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Three conceptions of the European Constitution

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Abstract

In this essay, it is argued that legal and political argument on the European constitution requires putting forward a *normative* conception of the constitution. Next to the formal and material understandings of the constitution, there is a need for a conception that determines the legitimacy basis of constitutional norms. This has considerable implications for the way in which constitution-making takes place. In particular, a critical *normative* conception of the constitution would render clear that any legitimate attempt at changing the basic constitutional norms presupposes a reinforced type of legitimacy. That has *not yet* been met in the European Union, but it *might be attained* in forthcoming *constitutional moments*.

Three Conceptions of the European Constitution

Agustín José Menéndez

“systems of law for (...) a multitude of human beings (...) which, because they affect each one another, need a rightful condition under a will uniting them, a constitution”.

Immanuel Kant

“On retrouvera nécessairement beaucoup des choses du premier projet de Communauté politique européenne dans les tentatives ultérieures. L’une d’elles, un jour, s’accordera pleinement aux circonstances et sera la bonne. Le texte qui fut remis aux six gouvernements le 10 mars 1953 aura été le modèle de tous les autres”.

Jean Monnet

“The constitution thereby acquires the procedural sense of establishing forms of communication that provide for the public use of reason and a fair balance of interests in a manner consonant with the regulatory need and context-specific issue”.

Jürgen Habermas

Introduction

The Laeken European Council launched a major process of reform of the primary law of the European Union. The ‘Declaration on the future of the European Union’, annexed to the Presidency Conclusions of the said Council, states that the Union stands at “a defining moment in its existence”, establishes a substantive reform agenda, and sets up a procedure to undertake the changes.¹ Not only the contents of the agenda are of an overt constitutional kind, but the reform procedure is more similar to a constitution-making process than to established Treaty reform procedure.² The reform agenda includes questions such as the status of the Charter of Fundamental Rights of the European Union, the division of competencies between the different levels of government and the role of national parliaments in the supranational polity. Moreover, what can be labelled as the ‘Laeken process’ is not circumscribed to the usual intergovernmental conference, but it structured around several steps. These include a (1) wide

¹ Declaration on the future of the European Union, available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

² On Treaty reform, see John Erik Fossum, ‘Constitution-making in the European Union’, in Erik Oddvar Eriksen and John Erik Fossum, *Democracy in the European Union. Integration through deliberation?*, (London, Routledge, 2000), pp. 111-40.

ranging public debate; (2) the conveyance of a preparatory Convention partially resembling a constitutive assembly; (3) the undertaking of national debates following the proposal made by the Convention; (4) an Intergovernmental Conference; (5) ratification in each member state. The representative character of the preparatory Convention (made up of representatives of the national and European parliaments, personal representatives of national governments and representatives of the major European institutions) has attracted considerable attention and is bound to change the ways in which the Intergovernmental Conference will unfold.³

This article aims at clarifying in which sense the Laeken process can make a constitutional difference. This requires, first, an analysis of the present constitutional shape of the Union (Part I). When we discuss whether a European Constitution is feasible or desirable, we need first to know what we mean by a constitution. To avoid talking past each other, some analytical clarity is needed. This can be brought about by means of distinguishing between the formal, the material and the normative conceptions of the Constitution (Section 1).⁴ The three conceptions are analytically complementary, although it is also argued that ultimately, the normative conception of the Constitution is the most relevant one. On such a basis, an account of the present state of the European legal order is put forward (Section 2); it is considered whether the Union has a constitution in a material, formal and normative senses. It is claimed that there is not such a thing as a *complete formal constitution* of the Communities and that the Union does not have a democratic constitution, that is, a constitution in the light of normative democratic theory. This is so despite the fact that we can make reference to a basic set of legal materials which are interpreted by Courts as the *material Constitution* of Community law, both in a structural and in a substantial sense. This is what is meant when it is said that the European Communities have a Constitution.⁵ Next, we can distinguish three different

³ This is, however, not the only, and maybe not even the major, novelty of the ‘Laeken process’, as it is argued in Part II of this article.

⁴ One could say that the concept of constitution is thus to be defined at the crossroad of critical normative theory and the *common constitutional traditions of the Member States*, to use a well-known expression of the European Court of Justice. This strategy seems to be not very dissimilar from the one suggested by Sartori; see Giovanni Sartori, ‘Constitutionalism, A Preliminary Discussion’, 56 (1964) *The American Political Science Review*, pp. 853–64, at p. 858.: “In my view, definitions are not private conventions of each speaker, but (whenever they have a historical referent) storehouses of past experience shaped by former practice. We bring them up to date, but their ultimate truth-value lies in the fact that they tell us how to behave *as experienced people* in matters regarding which each generation starts by having no experience (...) In particular, *the* definition of constitution which has objective worth is the one that appears to be the outcome of a long and painstaking process of trial-and-error concerned with the question: How can we be governed without being oppressed?”.

⁵ See Section 2 and references in fn 40.

rationales for having a European Constitution (section 3). Part II aims at reconstructing the Laeken process in a constitutional light (section 5) and to point to some of the potentialities and risks involved in the process (section 6). The paper leads to a simple but perhaps not irrelevant conclusion. The Union does not have a proper democratic constitution and it is not very likely to get one by the end of the Laeken process. For such a reason, it is simply inadequate to make use of the evocative power of the term constitution when we are not *democratically writing a democratic constitution*. The Laeken process is best understood as an attempt at laying the ground for an eventual democratic constitution for Europe.

Part I: The Constitution of Europe

I. The different conceptions of the constitution: formal, material and normative

The concept “constitution” is used in many different (sometimes even contradictory) ways in political and legal discourses. Such a usage is not peculiar to this particular concept, but one could argue that is characteristic of all political terms, the definition of which is part and parcel of political struggles.⁶ The plurality of conceptualisations of the term constitution is rather problematic when we enter a constitution-making process. This is so because the different conceptions of the constitution lead to very different interpretations of the procedure and the agenda of constitution-making, and also to different preferences concerning the outcome of constitutional deliberation. Such assessment applies with special intensity to an eventual European constitution-making process. While it is increasingly clear that the constitutional traditions of the Member States of the European Union uphold a common set of values,⁷ there are differences within the national constitutional traditions concerning the conception of the constitution (including on the adequate process through which a constitution is written).⁸

⁶ Stevenson, ‘Persuasive Definitions’, 47 *Mind* (1938), 331–50; Alexy, *A Theory of Constitutional Rights*, (Oxford, Oxford University Press, 1993), p. 138; and Carlos Santiago Nino, *Ética y Derechos Humanos* (Ariel, Barcelona, 1989), p. 15. For the constitution, see Giovanni Sartori, *supra*, fn 5.

⁷ This is rendered clear by the development of the concept of “common constitutional traditions” in the case law of the European Court of Justice, especially on what regards the protection of fundamental rights in Union law. The solemnly proclaimed Charter of Fundamental Rights of the European Union renders this even more explicit.

⁸ See Maurizio Fioravanti, *Los Derechos Fundamentales, Apuntes de Historia de las Constituciones*, Madrid, Editorial Trotta, 1996, pp. 25–53; *Constitucion. De la Antigüedad a nuestros días*. Madrid, Editorial Trotta, 2001; with Stefano Mannoni, ‘Il Modello Costituzionale Europeo. Tradizione e prospettive’ in Gabriella Bonacchi (ed.) *Una Costituzione senza stato?*, Bologna: Il Mulino, 2001, pp. 23–70. See also

On the one hand, some constitutional traditions, specially the British one, are rather at odds with the idea of an overt process of constitution-making. The Constitution is rather regarded as the outcome of a long evolutionary process. On the other hand, most continental traditions endorse explicitly the idea of a positivised constitution, or what is the same, a constitution the value of which is necessarily associated with the fact that it has been consciously decided.

If only for this reason, a basic, even if incomplete, conceptual clarification of what we mean by a constitution, and what we intend by making or amending *our* Constitution, is essential for the success of any constitutional debate, and especially for the success of the European constitutional debate.

A) The formal conception of the constitution

The *formal constitution* can be defined as the set of legal norms contained in a document (or compilation of documents) that is referred as the constitution in *social practice*.

The idea of a formal constitution is intrinsically modern. Modernity came hand in hand with the identification of law with written law.⁹ Liberal revolutions in continental Europe further tied the concept of law to the idea of systematic bodies of legislation (the *Code Civil* being the archetypical example of such association).¹⁰ Within this *enlightened* tradition, both in continental Europe,¹¹ and in the United States,¹² the association of *the* constitution with *one single* document came about.

Cristopher Möllers, 'Pouvoir Constituant—Constitution—Constitutionalization. Constitutional Concepts in Europe', especially section II; *mimeo*, on file with the author;

⁹ H L A Hart, *The Concept of Law*, (Oxford, Oxford University Press, 1961), p. 95 associates modernity and legality: "[T]he first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is a very important one: what is crucial is the acknowledgment of reference to the writing or inscription as *authoritative*, i.e. as the *proper way* of disposing of doubts as to the existence of the rule". But one could argue that pre-modern law might not be written, or only partially written, and still it was founded on a social practice which regarded as *authoritative* certain sources of law.

¹⁰ See, among others, R. C. Van Caenegem, *European Law in the past and the future*, (Cambridge, Cambridge University Press, 2001), pp. 1ff

¹¹ See, for example, António Manuel Hespanha, *Introduzione alla storia del diritto europeo*, Bologna, Il Mulino, 1999, pp. 201ff. See also Fioravanti, *supra*, fn 8; and Raul C. Van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge, Cambridge University Press, 1995.

¹² The United States Constitution of 1787 became in time the 'archetypical' constitution. The Federalists supported both a written constitution and adherence to the *common law*. The latter was not an obvious choice, as the reasons in favour of a constitution would also support a thorough codification of ordinary law. However, the federalists preferred to avoid such an exercise as they feared that this might undermine the protection of vested property rights. It would be not fully inaccurate to claim that Shays' rebellion was causally more effective in convincing pro-federalists than the Federalist Papers. See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, New York, MacMillan, 1913, pp.

The formal conception stresses three basic features: the written character of the document, the singularity of the constitution and the relevance of the social practice that refers to the document *as the constitution*. Firstly, there must be a physical object which can be referred as the constitution, be it a piece of paper or parchment, or an engraving in stone or in some other material. Secondly, the formalistic understanding of the Constitution comes hand in hand with a *monogamic* relationship between a document identified as the constitution and the constitution of a given political community. We could say that it implies the belief in *one legal system, one constitution*. This is closely associated, as Kelsen noted,¹³ with the fact that the formal conception of the constitution brings about legal certainty.¹⁴ Thirdly, the formal conception of the Constitution presupposes not only (and even not necessarily) that the authors of the constitution label itself as such, but a widespread social practice that identifies the document with the constitution of the given society. Therefore, the formal understanding of the constitution has a clear sociological slant, to the extent that ‘social practice’ is essential in determining which text is to be deemed the constitution.

