



# ***Neither Constitution, Nor Treaty***

## ***A deliberative-democratic analysis of the Constitutional Treaty of the European Union***

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## Abstract

The Constitutional Treaty of the European Union cannot be said to be a Constitution in the same sense that the term is generally used in most European countries. It is not a Constitution in the same sense that the German, Italian or Czech constitutions. This is mainly so because neither the procedure through which it was elaborated, nor its contents, comply with what deliberative democracy requires and expects from a constitution-making process and its outcome. On the one hand, the European people or peoples played almost no role in the signalling of the constitutional moment. The Laeken Convention did not have much of a relationship with European general publics, and it could only marginally exceed its own mandate of preparing the ground of the labours of the IGC. The IGC remained a secretive and diplomatic event, almost completely divorced from European publics. On the other hand, the Constitutional Treaty is unlikely to ensure the full democratic character of European Union laws. By means of assigning constitutional status to all the four parts of the Constitution, the Convention and the IGC give rise to a serious risk of *over-constitutionalisation*, which would result in a closing of the political space open to European and national legislatures. Moreover, the Constitutional Treaty only marginally improves the position of the European Parliament in the law-making process. Moreover, the Constitution consolidates and amplifies the *unbalance* which prevails between the simplified law-making procedures on issues related to the actual construction of a single market, and the extremely demanding procedures, with multiple veto points, which apply to market-correcting measures. This is amplified by the reinforced protection which the Draft Treaty offers to economic liberties, and values associated to them (such as price stability). All this entails that the Constitutional Treaty is not *the democratic constitution of the European Union*, and it cannot be considered on a par with national constitutions. Having said that, the Constitutional Treaty is a further and major step in the process of European integration. By consolidating the primary law of the Union, by its modest but relevant substantive reforms, the Constitutional Treaty prepares the ground of a future democratic constitution-making process.



“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, Mémoires

“Until now, we could reflect and describe things. From now onwards, action, always adventurous and risky, must take the place of meditation”

Altiero Spinelli, *La Sfida Europea*, speech at the Università degli Studi di Padova, 27 May 1982.

## Introduction

This article aims at offering a *critical normative* assessment of the ‘Draft Treaty establishing a constitution for the European Union’ (hereafter, the Constitutional Treaty).<sup>1</sup> More particularly, I will discuss whether and how the process of constitution-making and the contents of the Constitutional Treaty might contribute to enhance the democratic legitimacy of European Union law. “

In doing so, I come to what might look like a contradictory conclusion. On the one hand, it seems clear to me that both the constitution-making process and the Constitutional Treaty fall short of the constitutional standards stemming from a deliberative democratic conception. Thus, the Treaty cannot be regarded as a constitution in *a normative relevant sense*, without devaluating the constitutional currency. It is imperative making clear that the democratic legitimacy of the process and of the Constitutional Treaty is not on a par with that proper of most national constitutions.<sup>2</sup> On the other hand, the Constitutional Treaty is, overall, a significant achievement in the process of European integration and, moreover, the *political constitutionalisation* of the European Union is more likely within the new institutional and substantial framework contained in the Constitutional Treaty than under the present set of Treaties. As I have said, such a conclusion only seems to be contradictory, but it

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<sup>1</sup> The reference text is the one published in OJ C 310, of 16 December 2004, pp. 1-474.

<sup>2</sup> A proper consideration of this point would require considering in detail the relationship between the European Constitution and national constitutions. On this, see Pedro Cruz, *La Constitución Inédita*, Madrid: Trotta, 2005.

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is not. This might be clearer if one adds that that an overall positive judgment of the Constitutional Treaty is only *de rigueur*<sup>3</sup> on the condition that we do not overstretch the very idea of the democratic constitution; thus, if we realise that the Laeken process and outcome render more probable that the Union will *politically constitute itself*, without actually *politically constituting it*. This entails, quite obviously, a *gradualist approach* to both the concepts of democracy and of constitution.<sup>4</sup> Indeed, it seems to me that the *rigorous critique* of the Constitutional Treaty is not only compatible with a positive assessment, but the latter presupposes the former; such a critique allows realising what the Constitutional Treaty *simply cannot be said to be*, i.e. a full-blown *political* constitution, and helps realising its many positive features as strictly speaking the Treaty which establishes a constitutional framework for the Union. Moreover, it seems to me that the criticism of the democratic shortcomings of the Laeken process and outcome is the most useful contribution possible to the agenda that all democrats in Europe will have to confront the day after the Treaty enters into force, or its ratification definitely fails.

