Democracy beyond the State: Assessing European Constitutionalisation

Ulrike Liebert (liebert@uni-bremen)

Forthcoming in:
“Postnational Constitutionalisation in the Enlarged Europe - Postnationaler Verfassungsprozess im erweiterten Europa”
eds. U. Liebert, J. Falke, A. Maurer, Nomos, Baden-Baden 2005

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 of America, and have pointed to analogies between the Convention in Brussels and the Convention of Philadelphia. Such historical parallels are persuasive but sometimes miss 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 notably from that of the U.S., not only because of its much larger scale and the greater cultural and linguistic diversity of its 25 member states and 450 million inhabitants. More importantly, in trying to mould the "contradictory sovereignties of the parts... into a whole", the challenge to provide the emerging European polity with democratic legitimacy plays a pivotal role. The U.S. constituent act originated in a pre-democratic century and was, by modern standards, flawed by numerous democratic shortcomings. The EU Convention, by contrast, was explicitly mandated by the heads of state and government to improve the efficiency and legitimacy of European decision-making by resolving the democratic deficit in the enlarged Union. Looking back on 15 months of constitutional debates, the chairman of the Convention, Valéry Giscard d’Estaing, found hardly any other topic on which the positions diverged as much as in relation to democratic legitimacy. Vice chairman Giuliano Amato framed the task of building a consensus on this issue in a historical

---

1 I want to thank Roderick Parkes, Stiftung Wissenschaft und Politik, for his careful editing.
3 In accordance with the Laeken mandate of December 2002, Yves Mény, on the eve of the Convention, pleaded in “Le Monde” for the European constitutional project to cope with the challenge of democratic legitimacy; see Mény: Constituer l’Europe; Le Monde, 27.2. 2002, S. 1.
4 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, unequal representation in the Senate, judicial power; limited Congressional power; see Dahl 2001: 15-20.
perspective: While the 19th and 20th centuries had witnessed the birth of democracy in Europe and its expansion among nation states, he identified the challenge of the 21st century as not only laying down the conceptual parameters of a European transnational democracy, but also constructing it. Did the signing of the “Treaty on a Constitution for Europe” (TCE) after a year long struggle 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 state?

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. In their view, the EU lacks the socio-cultural prerequisites for a “government by the people”, since these people are presumed to exist within a national context which boasts a common language, a shared history, culture and identity, a public sphere and a homogenous people or *demos*. Some authors even defend the EU’s lack of genuine democratic legitimacy as being practically inevitable and even normatively desirable. 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 the citizens of the ten member states holding a referendum, choose to ratify the European Constitution, when this would deprive them of the democratic powers by which they are used to influence decision-making? Moreover, from the perspective of the national parliamentary representatives to whom citizens delegate the authority to ratify 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 in the affirmative. They argue that the EU were not only capable of giving itself a constitutional framework but also in need of a democratic one. Furthermore, constitutionalisation can be expected to make a difference for the legitimacy of the European polity given the provisions of the TCE on the democratic life of the Union, or the choice having it ratified by a referendum in as many as ten member states. Last but not least, the EU’s democratic experimentalism appears also relevant to the expanding theory and practice of post-national democracy in a regionalising and globalising world. The process of postnational constitutionalisation in Europe is an unprecedented and ground-breaking historical and political experiment. Its assessment will yield insights into the conditions for, and the impediments to democracy beyond the state, at the regional and the global scale.

---

6 Giuliano Amato, final session of the Convention (CONV 853/03, S.6).
7 Dahl 1999.
8 Von Kielmannsegg 1996.
11 Among the principled advocates of a European constitution are Habermas 2001:7; Peters 2001; Mény 2003; Giegerich 2005; Closa/Fossum 2004a.
12 For the EU’s “democratic experimentalism”, see Sabel and Gerstenberg (2002); for the EU’s “constitutional experiment” of transnational democracy, see Liebert et al. eds. 2003.
13 The notion of “postnational constitutionalism in the European Union” was introduced by Jo Shaw (1999; 2000, 2003), adapting James Tully’s concept of constitution from the Canadian context to that of the EU, by defining it as a “form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity (1995: 30), interpreting the European Union as an „essentially contested project” (Bańkowski and Christodoulidis, 1998).
This chapter takes a closer look at the process of postnational constitutionalisation from the perspective of democratic legitimacy: Did it effectively accommodate diversity and resolve the contentious issues at stake, thus promising to reinforce the democratic legitimacy of the European polity? How inclusive, responsive and dialogical were the procedures chosen for the first two of the three stages of European constitution-making, the Convention on the Future of Europe (February 2002 – July 2003), and the Intergovernmental Conference (July 2003 – June 2004)?

In the first section I identify 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”. In the third part, I draw upon models of transnational democracy to assess strengths and weaknesses of this construction.

My aim is to demonstrate that although the present constitutional framework of a hybrid, multilayered, semi-parliamentary system offers citizens a variety of opportunities for 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 for constituting a citizenry committed to support democratic principles and procedures beyond the nation-state, I argue, the process of constitutionalisation has still to prove to be capable of forging a transnational public sphere.