B) The material conception of the constitution

The material constitution can be defined as the *norms of social interaction* that are regarded as basic norms according to *social practice*. Legal scholars tend to refer to the material constitution in a more narrow sense, namely, as the norms that can be considered as *basic norms of the legal order* of a given community according to the social practice of the *legal actors of the said community*.

52ff. See also See Federalist, 12 (edition of Isaac Kramnick, Harmondsworth, Penguin, 1987, pp. 137-8): “A nation cannot long exist without revenues. Destitute of its essential support, it must resign its independence, and sink into the degraded condition of a province”. See also J Paterson, in *Hylton*, supra, fn. 2, at 178: “The government of the United States could not go, under the confederation, because Congress was obliged to proceed in line of requisition (...) Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional”. Paterson established a direct comparison with the Netherlands.

¹³ Hans Kelsen, *General Theory of Law and State*. (Cambridge (MA), Harvard University Press, 1945), p. 124: “[A] solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which is to render the change of these norms more difficult”.

¹⁴ Such certainty is not infrequently reinforced by the provision of specific procedures to produce a new document which should be labelled as the constitution. However, such special procedures are based on normative reasons which require rendering the constitution *special vis-à-vis* ordinary laws. The same normative reasons explain that the formal conception of the constitution tends to be associated with a punctual characterisation of the constitution-making process. There is a point or a reduced number of points in time in which the text of the Constitution is solemnly ratified and proclaimed as such constitutional text. Only in such a way it is possible to preserve the legal certainty stemming from the specific *constitutional form*.

As it is the case with the formal conception of the Constitution, the material understanding refers to social practice within the relevant society. But instead of considering relevant the social practice that labels something *as the constitution*, it focuses on what social actors regard as being the *basic norms* of the given society. Thus, it considers social practice in a wider sense in order to determine which are the basic rules that structure the society and/or its legal order.

It must be noticed that the concept of the material constitution emerges either in the absence of a *formal* constitution or in opposition to the concept of a formal constitution. In the first sense, the concept has been crucial to British legal and political academia. Social practice in the United Kingdom converged around the premise that *there was not such a thing as a formal constitution in Great Britain*.¹⁵ But when legal and political scholarship became a respectable academic enterprise in the XIXth century, British legal scholars reconstructed the *living constitution* in order to give form and content to the disciplines of administrative and constitutional law.¹⁶ In the second sense, the material conception of the constitution has proved to be a major critical tool. Such a critical edge can be used for different political purposes, ranging from the undermining to the vindication of formal democratic constitutions. This can be illustrated with two examples. First, opponents of democratic constitutionalism resorted to the concept of the material constitution in order to subvert the authority of the democratic constitution. A clear example of that is the conceptualisation of the material constitution offered by Mortati.¹⁷ While the formal constitution, which actually restrains the exercise of state power, is denounced as mere “transitory form”, a material conception of the constitution is determined by reference to the function of the constitution. The material constitution corresponds to the

¹⁵ But see Neil D. MacCormick, ‘Does the United Kingdom have a Constitution? Reflections on MacCormick vs. Lord Advocate’, 29 (1978) *Northern Ireland Legal Quarterly*, pp. 1–20. See the judgment on *John MacDonald MacCormick vs. Lord Advocate*, 1953 S.C. 396 [Court of Session]. The background to the case is explained in an extremely entertaining way by John MacCormick, *The Flag in the Wind*, Wackburg, London, 1950.

¹⁶ A similar kind of motivation can be found in the Germanic area, where the process of codification of private law was unsuccessful until the very end of the XIXth century, something which fostered the dogmatic reconstruction of the law, the elaboration of legal concepts. This is what underlies Christopher Möllers’ characterisation of German and British conceptions of the constitution as the formalisation of already existing norms, opposed to the French and American models, in which the constitution establishes a new political order out of political *fiat*. See *supra*, fn 8. But perhaps one should clearly differentiate between the conception of the constitution in political culture and the conception of the constitution in legal dogmatics. In Germany, the latter and not the former, is rather close to the British conception of the Constitution.

¹⁷ See his *La Costituzione in senso materiale*. Giuffrè, Milano, 1998.

essence of the state as “stable, authoritarian, coercive, necessary and total”.¹⁸ Such a conception enhances the power of authoritarian forces (no longer subject to the volubility of the people’s will) and is said to contain the true constitutional order of the community. Such a move clearly echoes the older distinction between the formal and the material conceptions of law, which Laband championed with the instrumental purpose of undermining the power of Parliament.¹⁹ Second, the distinction between the formal and the material constitution can be used to denounce the substantial undemocratic character of a regime, disguised by the appearances (but merely appearances) of the formal constitution. This is the basic move of Ferdinand Lassalle in his famous pamphlet *What is a Constitution?*. He criticised the Bismarckian political order by means of denouncing the gap between the formal and the material constitutions.²⁰

The legal understanding of the material constitution is but a specialized variant of the material understanding of the Constitution. The main peculiarity of the legal version is that the relevant social practices are those of legal actors (or scholars) themselves, and not the practices of society at large.²¹ Within the legal understanding, we can distinguish two different sub-conceptions of the material constitution. Firstly, some authors emphasise the *structural elements* of such a constitution (the structural material constitution). Thus, Hans Kelsen offers a characteristically legal twist to the material conception of the constitution by defining the constitution as “[t]hose rules which regulate the creation of general legal norms, in particular of the statutes”.²² He assumes that such rules are identified by legal scholars.

¹⁸ Quoted from the Spanish translation, *La Constitución en sentido material*, Centro de Estudios Políticos y Constitucionales, 2000, pp. 62–3. See also Massimo La Torre, ‘The German impact on Fascist Public Law Doctrine- Costantino Mortati’s Material Constitution’, in Christian Joerges and Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe*, Oxford, Hart Publisher, pp. 305–20.

¹⁹ Paul Laband, *El Derecho Presupuestario*, Instituto de Estudios Fiscales, Madrid, 1979.

²⁰ Ferdinand Lassalle, *¿Qué es una Constitución?*, (Barcelona, Ariel, 1977), pp. 57, and especially p. 94: “De nada sirve lo que se escriba en una hoja de papel, si no se ajusta a la realidad, a los factores reales y efectivos de poder”; also at p. 97: “los problemas constitucionales no son, primariamente, problemas de derecho, sino de poder; la verdadera Constitución de un país sólo reside en los factores reales y efectivos de poder que en ese país rigen; y las Constituciones escritas no tienen valor ni son duraderas más que cuando dan expresión fiel a los factores de poder imperantes en la realidad social: he ahí los criterios fundamentales que deben ustedes retener”).

²¹ In the Kelsenian move, this is what allows legal theory to remain pure, uncontaminated by social, political and ideological motives. Hans Kelsen, *Introduction to the Problems of Legal Theory*, Oxford, Oxford University Press, p. 7: “It characterises itself as a ‘pure theory of law’ because it aims at cognition focused on the law alone, and because it aims to eliminate from this cognition everything not belonging to the object of cognition, precisely specified as the law. That is, the Pure Theory aims to free legal science of all foreign elements”. In the Hartian sense, this is related to a sociological approach, in which the view of the officials of the legal system is determinant. See H L A Hart, *The Concept of Law*, (Oxford, Oxford University Press, 1961, pp. 114–5).

²² Kelsen, *supra*, fn 13, p. 124.

Under a different conceptual framework, H L Hart came to a similar point. The Oxonian philosopher defined law as the union of primary and secondary rules. Among the latter, he included the *rule of recognition*, which determines the feature or features that are taken as a conclusive affirmative indication that a given norm is part of the legal order.²³ The structural material constitution is closely associated to the idea of an *autonomous* legal system, that is, a system that decides for itself which norms are part or are not part of the legal system.²⁴ Secondly, some other legal scholars stress the *substantial elements* of the material constitution (substantial material constitution). This is especially so in those states where courts openly review the constitutionality of statutes. In those legal systems, legal scholars tend to identify the material constitution with the substantive contents that are mandated or prohibited by the Constitution, or what is the same, with the *canon of constitutionality*.

C) The normative conception of the constitution

The normative constitution is composed of those norms that present certain properties which are normatively relevant.

The basic insight underlying the normative conception of the Constitution can be derived from Article 16 of the Declaration of the Rights of Men and of the Citizen of 1789:

Any society in which the protection of rights is not guaranteed and the separation of powers is not established, has no Constitution²⁵

According to the said article, what is the constitution is not something to be determined by mere reference to social practice. ‘Ideal’ standards (in the sense of counterfactual) play a major role. No matter what the vast majority of the people say, a society in which rights are not protected and the powers of the state are not separated has no constitution. This *emancipation* from facts is the key element in the normative conception of the constitution. The concrete ‘ideal’ standards to be considered vary

²³ The other secondary rules in Hart’s model are (1) *the rules of change*, which determine the processes through which primary norms are altered and (2) *the rules of adjudication*, which empower given institutions or individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. See H.L.A. Hart, *supra*, fn 14, pp. 95-7.

²⁴ One thing is for a legal system to be autonomous, and another thing is to be closed. A post-positivism conception of law cannot accept the claim that legal systems are closed to general practical reasoning. See Robert Alexy, *An Argument from Injustice*, Oxford: Oxford University Press, 2002.

²⁵ In the original version, article 16 states that “Toute société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution”.

with different normative conceptions of the Constitution. There could be as many normative conceptions of the constitution as there are normative theories, that is, theories about what is *right*. But one can distinguish two main families of normative conceptions along the usual procedural /substantial divide. A substantive normative conception of the constitution will point to the *intrinsic normative* qualities of constitutional norms. Therefore, the relevant normative properties will be related to a substantial conception of the good. Liberist conceptions of the constitution consider as constitutional the basic norms protecting the right to private autonomy. A standard example of such a *substantial normative* conception of the constitution is that put forward by Epstein's.²⁶ In its turn, a procedural normative conception of the constitution will refer to the qualities of the process through which the norms were agreed upon. That is, all norms approved through a given process will be defined as constitutional. Democratic conceptions of the constitution could be said to be standard examples of procedural conceptions of the constitution. But also conceptions which consider constitutional the norms produced by wise legislators, for example, will qualify as procedural. It goes without saying that the procedural/substantive conception points to basic types. All conceptions of the constitution combine procedural and substantive elements, only they put more or less emphasis on one or the other.