The article is divided in four sections.<sup>5</sup> Section I explores the relationship between the European Constitution and the democratic legitimacy of European Union law. Section II dwells with the extent to which the Constitutional Treaty is likely to be drafted and discussed according to a procedure which can be considered to be democratic. Section III analyses the extent to which the contents of the Constitutional Treaty, if it entered into force, would contribute to enhance the democratic legitimacy of law-making in Union law. The fourth and last section holds the conclusion.

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<sup>3</sup> This paper does not consider the question of whether European citizens should vote in favour or against the Constitutional Treaty. The author has his own views on the matter, which cannot but be related to the views expressed here. But making oneself mind on the referendum requires considering a whole range of prudential questions which are not discussed here. Therefore, it seems to me that the thorough analysis of the Constitutional Treaty from a deliberative democratic standpoint is a prerequisite to form one's mind, and that the arguments expressed here can be agreed upon by citizens in favour, and against, the Constitutional Treaty.

<sup>4</sup> By this, I do not subscribe to the fashionable idea of constitutionalisation as an eternal process, but merely affirm that the complex character of the European Union, the convoluted road to political and legal integration followed in Europe, explains why democratic constitution-making will only be possible after (1) the material constitutionalisation of the supranational legal order into which national legal orders fuse (a phase which was basically completed by the early 1970s); (2) the consolidation and simplification of the material constitution resulting from (1) (a process which can be said to have extended from the Single European Act to the Laeken process).

A caveat must be added here. A proper assessment of the Constitutional Treaty, both in procedural and substantive terms, will become possible only *after the end of the constitution-making process*. A careful evaluation would require considering not only the Convention and the Intergovernmental Conference (hereafter, IGC), but also the national debates and the ratification procedures (taking place in 2005 and 2006). At the time of writing, thus, the analysis can only be provisional, and subject to all the ifs and buts which derive from that.

## **I. The relationship between the European constitution and the democratic legitimacy of European law defined<sup>6</sup>**

The close relationship which exists between, on the one hand the writing of a European constitution and, on the other hand the enhancement of the democratic legitimacy of the European legal order, is a consequence of the central role played by constitutions in modern legal systems. Fundamental laws contain the *hierarchically superior* set of norms of a legal order, which determine the procedural and substantive conditions of validity of all other legal norms.<sup>7</sup> This grounds the *validity radiating force* of constitutional norms. Fundamental rights and law-making provisions play a constitutional gatekeeper role, which entails that all the other norms in the legal system are substantially and procedurally conditioned by them.<sup>8</sup> This implies two reasons why the democratic legitimacy of a legal order is highly determined by the democratic legitimacy of the Constitution itself. First, if the *process* through which constitutional norms have been established or amended can be said to have met *democratic legitimacy requirements*, the case for establishing the legitimacy of the whole legal order is

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<sup>5</sup> The article is part of a longer work, which includes chapters on the transformation of the European legal order, on the nature of the European democratic challenge, and on the substantive challenges the Union is facing.

<sup>6</sup> This section summarises what I argue in *The European Democratic Challenge*, forthcoming in this series.

<sup>7</sup> Ignacio de Otto, *Derecho Constitucional*, Barcelona: Ariel, 1988, 14-7: "At the end of the day, the very concept of Constitution stems from the hierarchical ranking of legal norms".

<sup>8</sup> Robert Alexy, 'Discourse Theory and Fundamental Rights', 9 (1996) *Ratio Juris* 209-35; and 'Discourse Theory and Fundamental Rights' (with the same title as the abovementioned article, but different contents), in Agustín J. Menéndez and Erik Oddvar Eriksen (eds.), *Fundamental Rights through Discourse*, Oslo: Universitetet i Oslo, Arena Report 9/04, pp. 35-51. See also Luis Prieto Sanchís, *Justicia Constitucional y Derechos Fundamentales*, Madrid: Trotta, 2003, pp. 137-74.

considerably advanced. This is so because the framing role of the constitution implies that the validity of all legal norms depends on their constitutionality; but at the same time, their constitutionality implies that they *borrow* some of the democratic legitimacy which the constitution-making process has achieved. Second, the legitimacy of ordinary legal norms *crucially depends* on the design of law-making processes in the Constitution. It is of paramount importance that the Constitution fosters a dynamic relationship between strong and general publics,<sup>9</sup> that it assigns to *democratically representative* strong publics the last word in the legislative process, and that the constitution mandates the legislature to respect the substantive values which underpin democratic decision-making itself. If law-making processes are structured in democratic ways, the norms produced by them will be infused with democratic legitimacy.