2. Democratic legitimacy in the EU: contentious standards

Following David Beetham and Christopher Lord, to acknowledge political authority as legitimate in any society, we can measure it against different criteria: its formal legality; its normative justifiability according to its sources; its performance or instrumental justifiability according to its ends and the objectives it pursues; and the extent of its legitimation in terms of effective recognition or acceptance. (see Table 1)\(^{14}\).

<table>
<thead>
<tr>
<th>Dimension</th>
<th>Standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legality</td>
<td>authority is exercised according to established legal rules and formal procedures</td>
</tr>
<tr>
<td>Normative justifiability</td>
<td>authority is grounded on societal beliefs about the appropriate sources of authority (input legitimacy), i.e.</td>
</tr>
<tr>
<td></td>
<td>- popular sovereignty</td>
</tr>
<tr>
<td></td>
<td>- citizens’ representation</td>
</tr>
<tr>
<td></td>
<td>- citizens’ participation</td>
</tr>
</tbody>
</table>

\(^{14}\) See Beetham and Lord 1998: 1ff.
<table>
<thead>
<tr>
<th>Performance</th>
<th>authority aims (to fulfil/ meet/ perform/ realise?) publicly valued objectives and fulfils performance criteria (output legitimacy), i.e. related to:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- fundamental rights</td>
</tr>
<tr>
<td></td>
<td>- social justice</td>
</tr>
<tr>
<td></td>
<td>- economic prosperity</td>
</tr>
<tr>
<td>Legitimation</td>
<td>authority achieves explicit consent by the governed and other legitimate authorities, i.e. via:</td>
</tr>
<tr>
<td></td>
<td>- electoral authorisation</td>
</tr>
<tr>
<td></td>
<td>- recognition by other legitimate authorities</td>
</tr>
<tr>
<td></td>
<td>- deliberative persuasion</td>
</tr>
</tbody>
</table>

During the three waves of democratisation in the 20th century, democratic principles and procedures have become universally accepted norms for justifying political authority.\(^{15}\) Democratically legitimate government in these terms is encapsulated by the formulae “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”.\(^{16}\)

In the European constitutional debate, the appropriateness of each of these standards of legitimacy as applied to the EU has been a matter for contestation. The meanings of democratic norms vary, depending on the theoretical premises chosen, be they liberal, republican, participatory or deliberative standards.\(^{17}\) Legitimacy issues are at stake in three areas of the European constitutional debate: first, regarding the question of input- vs. output-legitimacy; second, relating to national vs. supranational sources of democratic legitimacy; and third, concerning the scope of the majority principles vs. consensus procedures in decision-making.

### 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. In this perspective, its problem-solving capacity is put under the spotlight. The output-performance based 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 provides limited legitimacy.\(^{18}\) In fact, already starting with the Maastricht Treaty reform, this strategy led to rising criticism of the European democratic deficit. Furthermore, protest movements took action, mobilising sections of the public disaffected by European Union policies,\(^{19}\) for instance, farmers, animal protection activists, consumers and opponents of the common currency. The EU, thus, witnessed the decline of twenty years of the public’s “permissive consensus” towards European integration. European political elites saw the rise of eurosceptic attitudes, and they were faced with demands to place input-legitimacy higher

---

\(^{15}\) See Huntington 1991.

\(^{16}\) Vivien Schmidt 2003

\(^{17}\) For these three alternative models of democracy for the EU see: Beetham/Lord 1998; Bellamy/Castiglione 1999; Closa/Fossum 2004.

\(^{18}\) Scharpf 1999:2.

\(^{19}\) Imig/Tarrow 2001
up on the EU agenda.²⁰ Liesbet Hooghe und Gary Marks have summarised these findings as 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."²¹

To enhance the democratic legitimacy generated at its input side, the present legal order of the EU basically offers two conceptual options: The European Council can be strengthened, since it incorporates the indirect legitimacy derived from governments that are democratically elected in member states; or the European Parliament can be reinforced as the carrier of authority delegated to it by the citizens through the act of voting. In view of the fact that a large share of citizens abstains, in reality, strengthening the EP may add to the EU’s democratic deficit. Yet, it is not clear to what degree abstention is primarily motivated by the perceived powerlessness of the EP and whether strengthening it would make abstention go down.

Equally sceptical towards all these strategies, a discourse about the “dilemma of democracy” (Graf Kielmannsegg) has gained currency. Taking its cue from the observation that European decision-making increasingly affects member societies whilst diminishing opportunities for citizen participation in decision-making and state controls of non-state decision-makers. As a consequence, European democratic self-governance – and, in particular, the strengthening of input legitimacy - are considered hardly sustainable as long as a European identity remains feeble and cross-border solidarities among constituents scarce.²²

If there is any escape from the democracy-dilemma into which the EU seems locked, post-national democratic constitutionalisation is arguably a key to it. First of all, although there is not a homogeneous “European people” to assume the constituent power in European constitutionalisation, Anne Peters has suggested no less than 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.²³ Second, to counter the no-demos thesis as a core element of the eurosceptic argument, Jürgen Habermas has proposed a re-imagining of post-national constitution-building as a virtuous circle, suggesting that "different anticipations stimulate and reinforce each other mutually in a circular process"and that, 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.²⁴ Following Habermas’ approach, European constitutional politics can be explored through the lenses of mutually reinforcing social and communicative mechanisms. These include mechanisms for framing European identity and transnational solidarity which might have implications for the construction of a constituency.