Among the different normative conceptions of the Constitution, special attention should be paid to the *deliberative democratic* conception. Among the many reasons for doing so, it will suffice here to assert that the deliberative democratic conception is the most adequate theory in order to reconstruct most of the constitutional traditions of the member states of the European union and of the Union itself. In the remaining of this section, I will consider the main elements of the democratic deliberative conception in some more detail.

The deliberative-democratic conception of the constitution defines as constitutional those norms that meet the highest standards of democratic legitimacy. Or what is the same, constitutional norms are those norms approved through processes of deliberation and decision-making in which citizens have had a right to participate in a meaningful sense, and for such a reason, they can see themselves as authors of the said norms.

The democratic principle of political legitimacy requires that all those affected by common action-norms should have the right to participate in the

²⁶ See Richard Allen Epstein, *Simple Rules for a Complex World*, Cambridge, Harvard University Press, 1995.

deliberation and decision-making of the said norms.²⁷ Thus, the democratic principle is clearly associated to the idea of the formation of the common political will in a way which is respectful of the autonomy of all citizens.²⁸ This *democratic* intuition seems at odds with the basic implication of the affirmation of constitutional norms, namely, the existence of mandated and required contents of common action norms. While the democratic principle seems to affirm the free formation of the common will, constitutionalism requires enforcing certain contents even against the common will.²⁹

The conflict can be sorted out if we proceed in five steps.

Firstly, social integration in modern societies cannot be achieved without having resort to law.³⁰ This implies that the discourse principle³¹ must be further specified into the democratic principle, which states that all those affected by common action norms should have the right to have a say in the deliberation and decision-making of the said norms. Common legal norms are thus identified with statutes, that is, legal norms.

Secondly, a literal understanding of the principle will not only protect the *public autonomy* of citizens, but it will be rather demand the effective exercise of such political autonomy. A considerable Some degree of *civic virtue* will be required.³² But this implies tilting the balance between public and private autonomy too much in favour of the latter, something that creates the risk of emptying the scope of private autonomy.³³ This is the main reason that explains why the democratic principle is further specified into the *principle of legality*, which affirms that the representatives of all those affected by statutes should have the right to have a say in the deliberation and decision-making of statutes. This allows the establishment of a process

²⁷ Jürgen Habermas, *Between Facts and Norms*, Cambridge, MIT Press, 1996, pp. 110.

²⁸ Ibid, pp. 84ff.

²⁹ Such intuition tends to be regarded as confirmed by concrete empirical instances in which *actual constitutional provisions* turn themselves into obstacles to a clearly democratic will. When the constitution stands in the road of a landslide democratic majority, the tension between the democratic principle and constitutionalism seems too obvious to be denied. But is that so?

³⁰ Ibid, p. 460. A good deal of the literature on the obligation to obey the law (and more generally, on political obligation) does not pay sufficient attention to the central role played by law in social integration. The basic endorsement of autonomy leaves use with no option but to have resort to law in our social and political interaction. This does not mean that there is any intrinsic legitimacy proper of the form of law, but that we cannot opt out from law. I expand on this in *Justifying Taxes*, Dordrecht, Kluwer, 2001, pp.220ff.

³¹ Habermas, *supra*, fn 27, p. 107.

³² Philip Pettit, *Republicanism : A Theory of Freedom and Government*, Oxford, Oxford University Press, 1997; Maurizio Viroli, *Republicanism*, New York: Hill and Wang; and John Maynor, *Republicanism in the Modern World*, Cambridge, Polity Press, 2003.

³³ Bruce Ackerman, *We the People: Foundations*, Cambridge, Harvard University Press, 1991, p.11 and 28.

of law-making which does not require a permanent political mobilisation of citizens.

Thirdly, we must consider that representation, even if understood as democratic representation, presents considerable risks. Any chain of representation, even if short and transparent, creates the conditions under which the representatives can act contrary to the will of those who they represent. This explains the main reason why the principle of legality must be further spelled out. We should distinguish, at the very least, between the constitution and ordinary statutes. Constitutional norms will be those legal norms that meet the highest standards of democratic legitimacy, those norms that were elaborated through demanding processes of deliberation and decision-making in which most citizens actually exerted their political autonomy. Ordinary legal norms (*statutes*) will meet the minimum democratic requirements, but they would be better regarded as provisionally legitimate because they are not as intensively legitimate as constitutional norms.³⁴ Their legitimacy will only be complete if they are in compliance with the constitutional norms established in the higher track of democratic law-making.

Fourthly, the democratic principle presupposes a political community in which all citizens want to acknowledge and respect the equal political rights of other citizens. Such rights represent the basic substantive values which constitute democracy. Even if such rights can only be properly realised through their positive affirmation by the law, their validity is not dependent on their being endorsed by the democratic process.³⁵ They point to a *thin substance*³⁶ which is the core of any *democratic constitution*. This thin substance is the most important part of the Constitution. Its affirmation is not in contradiction with the democratic principle, but simply reinforces it while constraining it.

Fifthly, the remaining contents of any positive constitution must be seen as reflecting basic *ethical choices* of a given political community. The legitimacy of such choices *constraining* the ordinary legislature stems from the fact that such contents have been established through law-making process

³⁴ One could refer to further refinements of the principle of legality; the phenomenon of decrees-laws or legislative decrees constitute examples of how the democratic principle needs to be implemented differently in order to preserve itself; other modalities of the principle of legality, which have only been partially acknowledged by legal theory, correspond to budgetary laws, to labour laws; and in many democratic states one finds specificities associated to national minorities or special territories, such as islands.

³⁵ See Frank I. Michelman, 'Constitutional Authorship' in Larry Alexander, *Constitutionalism. Philosophical Foundations*, Cambridge, Cambridge University Press, 1998, pp. 64-98, especially at p. 91: "A 'truly democratic' process is itself inescapably a legally conditioned and constituted process".

³⁶ See David Estlund, 'Making truth safe for democracy' in David Copp, Jean Hampton and John Roemer (eds.) *The Idea of Democracy*. Oxford, Oxford University Press, 1993, pp. 71-100 and 'The Insularity of the Reasonable: Why Political Liberalism must admit the truth' 108 (1998) *Ethics*, pp. 252-75.

which ensure a more intense democratic legitimacy than ordinary legislative procedures.³⁷

Table 1 AROUND HERE

D) The relationships between the different conceptions of the Constitution

In the previous section, analytical clarification of the concept ‘constitution’ has been offered by means of distinguishing three different conceptions of the constitution, the formal, the material and the normative. It must be added that the three conceptions are neither competing nor unrelated to each other.

Firstly, and as already indicated several times, one must see the three conceptions as capturing the basic ways of referring to the constitution in legal and political debate. The purpose of distinguishing among these conceptions is analytical. They should not be seen as alternative conceptions of a single concept, but as conceptions spelling out different ways in which the term constitution is used in a relevant sense.³⁸ Additionally, and as will be done on Section 2 regarding the European Communities, the three-fold distinction allows determining in which the sense a given political community has or has not a Constitution.

Secondly, the normative relevance of the different conceptions is strikingly different. In normative terms, the most relevant question, if not the only relevant question, is whether we can talk of a constitution in a normative sense. The affirmation that a legal system has a formal or a material constitution does not have any direct normative relevance. The fact that social practice points to a given document as the constitution, or that we can reconstruct the material constitution of a given political community, does not say anything about the crucial question of whether we can say that the concrete political community has a constitution in a normative relevant sense. Moreover, one can only determine the indirect normative value of the formal and material constitution by reference to the very idea of the normative constitution. This can be illustrated by considering in some detail the relationship between the democratic conception of the constitution and the idea of a written constitution. *Prima facie*, there is some association

³⁷ Some choices are rendered legitimate by the requirement of *substantive coherence*. It is open to be decided whether certain ethical choices are to be constitutionalised or not. But once certain choices are constitutionalised, then others might be also constitutionalised to render the first ethical choice a morally acceptable one. I claim that this is the case with the right to private property and some form of progressive taxation. See Menéndez, *supra*, fn 30, pp. 151ff.

³⁸ Different normative conceptions of the constitutions stand in a relation of competition. They present themselves as the *correct* normative conception, to the exclusion of other conceptions.

between the two. This is so to the extent that the written form is necessary for any democratic constitution. Only written constitutions can be democratic, because only in that case citizens can easily know what the democratic constitution establishes, and comply with it, and also consider whether the substantial content of the constitution should be amended. This does not mean, as already indicated clearly, that the mere written form of a constitution entails its democratic character.

2. Has the European Union already a Constitution? If so, in what sense?

One of the major sources of discrepancy in the present debate around the European constitution concerns whether the European Union already has a Constitution (or not). On the one hand, several different actors have referred to the Communities as already having a Constitution. The German Constitutional Court already spoke in such a vein in 1967,³⁹ while the European Court of Justice started to do so in the 1980s.⁴⁰ Legal scholars have anticipated and echoed this claim, to the point that Joseph Weiler has argued that “one of the great perceived truisms, or myths, of the European Union legal order is its alleged rupture with, or mutation from, public international law and its transformation into a *constitutional legal order*”.⁴¹ On the other hand, the lack of a proper European constitution is sometimes said to be an essential part of the legitimacy deficit of Union.⁴² Instead of the congeries of treaties and secondary norms, what is needed is a true constitution for the Union.⁴³

³⁹ See 22 BVerfGE 293 at 296. The European Communities were said to have a constitution of their own laid down in the Treaties. Referred by Manfred Zuleeg, ‘The European Constitution under Constitutional Constraints: the German scenario’, 22 (1997) *European Law Review*, pp. 19-29.

⁴⁰ See Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, judgment of 23 April 1986, [1986] ECR 1357, paragraph 23: “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. Although, as we will see, AG Lagrange had already referred to the basic Treaties as the constitution in the 1950s. This move have already been advocated back in 1955 by Advocate General Lagrange, who in case 8/55 argued that the Treaty of the European Coal and Steel Community should be regarded as “the Charter of the Community from the material point of view (...) even though concluded in the form of a Treaty”.

⁴¹ Joseph Weiler, ‘The autonomy of the Community legal order’, now in Joseph Weiler, *The Constitution of Europe*, (Cambridge, Cambridge University Press, 1999), at p. 295.

⁴² The discussion on the democratic deficit (‘legitimacy gap’) was sparked by the remarkable little pamphlet of David Marquand, *A Parliament for Europe*, London, Jonathan Cape, 1979. The effective direct election of the Parliament resulted in the second constitutional proposal in the history of the Communities, the Spinelli project. OJ C 77, of 19.03.84, pp. 53ff.