Under such a light, we can realise that the so-much discussed democratic deficit of the Union can be redefined by reference to the two-fold relationship between the European constitution and democratic legitimacy.

First, the law and institutions of European integration are not the result of a democratically enacted constitution, but of a diplomatically negotiated international treaty. True, the Treaties have been read in a constitutional key; courts and scholars have distilled from the Treaties (and even more fundamentally, from the constitutional traditions common to the Member States) the material constitution of the Union.<sup>10</sup> It is also true that treaty amendment process have become infused with elements of

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<sup>9</sup> See Nancy Fraser 'Rethinking the public sphere. A contribution to the critique of actually existing democracy', in Craig Calhoun, *Habermas and the Public Sphere* (Cambridge: The MIT Press, 1992), pp.109-42; 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; and 'Conceptualising European Public Spheres: General, Segmented and Strong Publics', Working Paper ARENA 3/04; and Hauke Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism', 31 (2002) *Millenium: Journal of International Studies*, pp. 675-90.

<sup>10</sup> See Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 (1981) *American Journal of International Law*, pp. 1-27; Giuseppe Federico Mancini, 'The Making of a Constitution for Europe', 26 (1989) *Common Market Law Review*, pp. 595-614; Joseph H. H. Weiler, 'The Transformation of Europe' 100 (1991) *Yale Law Journal*, pp. 2403-2483; Sabino Cassese, 'La Costituzione Europea', 3 (1991) *Quaderni Costituzionali*, pp. 487-508, Luis María Díez-Picazo, *Constitucionalismo de la Unión Europea*, Madrid: Civitas, 2002; Alec Stone-Sweet, *The Judicial Construction of Europe*, Oxford: Oxford University Press, 2004.

democratic constitution-making.<sup>11</sup> But such a complex process of *constitutionalisation* of the Treaties has not been the result of an intentional, democratic process of constitution-making. Thus, *there is no explicit democratic basis of the material constitution of the European Union, which has been basically constructed and affirmed by courts.*

Second, the *material* constitution of the European Union defines law-making procedures which are *insufficiently democratic*. This is so for the following five reasons:

- The assignment, in all processes other than co-decision,<sup>12</sup> of the last legislative word to the Council; this is an institution which is only *indirectly representative* of the will of European citizens, being composed of their national governments. Despite this, the Council is given the power to pass regulations and directives, with the mere consultation of the European Parliament, in domains which are characteristically reserved to *national laws by national constitutions*, such as taxation, social policy, and even the definition of crimes;<sup>13</sup>
- The lack of transparency of law-making processes, to the extent that the Council meets behind closed doors, and no transcription of its deliberations is published; sheltered by the secrecy of the Council, national government representatives gain considerable leeway to circumvent the mandates given to them by national parliaments; thus, while the assignment of legislative powers in EU law emancipates them from the control of the European Parliament, the secrecy of its meetings helps them escape the control of parliaments at home.
- A close consideration of the division of substantive issues among the many different legislative procedures reveals a *structural democratic deficit*. While measures which favour the strengthening and deepening of the single market are subject to relative simplified law-making procedures within which weak, if any,

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<sup>11</sup> John Erik Fossum, 'Constitution-Making in the European Union', in *Integration through Deliberation? Democracy in the European Union*. London: Routledge, 2000. pp. 111–40 and John Erik Fossum and Agustín José Menéndez, 'The Constitution's Gift', in *European Law Journal*, forthcoming.

<sup>12</sup> Anne Peters, 'European Democracy after the 2003 Convention', 41 (2004) *Common Market Law Review*, pp. 37–85, at p. 48, fn 43 quotes Parliament statistics according to which only 460 out of 1101 legislative acts were following the co-decision procedure in the period October 1997 to December 2003. However, the author claims that the real figures are even lower (around 25%) but she gives no explanation of why this is so.

