrag*, in: Liebert/Falke/Mauer.

- Neyer, Jürgen (2004): Politische Herrschaft in postnationalen Konstellationen.
Vergesellschaftung
und Verrechtlichung jenseits des Staates, Baden-Baden: Nomos.
- Offe, Claus (Hg.) (2003): Demokratisierung der Demokratie. Diagnosen und
Reformvorschläge, Frankfurt a.M.: Campus.
- Perrineau/Grunberg/Ysmal (Hg.) (2002): Europe at the Polls: The European Elections of
1999, New York et al: Palgrave.
- Peters, Anne (2004a): European Democracy after the 2003 Convention, in: Common Market
Law Review 41:37-85.
- Peters, Anne (2004b): Europäische Öffentlichkeit im europäischen Verfassungsprozess, in:
Europarecht 39/3:375-392.
- Peters, Anne (2003): A Plea for a European Semi-Parliamentary and Semi-Consociational
Democracy. European Integration online Papers (EioP) Vol. 7 No. 3
(<http://eiop.or.at/eiop/texte/2003-003a.htm>).
- Peters, Anne (2001): Elemente einer Theorie der Verfassung Europas, Berlin: Duncker&
Humblot.
- Pollak, Johannes (2005): Democracy and the European Constitution. Why size does matter,
in: Liebert/Falke/Maurer (Hg.): Postnational Constitutionalism in the Enlarging
Europe, Baden-Baden.
- Rittberger, Berthold (2003): The Creation and Empowerment of the European Parliament, in:
Journal of Common Market Studies, Vol.41, No. 2:203-25.
- Scharpf, Fritz (1999): Governing in Europe: Effective and Democratic?, Oxford: Oxford
University Press.
- Schmidt, M.G (2000) Der konsoziative Staat. Hypothesen zur politischen Struktur und zum
politischen Leistungsprofil der Europäischen Union, in: Grande/Jachtenfuchs (Hg.):
Wie problemlösungsfähig ist die EU? Regieren im europäischen Mehrebenensystem,
Baden-Baden: Nomos: 37-58.
- Schmidt, Vivien A. (2003): European Integration as Regional Variant of Globalization: The
Challenges
to National Democracy. Paper prepared for presentation at the annual meetings of the Society
for the Advancement of Socio-Economics, Amsterdam, June 2003:28-30.
- Schmitter, Philippe C. (2000): How to Democratize the European Union....And Why Bother?,
Lanham et al: Rowman&Littlefield Publishers.
- Shaw, Jo (2003): What's in a Convention?, in Shaw/Magnette/Hoffmann/Vergés Bausili: The

- Convention on the Future of the Union: Working Towards an EU Constitution,
London: Federal Trust/Kogan Page.
- Shaw, Jo (2005): What Happens if the Constitutional Treaty Is Not Ratified?, in:
Pernice/Zemanek (forthcoming)
- Shaw, Jo (2005): Europe's Constitutional Future, in: Public Law, Spring (forthcoming)
- Shaw, Jo (1999): Postnational constitutionalism in the European Union, in: Journal of
European Public Policy 6:4:579-97.
- Siedentop, Larry (2001): Democracy in Europe, New York: Columbia University Press.
- Smismans, Stijn (2004): The constitutional labelling of "The democratic life of the EU":
representative and
participatory democracy, in: Dobson/Follesdal: Political Theory and European
Constitution, London/New York: Routledge:122-138
- Telo, Mario (1995): Democratie et Construction Europeenne, Brüssel: Editions de
l'Université de Bruxelles.
- Weiler, Joseph (2002): A Constitution for Europe? Some Hard Choices, in: Journal of
Common
Market Studies 40/4:563-580.
- Vaubel, Roland (2004): Sieben Einwände. In zentralen Bereichen muss der vorliegende
Verfassungstext
noch verbessert werden, in: Die Welt, 9.Juli

DOCUMENTS:

- Draft Treaty on a Constitution for Europe (CONV 850/03; 18. July 2003)
- European Commission 2004: "The Future European Constitution" Flash Eurobarometer 159.
Conducted by EOS
Gallup, January
- Convention on the Future of Europe: Summary Plenary Session 4.7.2003 (CONV 849/03)
- Laeken Declaration on the Future of the European Union; Presidency Conclusions, European
Council Meeting in
Laeken 14 and 15 December 2001; Annex I
- Treaty on a Constitution for Europe (6. August 2004; CIG 87/04); Annexes (ADD1)