Reviewing constitutionalisation in this way as a de- and reconstruction of the alleged democracy-dilemma, the question of legitimacy in relation to constituency inputs takes centre

---

²⁰ Liebert 1999.
²¹ Hooghe./Marks 1999:96f; see also: Imig/Tarrow 1999.
²² See Offé 2003:269.
stage: Which appropriate sources of political authority should be privileged in order to justify 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.\textsuperscript{25} Others favour direct forms of participatory governance for the EU.\textsuperscript{26} A third camp proposes the framework of “deliberative supranationalism”, based on a non-political “expertocracy”.\textsuperscript{27} Finally, proponents of deliberative democracy have stressed the potential of deliberative persuasion for transnational democracy.\textsuperscript{28}

First, 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 speaking- 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.\textsuperscript{29} However, over the past 25 years, participation rates in the European parliamentary elections have plummeted.\textsuperscript{30} Critics of an EP-centred 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 in the EU, appear inviable;

Secondly, direct democratic and participatory instruments are experiencing increasing popularity.\textsuperscript{31} In the practice of EU governance, various forms of consultation of and cooperation with organised civil society have been created in the past five years, including private corporations, non-governmental organisations, think tanks, protest movements, and sub-state entities, in a growing range of policy domains, in community policies as well as in foreign and security policy and in justice and home affairs.\textsuperscript{32}

Thirdly, “deliberative supranationalism” is offered as a third alternative to supranational parliamentary government on the one hand, and participatory democracy on the other. At its heart lies a conception that depicts political legitimacy in the European multi-level polity as the product of two different sources of legitimacy: While the nation state remains key, obliged to shoulder the burden of democratic governance, the task of the supranational level, in the first instance, is to contribute expert- and deliberation- based legitimacy resources.\textsuperscript{33}

\textsuperscript{25} 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; see Lord 2002:225.
\textsuperscript{27} See Neyer 2004:48-56.
\textsuperscript{29} See Hix/Tapio/Scully 2003.
\textsuperscript{30} Participation in the European elections reached a historical low in 2004 with 46%; see Blondel/Sinnott/Svensson 1998; Mattila 2003.
\textsuperscript{31} See Abromeit 1998.
\textsuperscript{33} See Neyer 2005.
Fourth, the conception of “deliberative” or “discursive democratisation” builds, on the one hand, upon the idea that the multiple discourses of civil society are sources of order that may be democratised, including “contentious communications from the margins”; on the other hand, it identifies the space for “contestation across discourses in the public sphere as a key component of democracy”. 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.” As John Dryzek points out, government is thus deemed “extraordinarily weak in the global polity, which means that alternative discursive sources of order are especially important therein”.

2.2 National vs. supranational sources of democratic legitimacy

A second area of contention in the constitutional debate regards the question of the precise nature of the relationship between national and supranational sources of legitimacy: Is a democratically legitimate European polity necessarily detrimental to democratic legitimacy within the national realm? The treaty reforms of the nineties successively reinforced the European Parliament. This was perceived, however, to compete with national parliaments in a zero-sum game, where a gain in power for the European Parliament would result automatically in losses for national parliaments, and vice-verse. This view feeds into the idea that European integration and the principle of national democracy necessarily clash. As Per Cramer argues, this is why 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. Democratic intergovernmentalism advocates national political processes, and hence member states, to 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 opaque executive negotiations.

During the Convention debate, a roll back to liberal intergovernmentalism did not gain much leverage. In a minority report, the strengthening of national parliaments was called for within an institutional architecture where European parliamentarianism would complement national parliamentary governments. The model of a “Europe of national democracies” is offered to younger member state democracies still struggling to consolidate:

"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

34 Dryzek 2002: VI.
35 Id.: 19.
36 See Ritterberger 2003.
39 “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 Dalgaard und William Abitbol.
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, CONTRIBUT 347, 30.5.2003).

Opposed to the national democratic model, the project of a supranational democracy for the European Union \(^{40}\) defended the view that the EU’s finality were that of a democratic union of states and peoples who integrated in a "sui generis" form. It assumed that the EU had reached the limits of its operation in those areas where intergovernmental cooperation has become a source of impotence and a hindrance to effective problem-solving, and that political leadership by single member states was the origin of tensions and blockages. As a consequence, it was argued, the new institutional architecture of the EU would need to make new forms of civil society and direct citizen participation in European governance mandatory (id).