⁴³ Jürgen Habermas, ‘So, why does the European Union need a Constitution?’, 11 (second series) (2001) *New Left Review*, pp. 5-26.

In this section, the three-fold distinction between the formal, the material and the normative constitution is used in order to interpret those claims, and to determine whether they are contradictory (as is not infrequently assumed) or simply refer to different conceptions of the Constitution (as will be argued here).

A) Does the European Union have a material constitution?

The European Union already has a material constitution. We can make reference to the basic set of legal materials which are interpreted by European courts as the *material constitution* of the Community legal order. This is true both in a structural and substantial sense of the *material constitution*.

European law is an autonomous legal order. As we will see soon, scholars disagree on whether it was so from its very inception, or whether autonomy resulted from the acceptance of the doctrine of supremacy of Community law affirmed by the European Court of Justice in the mid 1960s. Moreover, the European Court of Justice has repeatedly affirmed that there are certain substantive contents prohibited or mandated by Community law. As a result, such contents must be seen as the parameter of constitutionality of both secondary Community legislation and national legislation implementing Community law or claiming an exception from Community law.

a) The structural material constitution

The three founding Treaties of the European Communities were, formally speaking, international treaties. However, one could argue that they established the Community legal order as an autonomous legal order, separate and distinct from national legal orders. Thus, from the very inception of the Communities, it was correct to reconstruct a material constitution (both in a structural and a substantial sense) from the text of the Treaties *themselves*.

It is true that the Treaties aimed at *functional* integration of the Member States, but it is equally true that they were conceived as a stepping stone in a wider process of regional integration in Europe. Five supportive arguments can be put forward. First, many relevant documents, such as the *Schumann Declaration* and the preambles of the Treaty of Paris and the Treaty of Rome, explicitly affirm that the Communities were aimed as means to

reach a wider and political end.⁴⁴ Second, the history of European integration indicates the persistence of a political end that is furthered through different means which are selected depending on the context and open possibilities at each time. For example, a good deal of the promoters of the failed European Defence Community were also supportive of the European Economic Community and European Atomic Community.⁴⁵ Third, we have the comments of contemporary observers, not yet ‘distorted’ by knowledge of what would happen later.⁴⁶ They further support the characterisation of the Treaties as containing the basic elements of the *material constitution* of the Communities. Fourthly, the political ambitions of the Communities are reflected in the Treaties. Even if there is no open

⁴⁴ From the Schuman Declaration: “The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims”. From Preamble to the European Economic Community Treaty: “Determined to lay the foundations of an ever closer union among the peoples of Europe (...) Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts”.

⁴⁵ See Brian Simpson, *Human Rights and the End of Empire*, Oxford, Oxford University Press, 2001 on the *dramatis personae* behind the European Convention and the Communities. Richard T. Griffiths, *Europe's First Constitution*, London, Kogan Page, 2001, on the continuity between the effort in support of Defence and Political Union and the Economic Community.

⁴⁶ See, among others, Ernst B. Haas, ‘International Integration: The European and the Universal Process’, (1961) 15 *International Organisation*, 366-392, especially at p. 369: “The most successful institutions in Europe are the ‘Communities’ of the Six, constitutional hybrids which once caused nightmares to the public lawyer (...) All fundamental decisions are made by the Council of Ministers. But they are decisions based on continuous compromise, constantly informed by generally respected expert bodies with constitutional powers of their own and in constant contact with supranational voluntary associations and interest groups” and p. 369: “many of the decisions are integrative in their immediate economic consequences *as well as* in the new expectations and political processes which they imply”; U.W. Kitzinger, ‘Europe: The Six and the Seven’, (1960) 14 *International Organisation*, p.20-36. At 24: And the Six made it crystal clear in the entirely political preamble to their Treaty that coal and steel marked but a beginning, made in a chosen key sector; their aim was a full European Economic Community, set up to advance political objectives”. At 25: “When the six met again at Messina, in June 1955, they drew the lessons of the struggle over the European Defence Community. The next attack could not be too directly political (...) Here was the indispensable tactical move without which there could be no further progress toward political union” At p. 27: “Thus at the conference of Messina, on the proposal of the Netherlands delegation, the economic and the political streams of thought merged once more. The European movement returned to that economic path toward political unity chosen in 1950, which the failure of the Defence Community had shown to be of vital significance, and which was also thrust into the foreground by the impasse within OEEC”. At p. 28: To the pure economist the provisions of the Treaty may seem strange without knowledge of the course of the negotiations. But as its aims are political, so its methods are politically conditioned”; At p. 30: “The convinced Europeans for whom the Economic Community as above all a big step forward toward political unity feared that the institutionally looser free trade area would detract from the importance of the Community and that wider and more anemic plans would prevail”. At p.35: “And even if on the purely economic level we were to succeed, some interesting political problems will remain. The Six, it would seem, are determined to take the Seven at their own valuation and ignore them as a political entity (...) The Six are now planning to develop their economic co-operation in the direction of its real political aim- beginning with a coordination of foreign policy

rupture with the ‘template’ of international public law⁴⁷, there is a good number of Treaty provisions that support the autonomy of the Community legal order. Not only the institutional structure of the Communities is much further developed than that of standard international organisations (in that respect, the establishment of a Court of Justice with compulsory jurisdiction is clear), but also the *system of sources of law* foreseen in the Treaty goes clearly beyond the standard paradigm of international law as it stood in the 1950s. Fifthly, the Treaties state the basic principle of equality of Community residents (the principle of non-discrimination on the basis of nationality, article 6 TEC). The principle of supremacy of Community law can be seen as a further specification of the principle of equality. This is so because only if Community law is *supreme*, we can be sure that European residents will be equal before the law within the scope of application of community law.

However, a good number of scholars remains sceptical towards the affirmation that the Treaties already pointed to a material constitution of the Communities.⁴⁸ Such scholars doubt that the Treaties could be read as establishing a legal order distinct from public international law. Three main arguments are put forward. Firstly, the Treaties were *international treaties*. Their process of negotiation and ratification did not depart from the basic template of public international law. Secondly, the text of the founding Treaties was clearly *programmatic*,⁴⁹ rather limited to the expression of the objectives that were expected to be attained.⁵⁰ Under such a perspective, it

⁴⁷ Cf. Bruno De Witte, ‘Retour à Costa. La primauté du droit communautaire à la lumière du droit international’ in Werner Maihofer (ed.), *Noi si mura. Selected Working Papers of the European University Institute*, (Florence, European University Institute, 1986), pp. 256–89.

⁴⁸ See, for example, Pavlos Eleftheriadis, ‘Begging the Constitutional Question’, 36 (1998) *Journal of Common Market Studies*, pp. 255–72, at p. 259: “The Court’s answer to the challenge of legal integration and uniformity has been the establishment of a ‘new legal order’, according to which the requirements of Community law always take precedence over national arrangements (...) The problem with the doctrine of a ‘European Constitution’ is that it is entirely free-standing. *It was promulgated by the European Court of Justice in the 1960s without much in the way of a political debate or consultation* (my italics)”. This is not completely accurate, as it was argued before. Moreover, Eleftheriadis neglects the fact that the German Constitutional Court (who, in p. 260, he considers as representative of the German constitutional theory tradition, which has “traditionally pursued a rigorous commitment to the idea of constitutional law as a determinate body of rules and principles”) referred to the Treaties as a “constitution” in the late 1960s, before the Solange I judgment.

⁴⁹ That is difficult to realise due to the fact that most of us have been taught Community law as it stood after the decisive judgments of the European Court of Justice. But see Pierre Pescatore, *The Law of Integration*, (Leiden, A.W.Sijthoff, 1974), pp. 19: “The Treaties establishing the European Communities, especially the Treaty establishing the European Community, laid down objectives rather than formulated substantive rules”.

⁵⁰ The *programmatic* character of the provisions of the Treaties is proven by the development of the doctrine of *direct effect* of directives. If the provisions of the Treaty were sufficiently clear, the Court could have relied on the doctrine of direct effect of Treaty provisions without having the need to “extend” it to directives.

was not extremely implausible to consider that it was not binding upon national legislatures in a direct way.⁵¹ Further anecdotal evidence in this direction is constituted by the fact that the original Court (in the Treaty establishing the Coal and Steel Community) was composed not by jurists exclusively, but also by laymen, more concretely, economists. Thirdly, European integration was not based on the ‘constitution’ of a new level of politics. The signatories of the Treaties were representatives of member states entering into an international agreement. There was, it is true, a diffused support for European integration among European publics, stemming in a good deal from the partisan movements of the Second World War⁵². But such support was never tested or institutionally articulated in a proper sense.

As a consequence, legal scholars claim that the rule of recognition of Community law would have remained being part and parcel of national legal systems after the entry into force of the Treaties.

The fact that the Treaties did not lay the foundations of a European material constitution does not necessarily entail that the Union does not have a material constitution *now*. The ‘constitutionalisation’ of the Treaties would have been brought about by the acceptance of the principles of supremacy and direct effect of Treaty provisions. In two sweeping decisions, the famous *Van Gend en Loos* and *Costa* judgments,⁵³ the European Court of Justice argued that Community law should be regarded as a legal order *of its own*, which should not be conceptualised following the lines, of either national or international public law. As it is well known, the cases established the doctrines of *direct effect* of Treaty provisions and the *supremacy* of Community over national norms. Both presupposed the affirmation of Community law as an autonomous legal order. Thus, they must be interpreted as claiming that the European legal order is structured around its own material (structural) constitution. Such an affirmation implied, at a more basic level, the claim that the Community legal order had a material

⁵¹ In a way not so different from the way in which XIXth century constitutional texts were regarded as basically *programmatic*, not *legal* in a relevant sense.

⁵² This was closely related to a *politics of memory*. Two disastrous wars have exhausted the legitimacy credit of the European nation-state. To survive, the nation-state had to be rescued. European integration played a major role in the salvage, by taming the *violent tendencies* of the nation and by establishing institutional frames to deal with common problems. The ensuing stability and peace was extended beyond the Member States of the European Communities. Supportive evidence in Harold Badinger, *Growth effects of Economic Integration- The case of the EU Member States*, Working Paper 40, (Vienna, Research Institute for European Affairs, 2001): “If no integration had taken place since 1950, GDP per capita of the EU would be approximately a fifth smaller today”; M Henrekson, J Torstensson, R Torstensson, ‘Growth Effects of European Integration’, (1997) 41 *European Economic Review* 1537-57, at 55: “The size of the coefficient indicates that EC/EFTA membership may increase growth rates by around 0.6-0.8 percentage points”.