<sup>13</sup> Cf. Articles 94 and 95.2 TEC, 95.2, 137.2 and 137.3 TEC, and 31(e) TEU.

veto powers are assigned to European and national parliaments (therefore, they can be said to be *underparliamentarised*), measures aiming at correcting the patterns of distribution of economic resources stemming from the operation of markets are subject to law-making procedures with multiple veto points (some of which are *over-parliamentarised*, as the concurrent favourable vote of both European, national and eventually regional parliaments is simultaneously required, thus rendering actual law-making rather improbable);

- European Union law, as interpreted by the European Court of Justice, offers a reinforced protection to basic economic liberties<sup>14</sup>, to the detriment of the values which underpin some of the civic, political and social rights protected by most national constitutions. To summarise, the material constitution of the Union increases the abstract weight to be assigned to economic liberties, thereby reducing the *political space* within which European and national legislatures can enact new norms;
- Judicial review of the constitutionality of European laws is rather limited by the fact that individuals are denied the right to stand before the European Court of Justice with a view of triggering such review. They can at most ask national courts to request a preliminary judgment on the issue from the European Court of Justice.

All these five democratic shortcomings are amplified by the fact that Union law trumps national law within its sphere of competence, and according to the *supremacy principle*<sup>15</sup> it also does so if both European and national norms are concurrently (and contradictorily) applicable in a given case. This is problematic because the democratic legitimacy of Community legal norms might be weaker, on account of the

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<sup>14</sup> The famous four economic freedoms, but especially the free movement of goods, services and capital, and only to a lesser extent of persons, or more accurately, workers. It might be pertinent to add that the Single European Act operated a far from minor operation within the “economic constitution” of the European Union, increasing the weight assigned to economic freedoms. Indeed, the original Rome Treaty could be constructed as being underpinned by a mixed economic constitution. The common market had a first pillar in the free movement of goods, and a second in the regulation of agricultural markets. Other economic freedoms were in a way *ancillary* to these two pillars.

<sup>15</sup> The principle of supremacy was not explicitly affirmed in the founding Treaties, but it can be said to have been implicit in an institutional and substantial structure such as that of the founding Treaties. On such a basis, the European Court of Justice first affirmed it in its judgment in case 6/64, *Costa v. Enel*, ECR [1964] 1. Obviously enough, the present shape of the doctrine was the result of a long process parallel to the constitutionalisation of Union law, in which the acceptance of the doctrine by national courts played a central role. On this, see Karen Alter, *Establishing the Supremacy of Community Law*, Oxford: Oxford University Press, 2001.

abovementioned five features, than that of national legal norms, and still, priority is given to the former over the latter.<sup>16</sup>

A final caveat. Those who will reject that the European Union is a political community in a relevant sense (a state in a Kantian sense, even if not a nation-state)<sup>17</sup> would also decline to follow the train of reasoning of this article. To them, the idea of granting the Union a democratic constitution is fundamentally wrong. In their view, the Union draws its legitimacy from the democratic legitimacy of its Member States. Therefore, it is proper and convenient that the material constitution of the Union is formalised in an international Treaty, and not in a constitution. This is indeed a coherent and sophisticated view.<sup>18</sup> If I do not share it, it is basically because it renders us incapable of accounting for the legal, economic and social reality of the European Union as it stands. It has been contradicted by facts since a rather long time, and at present seems unlikely to be redeemed by the future unrolling of the Union. The width and breadth of the positive and negative competences of the Union renders simply untenable to characterise the Union as an instance (even if a sophisticated one) of classical international organisation. Once this is realised, once one realises that the action of European institutions directly affects the lives of European citizens in manifold ways, one is forced to consider *how this can be democratically legitimated*. Under such circumstances, it is difficult not to conclude that the superior alternative by far is a