The most far-reaching utopian vision for a democracy beyond the state was represented by the conception of a value based "Unity of Europe". \(^{41}\) Accordingly, the EU was called to constitute itself as a “European community of fundamental rights”, a "European democracy” with a "republican institutional and procedural order”, a European public sphere, civil society, and "direct democratic instruments”. This was constructed as a "space for social security, justice and solidarity”, and a "space for welfare, sustainable development, with a European peace order”. Accordingly, neither a full-fledged European federal state, nor a final institutional form was required. But while direct democratic procedures as well as the European Parliament were to play an important role in this European democratic order, national parliaments were missing: Apparently perceived as a superfluous species, they were not even mentioned.\(^{42}\)

2.3 Majority vs. consensus democracy

Qualified majority in Council decision-making turned out to be a most divisive issue that drove intergovernmental constitutional negotiations at the Brussels summit in December 2003 into crisis and near break-down. Following the British Westminster model, the majority of convention members 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 majority support.

\(^{40}\) With its communication "A project for the European Union" (CONV 448/02) the European Commission challenged the EU Convention to view the reinvigoration of the project of a European supranational democracy as a precondition for strengthening the EU for its internal and foreign policy tasks.

\(^{41}\) See the proposal tabled by Johannes Voggenhuber, Austrian EP member in the Convention (CONV 499/03; CONTRIBUT 2002).

\(^{42}\) Cf. the contribution by Duhamel, van Lancker, Berès, Berger, Carmen Gonzales, Pacotti u.a. "Das Europa, das wir brauchen – Mindestanforderungen an einen neuen Föderalismus” (CONTRIB 368, CONV 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).
This position is often criticized from a theoretical perspective for not taking into account the minorities who could be prevented from obstructing the will of the majority only if they shared the same consciousness of a common political destiny. Empirically, comparative democracy research has 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 mechanisms for the safeguarding of minority positions, for instance regional devolution. In the practice of modern western democracy, the patterns of concentrating vs. dividing political power vary largely. Generally, majority democracy is less likely in societies with complex lines of political conflict where consociational forms of consensus building appear more adequate.\(^43\)

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 the people in each of the member states. Pleading for unanimity as the key decision-making rule in the Council of Ministers, they argued that otherwise it was hardly possible to legitimise EU/EC-decisions in a member state that had been defeated by a majority vote.\(^44\) 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 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, secure its output- as well as its input-based legitimacy.\(^45\) 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.\(^46\) In parliamentary debates, the pro and contra of legislative proposals could be publicly discussed, thus rendering co-decision-procedures transparent and democratically legitimate.\(^47\)

3. Negotiating democracy beyond the state in the Convention and the IGC

In the debate on the future of Europe preceding the Convention, the heads of state and government had made it obvious how deeply divided they were on the issue of the EU’s ‘finality’ – liberal intergovernmentalism or federalism.\(^48\) The Convention offered an alternative arena for not only articulating different visions of democracy but also debate them more in depth than in any previous bout of EU treaty reform. The question of whether and

\(^{43}\) Vgl. Lijphart 1999.

\(^{44}\) This tendency can be identified in the 1994 decision of the German Constitutional Court on the Maastricht Treaty; see Giegerich, in this volume.

\(^{45}\) See König 1997; See also critical discussions of the issue of majority rule in Pollak and Cichocki, in this volume.

\(^{46}\) This position was articulated by Jürgen Meyer, representative of the German Bundestag in the Convention; communication in a public lecture, Bremen, September 18\(^{36}\), 2003.

\(^{47}\) Giegerich, in this volume.

\(^{48}\) In this way, the British Prime Minister advanced the idea that the source of democratic legitimation lay with the Member States, the German Foreign Minister advocated the democratisation of the Community method in the context of a European federal state; France’s former Prime Minister Jospin refuted this, whilst the French President called for the Union to be democratised through parliamentarisation - a process involving the reinforcement of both national parliaments and the EP. See Carsten Schabacher, ”Die Reformdebatte der Staats- und Regierungschefs in der Sackgasse”, in Liebert et al. 2003.
why Europe needed a constitution was no longer central to this debate. Instead, the Convention turned into a laboratory for a new European democratic politics. It engaged with struggles about diverse issues of national vs. supranational, majority vs. consensus, representative vs. participatory vs. deliberative democratic legitimacy. In preparing for plenary deliberations, advocates of a “Europe of the democracies” found themselves clashing but also engaging with protagonists of a supranational, of a participatory or a representative democracy. How then did the Conventioners and the Intergovernmental Conference resolve the question that Philippe Schmitter has succinctly put: ”How to democratize the European Union (...) And why bother?”

To answer this question, one must first stress the importance of the procedures of deliberation and consensus-building. 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 of how to democratise the process of 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, was able to report that it had 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. He praised the draft as a ”result of the common attempts to reach a balance between different expectations and sensibilities of the convention members”. 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). Hence, the Convention draft can be safely said to safeguard ”the balance between member states and the European institutions”. 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.