⁵³ Case 26/62 *Van Gend en Loos*, [1963] ECR 1 and Case 6/64, *Costa*, [1964] ECR 585.

constitution of its own, while the doctrines of direct effect (of Treaty provisions) and supremacy of Community law must be seen as the main elements of the structural material constitution of the Communities. The combined claim of autonomy and the intended avoidance of any specific reference to the template of public international law or national law allowed the Court to let to itself the further refinement of the secondary rules of the Community legal order, that is, of its *material constitution*. Such cases implied not only a *legalisation* of the Treaties, but also their *constitutionalisation*, once the doctrines of supremacy and direct effect of Treaty provisions were accepted by national constitutional courts.⁵⁴

Whether the Court declared the autonomy of the Community legal order, or it actually established the autonomy of the Community legal order,⁵⁵ those cases can be regarded as having laid the basis of the *material constitution* in a structural sense. Even if *Van Gend en Loos* and *Costa* were far from providing a detailed or complete material constitution, and as such they were to be further specified by many later judgments, the said decisions did proceed to affirm the existence of such a material constitution of the Communities and to draw its basic lines.⁵⁶

b) The substantial constitution: the parameter of constitutionality

The European Court of Justice has slowly but steadily rendered clear that it regards certain norms of Community law as binding on the Community and the national legislatures. Therefore, such norms are interpreted as establishing mandated or prohibited contents for the legislatures. Community or national pieces of legislation which do not respect such contents will be declared void by the Court.

In this subsection, I will consider which are these substantial norms which constitute the parameter of constitutionality of Community law.

i) The four economic freedoms and free competition

⁵⁴ Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001.

⁵⁵ Notice that the Court (how could it be otherwise) argues that it is merely stating the law as it stands, therefore the judgments can only read as claiming that the European legal order has been established as an autonomous legal order. But it could be argued that such assumption was wrong, and it was only the authority of the judgments which established the autonomy of the Community legal order.

⁵⁶ Leaving the room open to an autonomous interpretation of legal concepts, which could allow abandoning a pure perspective of common denominator; or reference to the common constitutional traditions, that is, as national constitutional traditions as fusing into a European constitutional horizon, but not as fully determinant of the European constitution.

There is few doubt that the *free movement of goods*, as established in Article TEC 28 (ex Article 30), stands in a privileged position among the substantive principles of the European material constitution. Joseph Weiler has gone as far as to claim that the leading cases on the free movement of goods can be considered as standing only next to *Van Gend en Loos* and *Costa* in terms of constitutional importance:

“*Statistical Levy* and *Dassonville* stand to the material constitution as cases like *Van Gend en Loos* and *ERTA* stand to the structural constitution”⁵⁷.

The substantial constitution of the Communities further includes the other three fundamental economic freedoms, namely, the free movement of workers, the free provision of services and the free movement of capitals.⁵⁸ To this, we should add the basic provisions on competition law, including in ex Articles TEC 85 and 86.

The Treaty provisions on the basic order of the economy of the Union have been the core of the *parameter of constitutionality* of the Court of Justice, something rather unsurprising given the basic goal of the Rome Treaty, namely, the creation of a common market among Member States:

The common market, the heart of the material or substantive constitution of the Community, was in large measure judicially ‘constituted’, and is, too, and important part of overall European constitutionalism”⁵⁹

The elucidation of the substantial constitution of the Communities might have a more critical tone. Galtung’s characterisation of the European Communities as a neocolonialist power is a good example in that regard.⁶⁰ But leaving aside the value assessment of such an effort,⁶¹ what is relevant is that the analysis supports the same basic conclusion that has been put forward here, namely, that the basic economic freedoms enshrined in the Treaties are an essential part of the Community material constitution.

ii) Fundamental Rights as a general principle of Community law.

⁵⁷ J H H Weiler, ‘The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods’, in Paul Craig and Grainne De Burca (eds.); *The Evolution of EU Law*, (Oxford, Oxford University Press, 1999), pp. 349–76, at p. 354.

⁵⁸ *A propos* the free movement of capital, Directive 88/361, for the implementation of the free movement of capital, combined with the new drafting of Article TEC 52 introduced by the Treaty of Maastricht implied a change of the parameter of constitutionality in that respect

⁵⁹ Weiler, *supra*, fn 57, p. 359.

⁶⁰ Johan Galtung, *The European Community, A Superpower in the Making*. London, George Allen, 1973; ‘The Lome Convention and Neo-Capitalism’ (1975) *Prio Papers*, number 20.

⁶¹ *En passant*, Galtung’s approach is heavily indebted to Vladimir Lenin ‘Contre les Etats Unis d’Europe’, in Yves Hersant and Fabienne Durand-Bogaert, *Europes*, (Paris, Robert Laffont, 2000), pp. 157–60 and Jean Paul Sartre, ‘Préface’ in Frantz Fanon, *Les Damnés de la Terre*, (Paris, Maspero, 1961).

Next to the four economic freedoms, fundamental rights and liberties have become an integral part of the substantial constitution of the European Union.

The original text of the Treaties contained scattered references to fundamental rights. The relevant provisions were Article 6 TEC (non-discrimination on the basis of nationality) and Article 119 TEC (equal pay for equal work of men and women). It was the Court which affirmed a general principle of protection of fundamental rights as part of the *unwritten* law of the Communities.⁶² Since then, the Court has specified the fundamental rights protected by Community law case by case.⁶³ A good deal of the cases in which the European Court of Justice has spelled out the general principle of fundamental rights' protection were actually cases related to the four basic economic freedoms. But the Court has also affirmed other civic, political and social rights.

The solemn proclamation of the Charter of Fundamental Rights can be interpreted as further evidence of the increasing salience of fundamental rights within the parameter of constitutionality of Union law. At any rate, the Charter constitutes the best evidence available of the catalogue of rights and freedoms that are considered as *fundamental*, and therefore, as part of the said parameter of constitutionality.⁶⁴

It will be very interesting to consider the relationship in which the two main elements of the substantive material constitution of the Communities stand. Perhaps it will be sufficient to say that the progressive affirmation of fundamental rights has slowly but steadily lead to the recharacterisation of economic freedoms as specific contents of more abstract fundamental rights. This is related to the progressive opening to the weighing and balancing of economic freedoms against fundamental rights, and especially, collective goods and social rights.⁶⁵

⁶² Stauder and Costa.

⁶³ Koen Lenaerts and Piet Van Nuffel. *Constitutional Law of the European Union*. London, Sweet and Maxwell, 1999, pp. 548ff.

⁶⁴ Agustín José Menéndez, 'Chartering Europe. Legal status and policy implications of the Charter of Fundamental Rights of the European Union', 40 (2002) *Journal of Common Market Studies*, pp. 471-90; 'Finalité through rights' in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, *Chartering Europe. The Charter of Fundamental Rights of the European Union and its constitutional implications*. Baden-Baden, Nomos, 2003, pp. 30-47.

⁶⁵ Olivier De Schutter, 'La contribution de la Charte des droits fondamentaux de l'Union européenne à la garantie des droits sociaux dans l'ordre juridique communautaire', 12 (2001) *Revue Universelle des Droits de L'Homme*, pp. 33-47; Agustín José Menéndez, 'Rights to Solidarity. Balancing solidarity and economic freedoms' in Eriksen et al. (eds.), *supra*, fn 64, pp.180-99; Leonor Moral Soriano, 'How proportionate should anti-competitive State intervention be?' in (28) 2003 *European Law Review*, pp. 112-23.

B) Does the European Union have a formal constitution?

The European Union does not have a *formal constitution*. This is so to the extent that there is no single document, or compilation of documents, which social practice refers as *the constitution of the European Union*. This can be easily proven. On the one hand, the claims that the *European Union does not have a Constitution* and *that it should give itself one* are considered as a plausible claims in political discourse. If there was a well-established social practice of referring to a document as *the European Constitution*, such a claim will not be plausible. On the other hand, there is not even a consolidated practice among jurists and legal practitioners to refer to one single ‘consolidated text’ as the constitution. Even if we can find some compilations of the basic legal texts of the Union, they do not have the authority of a constitution. The contents of each edition are different, and none among them outstands as authoritative. It could be possible to compile into one single document all the relevant legal texts incorporating the *material constitution*. And allegedly this is what the Robert Schuman centre of the European University Institute has already done.⁶⁶ However, such a compilation fails to be endorsed by a widespread social practice of pointing to such a document as the *constitution*.

Having said that, it must be added that the solemn proclamation of the Charter of Fundamental Rights of the European Union⁶⁷ can be interpreted as a first step in the formal constitutionalisation of the Union. If it can be shown that Charter is legally valid,⁶⁸ the Charter must be seen as a first fragment of a written constitution of the European Union. The legal validity of the Charter is not obvious, given that it has been formally incorporated into the Treaties. But its legal validity can be grounded on the fact that the Charter renders explicit what was already implicit in Community law. That is so in a double sense. Firstly, and more weakly, it gives positive and concrete form to the four universal values that Community law claims to endorse, namely, dignity, freedom, equality and solidarity.⁶⁹ Secondly, it consolidates the common constitutional traditions on the protection of fundamental rights, especially as reflected in the European Convention of Human Rights and its protocols, the jurisprudence

⁶⁶ *A Basic Treaty for the European Union. A Study of the Reorganisation of the Treaties*. Florence, European University Institute, 2000.

⁶⁷ OJ C 364, of 18.12.2000, p.1.

⁶⁸ See Menéndez, *supra*, fn 64.

⁶⁹ See the preamble of the Charter: “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”.

of the European Court of Human Rights and the case-law of the European Court of Justice.

C) Does the European Union have a normative constitution?

The answer to the question whether the European Union has a constitution in a normative sense depends on the conception of the normative constitution which is put forward. It is not extremely hard to show that the European Union does not have a normative constitution in a deliberative democratic sense. First, it is rather difficult to determine which are the norms which citizens could see themselves as authors of in the absence of a formal constitution. As it was stressed, the *democratic conception of the constitution* presupposes a *written constitution*. On the other hand, it is hard to argue that the material constitution of the Union has been endorsed in a meaningful sense by European citizens. European citizens do not see themselves as authors of the material constitution of the Union. This is the deepest root of the *democratic deficit* of the European Union. From a democratic normative conception of the Constitution, one of the two basic goals of a constitution-making process for Europe will be to design the process in such a way that a coherent common will of Europeans on their constitution could be formed.⁷⁰

To the extent that it is accepted that the Charter of Fundamental Rights is a fragment of the written constitution of the European Union, it is necessary to consider whether the Charter can be said to have been elaborated democratically.