A second finding is that the contents of the Treaty on a Constitution for Europe flew in the face of academics, such as Andrew Moravcsik, who deny the democratic legitimacy deficit

---

49 Schmitter 2000.
50 (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).
51 (CONV 814/03, S.1).
52 93 of the 105 Convention members had signed the concluding document by July 23, 2003, including the Polish and Spanish government representatives, thus confirming successful consensus-building.
53 The Convention draft Treaty did not contain revolutionary changes but only modification for strengthening the ”rule of law” principle, it also clarified the relationship between the powers, improved rights and opportunities for participation, among them the incorporation of the Charta of Fundamental Rights. It also aimed to make the Union more transparent – by rendering the legislative function of the Council public – and increased accountability, by the election of the Commission president. It expanded qualified majority, made national parliaments the guardians of subsidiarity, established the Citizens’ initiative and the exit option for member states.
54 See Josef Falke’s Synopsis, comparing the Convention and the IGC constitutional documents 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, of which originated from British initiatives. See House of Commons, ”White Paper on the Treaty for a European Constitution”, September 9th, 2004
55 ”Treaty on a Constitution for Europe”, 29. October 2004 (CIG 87/04; ADD1)
of the European Union to be an issue and need to be resolved. Instead, the draft Treaty clearly seeks to respond to the mandate established by the European Council in Laeken entitled "More democracy, transparency and efficiency in the European Union". The Convention members shared the 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, including national parliaments. Most Convention members were therefore persuaded that the European Union had to take better account of the expectations of its citizens, and that it should grant more rights for participation, control and accountability in European decision-making to civil society and, in particular, to young people. Furthermore, Convention members perceived the necessity of strengthening the link between legitimacy and efficiency. In view of the overdeveloped constitutional powers of governments and the "relatively meagre" level of democratic self-governance in the EU, 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 its decision-making efficiency and effectiveness. It seeks to effect a rapprochement between citizens and the former union of states, improving their opportunities for participation and representation in a multi-layered, semi-parliamentary system that aims at balancing the expansion of qualified majority with consensus procedures. This construction rests on three pillars:

- replacement of the intergovernmental European Union by a "Union of citizens and states";
- opportunities for participation and representation in a multi-layered semi-parliamentary polity;
- 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. In any case, if the member states are to work together in a framework of European governance that deeply intervenes in their internal social fabric thus provoking resistance and protest movements, they need to become more responsive to their citizens and publics:

---

56 See Moravcsik 2002:605
57 The Laeken Declaration includes three questions related to the issue of democratic legitimacy posed to the members of the Convention: Firstly:, How to strengthen the democratic legitimacy and transparency of the three EU organs in the framework of a „clear, effective, democratically controlled community approach“? Secondly: What is the role of member state parliaments in strengthening the democratic legitimacy in the EU and which initiatives could be taken to develop a European public sphere? The final question relates to the "democratic challenge" of how "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.
58 CONV 14/02, S. 5
59 CONV 60/02, S. 6
60 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, was conceived as a matter of responding to citizens’ expectations and as the idea to foster participation and control rights that civil society and young people want to enjoy in European decision-making processes (id., p.5). The “Union of States” was replaced by a formula responding to such demands— 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 the two (elements) 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.”

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 new “Union of Citizens” is based on provisions such as

- 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 include specific rights and duties, among them active and passive electoral rights 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; (duties?)
- 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)62;
- 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;

61 Schmierer, in this volume.
62 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 on the part of the Union to implement the constitution. The requirements of such a special procedure as well as the conditions of citizen initiatives shall be laid down in a European law.
The TCE 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 makes progress towards 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 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. Said that, the TCE answers the question as to who is considered the subject of a democratically legitimate union. Furthermore, it seeks to overcome the ”treaty vs. constitution” controversy as a false alternative: Citizens and states are equally constitutive of this Union, complementing and completing one another. The preamble, by establishing a Union founded not only on states but equally on citizens, chooses a formulation with a high symbolic value. As John Erik Fossum notes, this formula could turn into an anchor for a ”constitutional patriotism” beyond the state that might be compatible with the ”deep diversity” characteristic of the European Union.

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

The second controversial theme in the constitutional debates concerned an appropriate strategy for reinforcing the input-based legitimacy of European governance and posed the question of how much weight representative, rather than participatory, procedures and standards should have. The consensus reached by the Convention and the agreement negotiated by the intergovernmental conference indicate no clear answer to this question. They 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 national representative mechanisms, in no less than six plenary debates, the Convention discussed how to integrate national parliaments better into the activity of the Union without bringing them unduly into competition with the European Parliament. 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). There was general agreement surrounding the idea that national parliaments needed support in their “crucial role in safeguarding democratic legitimacy in Union

64 See id.
66 The plenary meeting was devoted to the theme ”Effectiveness and Legitimacy of the EU in exercising its tasks” (23./24.5.2002)
activities” (CONV 97/02, p. 8), and that the 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 on the "Role of member state parliaments” emphasised in its final report the multilayered conception of European governance, putting forward a framework with a double – transnational and national democratic system of divided authority, with diverse power centres. Because of the deep roots that the EU has in its member states, the national parliament was acknowledged as one of the most important mechanisms for achieving Community aims, in addition to but not in competition with the European Parliament: Both served democratic legitimising aims by assuming different tasks (CONV 353/02, p.2), enhancing the EU’s responsiveness towards citizen requests, as Convention president Giscard d'Estaing pointed out. 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 practically strengthens European citizenship 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 draft avoids the perils of a supranational parliamentary state superimposed on national democracies, 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 in 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 its 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 actions before the European Court of Justice. 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. The parliaments of the member states and the European Parliament are not in competition, since both have the same goal, although different tasks.

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", the "principle of participatory democracy", and "open, transparent and regular dialogue (of the organs) with the representative associations and civil society". Thus, the Convention constitutionalises the European Commission’s established practice of organising 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-
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).

Third, 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 are to participate in electing the Commission presidency (Art. I-27 Abs. 1 VVE). The Constitutional Treaty reinforces the European Parliament’s role as co-legislator to 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 TCE broadens the number of joint decision procedures to 84 (27,72%). These modest advancements notwithstanding, in all events the IGC renegotiated to increase the number of areas without any participation of the European Parliament to 111 – against the Convention draft that had sought to reduce that number from 98 to 90.

The concept of “multi-layered, semi-parliamentary governance” is suggested here to capture the novel construction of a “Union of Citizens and States” which is not meant to 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 of checking and balancing participatory governance by means of 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 at the member state level as well as at the European level. Representative, deliberative bodies enhance parliamentary checks on participative governance controlled by the Commission, and on intergovernmental decision-making processes by the Council. Arguably, by consulting the TCE, member state citizens will gain a better chance of understanding the European constitutional arrangements than by any other Treaty reform adopted by the EC/EU, so far.

However, in this framework of European multi-layered governance, sub-national parliaments with legislative powers are missing as control mechanisms which, for ensuring the proper implementation of the principle of subsidiarity, would need to receive early information through the Commission as well. Their inclusion remains still a desired but as yet unachieved objective.

3.3 Balancing majority rule and consensus procedures

The near failure of the IGC 2003-4 was neither provoked by the persisting, albeit modestly reduced, asymmetry between the range of those areas of decision-making delegated to the Council and the extent (roughly halved) of those areas where the European Parliament participated in joint decision making. Nor was the crisis of the Brussels summit of 13

73 The 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 in relation to the advisory activities of the European Parliament and for Council legislation. Art. 36 firmly established a unified right to vote in European parliamentary elections. Compare Casini 2003.
74 See Maurer 2004:4.
75 In using the term “semi-parliamentary”, I follow Anne Peters’ suggestion; see Peters 2003.
76 See CONV 798/03, p.3.
December 2003 due to arguments over the legitimacy deficits pertaining to a still top-heavy executive system of governance. The most divisive theme in IGC negotiations proved to be the issue of Council decision-making powers itself. The Convention had planned a substantial expansion of the areas under qualified majority rule, compared to those under unanimous decision-making.\textsuperscript{77} Moreover, it provided that the system of weighted voting in the Council Decision from 1 November 2009 onwards should be replaced with a "double majority".\textsuperscript{78} In the preamble, The Convention draft had 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."\textsuperscript{79}

Without success. On the issue of the double majority the Convention draft met stubborn resistance by those IGC participants who feared to lose most. The governments of member states with intermediary population strength - Poland and Spain – vetoed the new system since they expected to become marginalised by the most heavily populated members, namely Germany, France and the UK. Such fears might have been unfounded before 2004: In fact, the experience of the EU-15 indicates that only about 25% of all majority decisions were not unanimous. But the reality in an enlarged EU promised to be rather different. At any rate, after the electoral success of the Spanish Socialist Party with its pro-European stance in March 2004, and under the pressure of the Polish public on its government the way was free for the IGC under the Irish Presidency 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 crafted expands the unanimity procedure\textsuperscript{80}, and raises the requirements for qualified majority in the European Council.\textsuperscript{81} Symbolically important, the TCE that is submitted for ratification drops the reference to majority democracy in the preamble. Considering the argument made by Arend Lijphart on the correlates majoritarian vs. consensus democracy, the Constitutional Treaty can be said to be less majoritarian and more consensual and, hence, to better fit the characteristics of the European multinational society.\textsuperscript{82}

Yet, it must be viewed in a critical light that, in the new constitutional order, the European Parliament remains excluded from numerous decisions taken by the Council\textsuperscript{83}, and in

\textsuperscript{77} 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.

\textsuperscript{78} 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 lays down that starting from 1 January 2005 each member of the Council can demand an examination of the representativeness of Council decisions if less than 62% of the population were represented in it.

\textsuperscript{79} Quoted after Thukydidies II, 37; Compare Preamble of the Convention draft.

\textsuperscript{80} The number of subjects decided under unanimity increases from 78 to 92, while the number of majority procedures is extended from 175 to 182.