Some leading commentators have pointed to the lack of democratic legitimacy of the Charter-making process.⁷¹ The claim is that, despite its positive innovations, the Charter Convention was not as democratically legitimated as it will be proper of a *constitutional assembly*. The members of the Convention had not been *directly* elected by the people and they lacked a *direct mandate* concerning the contents they should favour as representatives.

⁷⁰ The other main objective would be that the constitutional norms themselves would be such as to enhance the democratic participation of European citizens in the deliberation and decision-making on ordinary common action norms. This is further spelled out in section III.

⁷¹ See Joseph H. H. Weiler, 'Diritti umani, costituzionalismo e integrazione: iconografia e feticismo' in Mario E. Comba (ed.), *Diritti e confine. Dalle costituzioni nazionali alla Carta di Nizza*, Torino, Edizioni di Comunità, 2002, pp. xiii-xxxii and 'A Constitution for Europe: Some Hard Choices?', 40 (2002) *Journal of Common Market Studies*, pp. 563-80.

Without challenging the merit of this line of criticism, two factors must be taken into account. First, it must be taken into account that the Charter Convention did not aim at writing anew the catalogue of fundamental rights of European citizens. The democratic legitimacy required for consolidating the already existing fundamental rights provisions in Community law must be different from that of *actually writing a catalogue of rights without the authoritative limit provided by positive law*. Second, the fact that fundamental rights provisions in Community law are based on the *common constitutional traditions*, and that such *common constitutional traditions are perceived as legitimate*, means that the legitimacy burden is considerably lightened, to the extent that it can be argued that national catalogues of rights are legitimate from a democratic standpoint.

D) Some Interim Conclusions

In this section it has been shown that the European Union *already* has a material constitution, both in a structural and a substantial sense, but it cannot be said to have a formal constitution or a democratic constitution.

This allows us to draw one first conclusion, namely, that a good deal of the apparently contradictory statements in the public debate on the European constitution are not as contradictory as they seem to be. When somebody claims that the European Union already has a constitution, they tend to mean that it has a material constitution, both in a structural and in a substantial sense. This is not contradictory with the claim that the Union does not have, and therefore needs, a *democratic constitution*. This is so because the existence of a *material* constitution does not entail democratic legitimacy.

A second provisional conclusion that can be established is that an eventual democratic constitution of the Union will not *constitute* anew the Union, but will reconstitute it along democratic lines. This is so for two reasons. Firstly, the constitution of the Union will coexist with the different national constitutions. Most member states of the Union are already constitutional states. The constitutionalisation of the Union has proceeded as a ‘fusion’ of established constitutional traditions.⁷² This process has been eased by the universalistic drive of constitutionalism, and by the common ethical underpinnings of constitutionalism in the Member States of the Union. On the other hand, constitution-making will proceed in the constitutional framework (even if open to be changed by the constituting power) provided by the structural and substantial material constitution of the Union.

⁷² Habermas, *supra*, fn 43 and Fioravanti, *supra*, fn 8.

3. Some rationales for a European Constitution

The three-folded distinction between different conceptions of the Constitution can also be of some use in order to determine the *different specific rationales* for drafting a European Constitution.

The case for drafting a document called a European Constitution, that is, for formalising the European Constitution, is related to the basic value of *the constitutional form*. Thus, a formal constitution will contribute to render clearer which are the basic rules of the European legal order. This is a value usually associated to the words ‘transparency’ and ‘visibility’, but perhaps it will be more precise to associate it to ‘readability’ and ‘legal security’. In itself, a written constitution will render clearer to citizens which are the basic structuring rules of the European constitutional order, and thus, clearer which are the common action norms which are expected to guide their action. This will also render easier to determine whether they should feel obliged to comply with Community law. Moreover, the *formal value* of the Constitution stands in a close relationship to the democratic use of the constituent power. A clear definition of which are the *present* constitutional rules is a basic precondition for a meaningful exercise of the constituent power by the citizens in any future occasion.

The case for drafting a European constitution in compliance with democratic standards of legitimacy is three-folded. Firstly, the process of drafting such a constitution could be unconventionally⁷³ democratic in itself. The advocates of the constitution could structure their own agenda of political mobilisation in order to render clear that there is a wide majority of the citizens in favour of the European constitution. The analysis of unconventional constitutional moments by Bruce Ackerman is indicative of such possibilities.⁷⁴ Secondly, the constitution could be one that defines the process of constitutional amendment in such a way that it could be meaningfully said that any amendment will meet the highest democratic

⁷³ Of course, constitution-making can be conventionally democratic, if a process of constitution-making has already been established which properly tests the existence of a coherent common will in favour of the amendment of the Constitution. But such a process has not been established in Europe. The procedures of Treaty amendment cannot be regarded as such. On the one hand, they have been conceived as procedures of Treaty amendment, that is, they aim at testing the existence of a common will *among nations*, not *among citizens*. On the other hand, the procedure does not require the affirmation of even a coherent common will within Member States. Under such circumstances, the *democratisation* of constitution-making can only happen *unconventionally*.

⁷⁴ Bruce Ackerman, *We the People: Transformations*, Cambridge, Harvard University Press, 1998.

standards of legitimacy. Thirdly, the constitution could be one that enhances the democratic standards of the process of ordinary legislation. Even if ordinary statutes cannot be expected to meet the same degree of legitimacy as the constitution,⁷⁵ the extent to which such statutes are supported by a coherent common will could be improved by means of designing the processes of law-making.

The Little Europe of the Coal and Steel Community could derive a more than sufficient legitimacy credit from the diffused support of Europeans towards some kind of integrationist project and, in an indirect and mediated way, from the political legitimacy of the Member States. But once Community norms start to have a clear and evident impact on the daily lives of European citizens, diffused and indirect sources of legitimacy cease to be enough.⁷⁶ Under such a light, it can be said that the democratic deficit of the Union is two-folded. First, the Union's material constitution has neither been subject to a democratic constitution-making process of elaboration (as the most recent national constitutions) nor has it being democratically endorsed by democratic consistent majorities.⁷⁷ The European material constitution is open to be amended only through the amendment of what formally keep on being international treaties. The constitutional legitimacy of Treaty reforms is indirect, and it is based on the incorporation mechanism characteristic of international law, in open contradiction with the logic of democratic constitution-making.⁷⁸ On the other hand, the actual legislative procedures of the Communities are based on the double indirect legitimacy of the norms, given that the extent to which direct representatives of the people have a chance to influence the deliberation and decision-making upon such norms.⁷⁹

⁷⁵ See section 1.C.

⁷⁶ One could argue that such clear and direct impact can be traced back at the very least to the completion of the Customs Union in 1969. Which is not by coincidence the same year of the first judgment in which the European Court of Justice acknowledged the unwritten general principle of fundamental rights protection as part and parcel of Community law.

⁷⁷ As Bruce Ackerman argues the Federal Constitution in the US was. See *supra*, fn 74, pp.32ff.

⁷⁸ Treaty reform, as it is argued *infra*, is a process that has been characterised by a scarce feeding back of public spheres debates, and which ultimately revolves around a binomic decision. One could argue that the absolute democratic quality of the process of Treaty reform has remained stable since the founding of the Communities. However, the democratic relevance of the issues contained in Treaty amendments has got transformed. The loss of bite of national regulatory power implicit in the reinterpretation of the economic communities in the Single European Act or the Treaty of Maastricht had far superior implications than the transfer of sovereignty and national regulatory power in the Paris and Rome Treaties. Thus, the match between the democratic relevance of the issues at stake and the democratic quality of the amendment procedures has increased, not decreased. Keeping the same Treaty amendment procedure has rendered the democratic deficit *worse*.

⁷⁹ See Hauke Burnkhorst, 'Constitution without a state. A European Constitution in the Making', *mimeo*, on file with the author.

The case for amending the material constitution is thus two-folded. First, there is a case for introducing a *normatively* sound description of the *sources* of Community law. There are good *democratic* reasons to amend not only the process through which secondary legislation is made, but also to establish a proper hierarchy of norms, in compliance with a constitutional principle of legality. Second, there is a case for reconsidering the balance between the different goals pursued by the Union. The proper balance between economic and social goals should be reconsidered in the light of the openly *political* character of the Union.

(TABLE 2 AROUND HERE)

Part II: The Laeken process

In the first part of this paper, it was argued that the European Union lacks and needs a constitution in a democratic sense. To put it differently, the Union is already constituted *materially*, but it stands to be reconstituted *democratically*.

The second part of this section aims at assessing whether and in which sense the Laeken process could contribute to bring about a written, democratic constitution for the Union. To do so, I start by considering what are the claims about the process made at its signalling; that is, which is the claim raised by the Laeken process (section 4); next I try to reconstruct the Laeken process in a constitutional way (section 5); this is followed (section 6) by some very provisional assessment of the process.

4. Towards a democratic constitution?

The basic claim raised by the European institutions at the beginning of the Laeken process is that the legitimacy deficit of the European Union could be overcome (or at the very least, significantly diminished) by means of the constitutionalisation of the Union.

The diagnosis of the Laeken Declaration on the future of the European Union is clear. European citizens want a “democratic” Europe,⁸⁰ a statement which implies the corollary negative, namely, that the Union is, as

⁸⁰ Several sentences point to this clearly. The first subheading in the text reads “The democratic challenge facing Europe”. It is argued that “citizens feel that deals are too often cut out of their sight and they want better democratic scrutiny”, that “the image of a democratically and globally engaged Europe admirably matches citizens’ wishes” and that “citizens are calling for a clear, open, effective, democratically controlled Community approach”.

of yet, *not sufficiently democratic*. This results in a self-imposed mandate: “The Union needs to become more democratic, more transparent and more efficient”.

The way ahead to achieve such outcome is double. Firstly, the European legal order is to be refounded. A constitution should be written and placed on top of the legal system as a whole: “The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union”. But even if the reference is to a “text”, it is wrong to conclude that the declaration is concerned with the form of the constitution. The constitutional form goes hand in hand with the *constitutional* nature of the questions to be settled in the reform process and with the *constitutional* nature of the reform procedure. As it was argued, the Laeken process is comprises several stages which make it more similar to a constitution-making process than to the usual Treaty reform procedure. The European Council seems to hope that the new constitution will render explicit what was up to now implicit, namely, that European citizens not only support European integration, but that they also consider the basic legal structure of the Union as *theirs*.⁸¹

Secondly, the decision-making processes of the Union is to be amended in such a way that they become more democratically legitimate. A whole array of concrete questions are made in the Laeken declaration in this concrete regard, and have already been considered by the convention. They range from the further parliamentarisation of the Union to the establishment of a European electoral constituency.⁸²

5. The Laeken process and the three conceptions of the Constitution

In this section, an attempt is made to reconstruct the Laeken process in a constitutional light. This is done under two basic assumptions. Firstly, that what we need to assess the Laeken process as a whole. The different phases of the process should be distinguished, but one cannot assess them in

⁸¹ This is implicit in the declaration, even if only hinted at explicitly: “Citizens undoubtedly support the Union’s broad aims, but they do not always see a connection between these goals and the Union’s everyday action”.

⁸² CONV 353/02, Final Report of the Working Group on the Role of National Parliaments. On the definition of the electoral constituencies for European elections, see, among others, CONV 335/02 (constitutional proposal by Pacciotti) and CONV 585/03 (Bruton).

isolation, but as part of a bigger whole. This is especially relevant given the predictable tendency to focus upon what is new in the process, namely, the Convention. Secondly, that one should distinguish three different aspects of political decision-making: A) signalling; B) deliberation; C) decision-making. What is peculiar about constitution-making is not this three-fold distinction,⁸³ but the structure of each of these phases.

A) The signalling phase

The signalling phase is that in which the problem to be sorted out is defined and the agenda of reform is (provisionally) established.

On what concerns the Laeken process, a concrete formulation of the need to change the material constitution of the Union can be traced back at the very least to Fischer's speech at Humboldt's University.⁸⁴ Such speech prompted a series of reactions on the side of national politicians, through which the case for reform gathered momentum.⁸⁵ It is relevant to notice that most of those speeches addressed a series of core common issues and were characterised by being addressed to European audiences, not only national ones. They made it clear that there is a need for a constitutional reform, although the concrete contours of such reform were not clearly delineated. The first 'institutional' signalling came through Declaration 23 annexed to the Treaty of Nice,⁸⁶ which called for "a deeper and wider debate about the future of the European Union". It foresaw "wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc", not only from actual Member States but also from candidate countries. The basic constitutional program was delineated, with reference to *legal status* of the Charter of Fundamental Rights of the European Union, the distribution of powers between the European Union, the member states and regions, and the role of national

⁸³ Both intergovernmental conferences and the Laeken process can be analysed with the help of such conceptual tools. The differences between them lie in the concrete way in which each of these phases is undertaken. In intergovernmental conferences, the aim is to determine whether or not there is a common will among states; in democratic constitution-making, the aim should be to determine whether there is a common will among citizens. The Laeken process, as it will be argued, will probably sit somewhere in between.

⁸⁴ Christian Joerges, Yves Mény, J.H.H Weiler, *What kind of Constitution for what kind of polity*, Cambridge and Florence: Harvard Law School and European University Institute, 2000.

⁸⁵ Carlos Closa, 'The Implicit Model of Constitution in the EU Constitutional Project', in Erik Oddvar Eriksen, John Erik Fossum, Agustín José Menéndez, *Constitution-Making and Democratic Legitimacy*, Oslo, University of Oslo, 2002, pp. 53-74.

⁸⁶ OJ C 80, of 10 March 2001, pp. 85-6.

Parliaments in the resulting institutional architecture. The ultimate goal was established as "to improve and monitor the democratic legitimacy of the Union and its institutions, in order to bring them closer to the citizens of the Member States".

The "deeper and wider [national] debate(s)" cannot be said to have resulted in national public spheres being *coordinated*, in the sense of discussing simultaneously around a common agenda.⁸⁷ The problem has not been so much the lack of convergence of the discussion, but its absence. Contrary to the expectations (and to the over-optimistic assessment of the Swedish Presidency)⁸⁸, the debate was conducted around strong, not weak publics,⁸⁹ something which did not add to the democratic legitimacy of the enterprise.

The ultimate and final institutional signalling was the Laeken declaration itself, which has been analysed in some length *supra*.

Overall, the signalling phase was characterised by a strong mobilisation of political elites, by a relevant involvement of 'strong publics' such as the European Parliament, some national and regional parliaments, but by a dismal level of mobilisation of *weak publics*.

B) The deliberation phase

The Laeken process is characterised by the temporal intertwining of deliberation and decision-making phases.⁹⁰

The first deliberation phase corresponds to the work of the Convention. The Laeken declaration establishes the basic structure and working methods of the Convention, by means of setting up the Praesidium, allocating to it a major role and nominating its three main members. It also lays down the basic rules for determining the composition of the Convention as a whole. In addition, it also provides the Convention with a year of time to actually deliver, something which is not deprived of importance as it constitutes a further limit to the action of the Convention.⁹¹

⁸⁷ Hans Jörg Trenz and Klaus Eder, 'The democratising dynamics of an European public sphere. Towards a theory of democratic functionalism', *mimeo*, on file with the author.

⁸⁸ Report on the Debate on the Future of the European Union, 9520/01, POLGEN 14, Brussels 8 June 2001.

⁸⁹ See Erik Oddvar Eriksen and John Erik Fossum, 'Democracy through strong publics in the European Union?', 40 (2002) *Journal of Common Market Studies*, pp. 401-24.

⁹⁰ This in itself might contribute to characterise the process as *constitutional*. In fact, such intertwining is characteristic of constitutional moments, which require a thorough testing of whether there is consistent common will in favour of constitutional amendments. However, whether the way in which deliberation and decision-making are intertwined in the Laeken process corresponds to a constitutional logic is another question.

⁹¹ See *supra*, fn 1.

It will be wrong to characterise the Convention as a constitutional assembly. Even if its members are politically representative, in the sense that they have been nominated by representative institutions, it is clear that they have not been directly elected by citizens in an electoral process in which their views of the constitutional future of the Union were publicly debated.⁹²

It is more adequate to see the Convention as a strong public, the main goal of which is to set an agenda for constitution-making and to explore the potential outcomes of such exercise. The *transparent* way in which the Convention should deliberate plays a major role in fostering the chances of meaningful input from European publics to the whole process. It deserves to be stressed that the Laeken declaration specifically provides for an institution (the Forum) through which the labours of the Convention could be influenced by the weak European publics. The Forum is defined as a “structured network of organisations receiving regular information on the Convention’s proceedings”, whose contributions could be used as “input” to the debate.

With voting ruled out as a means of determining whether a common will has been formed among the members of the Convention, it is difficult to consider the Convention as a *deliberative public*. This is so because in the absence of voting, the Praesidium becomes the *authoritative interpreter* of the common will of the Convention, without reference to any intersubjective test of such common will.

The second deliberation phase will take place between the reporting of the Convention and the opening of the IGC. This is a phase which has been wrongly neglected up to now by the public and by scholars. This phase has a considerable democratic potential. The outcome of the Convention (likely to be a single constitutional proposal) could act as a common agenda for overlapping public discussions in all member states. This would provide an opportunity for the formation of a European common will transcending national cleavages. Moreover, the building of an actual democratic support for the final result might critically depend on this phase.

⁹² Two basic conditions must be met for an assembly being legitimised as a constitutional assembly. On the one hand, such assembly must be *directly elected by the people*. Direct, unmediated representation is absolutely necessary concerning the usual understanding of the principle of legality, but even more so, on what concerns the drafting of a constitution. On the other hand, the election of the assembly must have been so with a clear mandate to write a constitution. Only in that case the public deliberation preceding the election will have focused on the ideas of the different candidates on the concrete exercise and question of drafting the constitution.

The third deliberation phase will correspond to the works of the Intergovernmental Conference. Even if the Laeken process does not contemplate any change in the procedure through which the IGC will be conducted, its insertion into a wider process will for sure influence the shape of the IGC 2004. The secretive character of previous IGCs will be difficult to maintain with the precedent publicity of the works of the Convention. This is especially so in case that social actors actually manage to spark a wide ranging debate focused on clear alternatives to the Convention's proposals.

The final phase of deliberation will take place before the ratification of the Constitutional Treaty.

C) Decision-Making

As it was already indicated, the Laeken process is characterised by the intertwining of deliberation and decision-making phases in temporal terms.

The first decision-making act corresponds to the reporting of the Convention. According to the Laeken Declaration, the Convention should "draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved". It is important to notice that the Laeken declaration assigns a kind of agenda-setting role to the said document: "Together with the outcome of national debates on the future of the Union, the final document will provide a starting point for discussions in the Intergovernmental Conference", but not a further substantive role, as it is made clear that the IGC will take the "final decisions".

The second decision-making step, as has just been indicated, is assigned to the Intergovernmental Conference. In principle, the design of the process does not preclude that the IGC does not take much into account the recommendations of the Convention. But even if the IGC will retain the power to decide the text that will be discussed in the third and final step of decision-making (the ratification stage), there are some differences between the Laeken process and previous IGCs. Firstly, it is clear that the agenda of the IGC will be clearly known to the public, as it will be determined by the debates on the Convention. Second, the degree of mobilisation of civil society in the Laeken process will increase the alertness of at the very least some sectors of the weak public concerning the outcomes of the IGC. Third, the conclusions of the Convention could only be disregarded by the IGC by means of putting forward *arguments* why this is so. The more that the conclusions of the Convention are widely

supported among its members, and the more that they emerge as endorsed by the public debates, the more that this third point is true.

The final decision-making stage corresponds to the ratification stage. In principle, such stage will be identical to the ones in which previous Treaty amendments were decided. This will imply that the Constitutional Treaty will have to be ratified by all member states, and such ratification will follow the procedure established by each member state in that respect. However, it is not too adventurous to claim that two main questions will be at the very least discussed during the Laeken process in this regard. Firstly, whether the *constitutional dimension* of the new text does not render necessary in each member state a stronger test of support of national citizens than what was the case in previous Treaty amendments (that is, the *generalisation* of the resort to referenda even in those states where those were not called upon in previous Treaty amendments). Second, whether such *constitutional dimension*, which presupposes the clear affirmation of the Union as a political community, does not render *undemocratic* that a constitutional amendment could fail because of a narrow majority in one member state is against it.

(TABLE 3 AROUND HERE)

6. Constitutional potentialities (and risks)

A) Potentialities

The ambitious goals set in the Laeken Declaration might or might not be achieved. By means of distinguishing concurrent but different rationales of any European constitution-making process (see Table 2), we are in a position to distinguish the different (but potentially) cumulative potentials of the Laeken process. Among them, we could consider three.