\textsuperscript{81} 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).

\textsuperscript{82} See: Lijphart 1984; Schmidt 2000.

\textsuperscript{83} 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.
particular from a large range of areas under qualified majority. 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 insofar as they strike a balance between majority and unanimity elements in decision-making. Yet, 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. Multi-layered semi-parliamentarism: assessing the EU polity’s democratic legitimacy

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 realm: “democratic intergovernmentalism”, “radical republican democracy”, “cosmopolitan democracy”.

of freedom, security and justice and 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.

84 The following subjects fall under Council majority decision-making but outside parliamentary co-decision: 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.


86 The liberal-internationalist image of transnational democracy privileges a state-centric, reformist, pluralist notion of democracy premised on the 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; see (McGrew 2003: 11ff.

87 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 fate” and ‘multiple sites of power”; they dismiss the need for ‘sovereign’ or centralised 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 collectives from the local to the global scale. Output legitimacy is measured in terms of public good, community values, collective identity (McGrew 2003: 16ff.).

88 The 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
Table 2: Legitimacy Standards of Transnational Democracy

<table>
<thead>
<tr>
<th>Model</th>
<th>Legitimacy standards: legal, input, output and legitimation90</th>
</tr>
</thead>
<tbody>
<tr>
<td>democratic inter-</td>
<td>1. rule of law and civil rights</td>
</tr>
<tr>
<td>government-</td>
<td>2. National elections and formal representation</td>
</tr>
<tr>
<td>talism</td>
<td>3. effective supranational problem-solving</td>
</tr>
<tr>
<td></td>
<td>4. Intergovernmental Conferences; procedures of national ratification</td>
</tr>
<tr>
<td>radical republican</td>
<td>1. challenging the rule of law and national sovereignty</td>
</tr>
<tr>
<td>democracy</td>
<td>2. active citizenship and effective representation, taking inequalities into account; multiplicity of self-governing collectivities from local to global</td>
</tr>
<tr>
<td></td>
<td>3. public good, community values, collective identity</td>
</tr>
<tr>
<td></td>
<td>4. constitutionalism by direct democracy and self governance</td>
</tr>
<tr>
<td>cosmopolitan democracy</td>
<td>1. human rights and rule of a cosmopolitan democratic law</td>
</tr>
<tr>
<td></td>
<td>2. participation of progressive transnational social forces; double - transnational and territorial - democratization</td>
</tr>
<tr>
<td></td>
<td>4. heterarchical (non- hierarchical) system of divided authority, with diverse power centres shaped by democratic law</td>
</tr>
<tr>
<td>deliberative (discursive)</td>
<td>1. transnational civil society dialogue and control over the terms of political discourse and the operation of governance</td>
</tr>
<tr>
<td>democracy</td>
<td>2. Right of all-affected to a voice in public decisions which impinge on their welfare or interests</td>
</tr>
<tr>
<td></td>
<td>3 transnational public sphere of democratic deliberation, non-domination, participation and public deliberation</td>
</tr>
</tbody>
</table>

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

The discussion in the previous three sections offers the basis for answering this question. Thus far, it has been pointed out that the consensus built by the Convention and renegotiated by the IGC has forged a hybrid model of democratic legitimacy. Lacking a more stimulating term, this was described as multi-layered, semi-parliamentary governance beyond the state. 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 is valuable in so far as it promises to secure the consent of a maximum range of its constituent parts. For enhancing democratic legitimacy beyond the state, the Constitutional Treaty encapsulates a consensus that is unprecedented in so far as it establishes the largest common-denominator for democratic life in Europe. In this respect, the Convention has made a remarkable difference. But measured by the standards of transnational 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).

89 The 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; see Dryzek 2002.

90 For the definitions of these four modes of legitimacy, see Table 1, above.
democratic theory, the European construct of a transnational democracy reveals not only strengths but also crucial weaknesses.

On the one hand, the TCE configures a hybrid construct of a transnational democracy that incorporates elements of democratic intergovernmentalism: To start with, it strengthens the prerogatives of national representative parliamentary government as it is established in almost all member states. Furthermore, it keeps Intergovernmental Conferences and national ratification procedures as the decisive mode of treaty reform. Finally, it does not depart from the prevalence of national elections and forms of representation in European institutions, although aimed at enhancing effective supra- and transnational problem-solving.

On the other hand, the TCE construction adopts essentials elements of a cosmopolitan model of democracy, namely constitutionalism and the rule of law as a framework for constructing a multilayered, dual and heterarchical democratic system beyond the state. Furthermore, it incorporates multiple sources of sovereignty, including citizenship. Yet, it is questionable whether this blend of different democratic principles will be sufficient to shape the future democratic life of Europe effectively. In fact, the constitutional construct is flawed by a weakness that might perpetuate the democratic deficits of the status quo.