Firstly, the actual unfolding of the process could reinforce the interpenetration of national public spheres, their *Europeanisation*. Even if we have already some plausible precedents of such interpenetration⁹³, the

⁹³ Arguably, at least two precedents: (1) The debate following the formation of a new ruling coalition in Austria in 2000; (2) The run-up to the Nice European Council. See J Habermas, *supra*, fn 43, p. 18: “A real advance would be for national media to cover the substance of relevant controversies in other countries, so that all the national public opinions converged on the same range of contributions to the same set of issues, regardless of their origin. This is what happens temporarily- if only for a few days- before and after the summits of the European Council, when the heads of the member states come together and deal with issues of equal perceived relevance for citizens across Europe. The fact that these multiple, horizontal flows have to pass through the filters of translation does not reduce their essential significance”.

Laeken process provides unique opportunities to foster such development. This is especially so regarding the *reflection period* that will mediate between the closing of the Convention and the opening of the Intergovernmental Conference. The report of the Convention could be regarded as setting a common agenda, stemming debate *simultaneously* in all European public spheres. This could well lead to a reconsideration of preferences concerning European integration and an alteration of political cleavages around non-national lines. The extent to which the Laeken process succeeds in this respect depends, quite obviously, on the extent to which European citizens actually mobilise and discuss the pros and cons of the Constitution. This positive effect of the process is not dependent on the actual drafting of a Constitution at the end of the process.

Secondly, an amendment of the material constitution resulting in the simplification of the law-making process within the Union could lead to a more coherent formation of the European common will. A reduction of the number of different legislative procedures⁹⁴ could be coupled with a further democratisation of such processes, either by means of increasing the role of representative institutions, such as the European Parliament or national parliaments.⁹⁵

Thirdly, the *formalisation* of the Constitution does not necessarily entail that the constitution has either been written in a democratic way or that it enhances the democratic character of European law;⁹⁶ but a written constitution lays the ground for the use of the European constituting power in later times. A simplified and streamlined written document which reflects the substantive constitution of the Union in a readable way could thus be considered as a previous step to a full constitutionalisation of the Union in a democratic sense. As it was argued, the amending of the substantive constitution requires a previous knowledge of what is the said substantial constitution. Therefore, a written constitution which basically reflects the present substantial constitution of the Union will contribute to a democratic reconstitutionalisation of the Union. Moreover, the *formalisation* of the constitution could render more visible the fact that Europeans share a European legal order, which constitutes a community of risks among them. As such, it could enhance the *predisposition* of European citizens to acknowledge each other as citizens of Europe.⁹⁷

⁹⁴ CONV 424/02, Final Report of the Working Group on Simplification.

⁹⁵ CONV 375/1/02, Final Report of the Working Group on Complementary Competences.

⁹⁶ See *supra*, section 1.D.

⁹⁷ Agustín José Menéndez, 'Taxing Europe', *Arena Working Paper* 3/03.

B) Risks

No constitutional process is risk-free. A written constitution is needed for democratic reasons, as it was argued. But the existence of a written constitution is democratically dangerous to the extent that even if the substantial contents are not dignified by the highest democratic legitimacy they will impose constrain on the ordinary democratic law-making processes. In this respect, two main risks are obvious in the Laeken process.

Firstly, Europeans could end up having a European written constitution which does not reflect the substantive material constitution of the Union. The result will be a gap between the formal and the material constitution. If such a gap is wide enough, the advantages of the *formalisation* of the Constitution can be more than wiped off by the disadvantages stemming from the said gap. *It is worse to have a formal constitution that does not reflect the material constitution than to have no formal constitution at all.*

Secondly, the evocative 'normative' power of the term Constitution has been considerably used in the Laeken process. It might be the case that the final outcome of the Laeken process is still far from being a democratic constitution. If that is so, the evocative power of the term constitution will have been misused. The expectation will have been created of obtaining a democratic constitution, only not to finally stand to it. After all, the new constitution could be ratified by many countries without the need of any popular consultation. Under such circumstances, the new constitution could keep on being a constitution *octroyée*.⁹⁸ Many actors have expressed their views during the process that the *constitutionalisation* of the Union is a matter of writing a new international treaty, only that this time the outcome is labelled as a Constitution (or a Constitutional Treaty). Thus, a constitution *for* European citizens could usurp the place of a constitution *by* European citizens. This result will be deeply damaging to the Union. On the one hand, it will almost exhaust a promising strategy of *democratising the Union*. If such a chance is wasted, by means of doing precisely the opposite, genuine democrats run the risk of losing one of their major trump cards. On the other hand, this might lead to a constitutional deadlock, especially considering the tall task of signalling and sustaining unconventional constitutional moments in the Union.

⁹⁸ Although some seem to prefer such a kind of Constitution. See Jack Straw, 'A Constitution for Europe', *The Economist*, 12 October 2002.

Conclusion

In this paper, it has been argued that the debate around the European constitution requires some previous conceptual clarification. A three-fold conceptualisation of the constitution was proposed by means of distinguishing between the formal, the material and the normative conceptions of the constitution (in the latter case, special attention was paid to the deliberative democratic variant of such a conception). Equipped with such analytical distinctions, we can interpret the apparently contradictory claims of the present European constitutional debate as supportive of the following diagnosis. The Union already has a constitution in a material sense, while it lacks a constitution in a formal and in a democratic sense. Furthermore, the three-fold distinction allowed us to distinguish different concurrent rationales for entering into a constitution-making process in Europe.

This led to an assessment of the potentialities and risks involved in the Laeken process as it has been designed. The process has the potentiality of contributing to the constitutionalisation in a democratic sense of the Union, of laying the ground for an eventual (and later) constitutionalisation of the Union *in a democratic sense*. At the same time, it is not very likely that it will result in a democratic constitution of the Union. The best interpretation of the Laeken process is as a relevant step in a larger constitutional process. A written constitution reflecting the present substantial constitution of the Union could be regarded as a contribution to a future democratic use of the constituting power, but cannot be seen as a substitute for a proper democratic constitution.

European institutions have finally realised that the major European challenge is building a meaningful democracy at the supra-national level. The main problem which the Union faces is its democratic legitimacy. Among the many pressing problems for the Union, the key one is the appropriate way in which Europeans should acknowledge each other political rights, and exercise them together. The Laeken Declaration should render clear that the democratic deficit cannot be considered a purely psychological question, a matter of *sociological* perceptions.⁹⁹

In a provocative manner, I am tempted to conclude by claiming that the first commandment of the democrat is not to take the name of the Constitution in vain. What is to be referred as the Constitution is not a purely semantic question, but one based on the normative value of the

⁹⁹ In this respect, see N W Barber, 'Citizenship, nationalism and the European Union', 27 (2002) *European Law Review*, pp. 241-59, at p. 247.

concept. A value that stands for the strong evocative power of the term. It will be a pity to frustrate expectations by presenting an *octroyée* constitution as a substitute of a democratic constitution. Europe needs a democratic constitution, not a new *Statuto Albertino*. If we are not writing a democratic constitution democratically, but merely laying the ground for it, we should have the courage to acknowledge it openly.

Table 1. The identification of constitutional norms according to each conception of the constitution

CONCEPTION	HOW DO WE KNOW WHETHER A LEGAL NORM IS A CONSTITUTIONAL NORM?
Formal	It is contained in a document (or a compilation of documents) which is designed as ‘the constitution’ according to social practice within the given society
Material	<p>Sociological: It is a norm considered as forming part of the basic structure of society according to social practice within the given society</p> <p>Legal Variant: It is a norm considered as forming part of the basic structure of the legal order according to the social practice of legal scholars</p>
Normative	<p>It presents certain normative properties</p> <p>Democratic Variant: The norm overcomes the highest standard of democratic legitimacy (it is possible to say, in a meaningful way, that most of its addressees can see themselves as authors of the norm)</p>

Table 2. Some Rationales for a European Constitution

CONCEPTION OF THE CONSTITUTION	RATIONALES
FORMAL	<p>Readability: allowing for a democratic use of constituent power</p> <p>Legal security: rendering clear which are the common action norms that we should comply with</p>
MATERIAL	<p>Hierarchy of Sources of Law: Normatively sound theory of the sources of law</p> <p>Politicisation of the Union: Reconsidering the balance between the goals of the Union</p>
NORMATIVE (DELIBERATIVE DEMOCRATIC)	<p>Constitutional Democratisation: Democratising the EU through an unconventional constitutional process that manages to form a coherent common will of Europeans</p> <p>Constitutional Democratisation: Drafting new rules of Treaty amendment which are democratically sensitive</p> <p>Legal Democratisation: Reviewing ordinary law-making process to render them more democratic</p>

Table 3. The Structure of the 'Laeken' Process

PHASE	WHAT	PUBLICS	DEMOCRACY
Signaling	Fischer's Speech followed by several speeches of leading politicians	Intense involvement of strong publics (European Parliament, national parliaments, regional parliaments, political parties) Weak involvement of weak publics (with some exceptions)	Plus: Signalling addressed to European audiences, debating European questions Minus: Low level of mobilisation of weak publics
	Declaration 23 of the Nice Treaty		
	Laeken Declaration		
Deliberation #1	Deliberation of the Convention	Siege Model intervention of mobilised publics; helped by transparency, possibility of presenting input Rather weak involvement of general publics (with some exceptions)	Plus: Transparency in the deliberation increases chances of meaningful input coming from general and specialised publics Minus: Rather weak involvement of general publics (with some exceptions)
Decision-Making #1	Reporting of the Convention	Setting the agenda for Deliberation #2	Risk: Praesidium dominance; the absence of voting might result in a report drafted by the Praesidium without much regard to the actual deliberation of the Convention
Deliberation #2	Synchronised National and Regional Debates	Potentiality for strong intervention of public input, potentiality for the emergence of a coherent common will of Europeans transcending national cleavages	Plus: Potentiality for strong public intervention Minus: Absence of any mechanism for institutionalising the outcome of the debate (for example, through elections to the European Parliament)
Deliberation #3	Intergovernmental Conference	Siege Model intervention of mobilised publics; helped by the fact that the agenda will have been settled by the Report of the Convention	Minus: Risk of IGC as we know them, bypassing the previous phases
Decision-Making #2	Constitutional Treaty		Minus: Risk of a formal constitution not reflecting the material constitution Minus: Risk of a constitution <i>octroyé</i>
Deliberation #4	National Debates leading to ratification	Potentiality for strong intervention of publics	Minus: Risk of <i>renationalisation</i> of debates
Decision-Making #3	National Ratification		

Figure 1



Plantu's visual representation of the different conceptions of the European Constitution

Source: *Le Monde*