By seeking to merge two major competing strategies for building transnational democracy, namely democratic intergovernmentalism and cosmopolitan democracy, the European Conventioners have missed the standards of deliberative democracy. While engaging to a limited degree with procedures of public and transparent deliberation and established a short-lived dialogue with civil society, they largely missed the opportunities to truly enhance public information and debate, let alone institutionalise a strong European public sphere. Yet, the large majority felt badly informed about the future European Constitution: For example, 60% of the interviewed persons did not know that the draft constitution provides citizens with the right to initiate legislation.

To be fair, the Convention sought to incorporate consultations with civil society into its proceedings, by opening the exclusive process of constitutionalisation, previously the domain of the European Court of Justice, national Courts and the Governmental Conferences. But - disclaimers to the contrary - the Convention debates of the 105 representatives from 15 member states and 13 applicant states became effectively accessible only to small minorities with a strong interest in European politics, with digital competences, and mastering one of the major official languages of the EU. The mass media remained reluctant towards the seminal challenge to translate constitutional deliberations for national mass public audiences. A lack of opportunities to participate was lamented by organisations from the new applicant states and especially as concerns the Youth Convention which was transformed into an "elite project". Complaints were also heard from women's organisations and EU-gender research

91 At the beginning of 2004, public support for the Constitutional project seemed unproblematic: 77% of the surveyed citizens in the EU-25 supported a European constitution, with 83% of Germans in favour (14% against); Poland: 72% (18%); UK: 51% (30%); Sweden: 58% (26%). But the Constitution was supported overproportionately by men (+5%), by the 40-54 years-age group and less the 15-24 old; more by the educated, employed, urban population (Eurobarometer No. 159, January 2004).
92 Consultations 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 organisations, human rights and women's groups.
93 Minutes and documents were available only in the official languages of the old EU-15, excluding the candidate publics without further language competences.
94 CONV 112/02; p.2
95 See Wehlitz 2003.
As well as from broad national public media. According to an Eurobarometer survey, media through which citizens wished to be better informed about the European Constitution were ranked 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%). 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.

To empower the constitutional project in the practice of European governance, the TCE needs to overcome a series of difficult tests. Needless to stress, the fate of this third stage of the European constitutional experiment – the ratification outcomes - is in all events not wholly determined by the failure by which the Conventioners, mass media and political parties have failed to conform to the standards of a deliberative democracy. As importantly, this fate will depend on the quality of the ratification processes and whether they will communicate the TCE effectively to member constituencies. Whether the Constitutional Treaty will enhance the democratic legitimacy of the European polity will be, in the final analysis, a question of its legitimation, and thus on the extent to which it will gain consent and support on the part of the citizens and their representatives in member states. Toward that end, the Constitutional Treaty needs to pass popular referenda in ten out of twenty five member states. Here, the attempts to communicate the European Constitution to the public face serious challenges.

Constitutional ratification is structured by a multiplicity of different strategies towards a constitutionalism beyond the state, from denial and indifference; over treaty minimalism; constitutional materialism; claims for semi-permanent revision; politically uncontentious low-key constitutional stealth; constitutional vindication, including a defined “finalité”; to the projection of a new constitutional point of departure. While some protest that due to the new TCE material deteriorations will outweigh by far substantive advances, others expect that the TCE will reduce the legitimacy deficit and enhance the EU’s capacity to act. Considering the cacophony of contradictory interpretations it is difficult for the lay citizen to distinguish between truth and hyperbole. As a last resort, she might take refuge to the Constitutional Treaty text, which with its 349 pages, 448 articles and supplementary annexes offers better conditions for checking rival claims than any of the more opaque and voluminous EC/EU-treaties of the past. 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.

---

96 See Mateo Diaz 2003.
97 See Eurobarometer No. 159, Januar 2004.
100 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.
101 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.
5. Conclusion

In the beginning 21st century, a major playing ground for the fourth wave of democratisation can be found in democratic experimentalism in and by the European Union. This chapter seeks to demonstrate how deeply the European polity is engaged with this experiment of reconfiguring its presuppositions for democratic legitimacy. I have argued that in its ongoing process of constitutionalisation, the EU has moved beyond liberal democratic intergovernmentalism and has embraced principles of a cosmopolitan strategy of democratisation beyond the state. Furthermore, in an unprecedented process of transnational deliberation, political elites have re-constructed the European polity as a multilayered system of semi-parliamentary governance. This construct appears always less *sui generis* the more it approaches the standards of democratic legitimacy familiar from nation-state models. Thus, the „cosmopolitan Europe“ that Ulrich Beck and Edgar Grande have described as „the last realist utopia“ in Europe and a „vision“ for the future of the European Union of States already is more than an idea. Over the past five years, in the process described here as „postnational constitutionalisation“, this idea has become translated into the project of re-constituting the enlarged European Union as a democratic polity beyond the state. Thus far, the framing of this Constitutional Treaty project 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 not lived up to its potentials. If it continues to leave behind both deliberating citizens and a public sphere, the European constitutional project, despite its many achievements, risks remaining just one more idea, or less: a mere piece of paper.

References:


---

104 See Beck and Grande 2005.


DOCUMENTS:
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)