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<sup>16</sup> The principle of supremacy basically affirms that if both a European and a national legal norm are both *prima facie* applicable to a given case (thus, if the choice of law cannot be sorted out applying the division of competences between the European and the national legal orders), and the normative consequences they entail are contradictory, the Community norms should be applied. This should be the case *not only from the perspective* of Union law, but also of national legal orders. Moreover, given that national legal orders *are integrating* into the European legal order, it is simply not possible to say that the conflict leaves untouched the validity of the national norm. Now, this entails a hierarchical prevalence of European over national law *within the whole scope of application of Community law*, a scope which has grown to become almost as co-extensive with the one proper of national legal orders. At the very least, the *substantive* radiating force of the basic principles of Community law extends to every corner of national legal orders. The problem is, quite obviously, that the hierarchisation of legal norms (part of the system of sources of law) is expected, in democratic legal systems, to operationalise the democratic principle. Thus, a democratic system of sources of law ensures that the intensity of the democratic legitimacy determines its hierarchical ranking, which implies a norm will only prevail over another if the procedure through which it has been elaborated *tends to ensure* a higher democratic legitimacy (for example, because it requires a more demanding testing of the existence of a common will in support of the norm). The question becomes really complicated in Union law because Community norms have a *scope democratic surplus* and *nation-states* have a structural democratic deficit. On this, see my *European Democratic Challenge*, *supra*, fn 6.

<sup>17</sup> Jean Marc Ferry, *La Question de l'État européen*, Paris: Gallimard, 2000.

*direct democratic legitimation* of European law and institutions, which in its turn requires the writing of a European constitution. *When* and *how* are questions of prudence, which is clearly not a secondary political virtue.

## II. Is the Laeken constitution-making process sufficiently democratic?

As was already argued at the beginning of the previous section, the democratic character of an eventual European Constitution must be assessed with the help of a two-pronged examination. In this section we will consider the first limb of the test, namely, the extent to which the process of writing the European Constitution can be said to have been democratic. I will do so by reference to five distinct phases of the process,<sup>19</sup> namely:

- The signalling of a constitutional moment
- The Convention
- First round of national debates
- IGC
- Second round of national debates, leading to eventual ratification through national referenda and parliamentary resolutions

### A) Signalling

Constitutional signalling, in European nation-states and elsewhere, requires both leadership and democratic legitimacy. The person or movement who puts the constitutional reform process in motion does so by means of asserting the claim that there is widespread support in favour of the enactment, or reform, of the constitution. But it can be perfectly the case that such majority would only emerge *after* the claim has been made, or even *because the* claim has been made. To put it differently,

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<sup>18</sup> Indeed, see Derrick Wyatt, 'New Legal Order, or Old?', 7 (1982) *European Law Review*, pp. 147-166. Ole Spiermann 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order', 10 (1999) *European Journal of International Law*, pp. 763-89.

<sup>19</sup> The justification of the distinction of the five phases is closely related to the deliberative democratic theory of constitution-making defended in Section 1 and more extensively explicated in Fossum and Menéndez, *supra*, fn 11.

signallers make a claim to political leadership, which indeed can turn a diffused feeling in favour of constitutional reform into an articulated one. But if this is not the case, their claim to leadership is not redeemed, and the process fails.<sup>20</sup>

Fischer's speech of May 2001 can retrospectively be seen as the first major call to write a Constitution for the Union,<sup>21</sup> while the *formalization* of the signalling can be attributed to the Laeken Declaration,<sup>22</sup> unanimously approved by the members of the European Council. A considerable number of speeches and contributions by leading national politicians, and some among the political and intellectual European elites, endorsed Fischer's basic plea, and put forward different constitutional agendas and proposals.<sup>23</sup> Thus, the element of leadership was clearly present. Contrarily, the democratic impulse was extremely weak, as there was almost no indication that the signalling managed to articulate the latent support of *European citizens* for a European constitution. Despite some initiatives to foster national debates on the European constitution (especially under the Swedish and the Belgian Presidencies of the Council in 2001),<sup>24</sup> European citizens did not seem to be moved by the apparent constitutional enthusiasm of their elites. However, it is true that the direct *representatives* of citizens, i.e. national parliamentarians, were widely supportive of the constitution-making process (something which was reflected indeed in their attitude in the Convention). Thus, the Laeken signalling was characterized on the one hand by strong leadership coupled with resolved support on the side of strong publics, and on the other hand

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<sup>20</sup> See Bruce Ackerman, *We the People*, Cambridge: Harvard University Press, 1991 (volume 1) and 1997 (volume 2), especially vol. 1, p. 272 and 274. On false positive and false negatives, see volume 1, pp. 278ff and vol. 2, pp. 29ff and 414ff.

<sup>21</sup> 'From Confederacy to Federation: Thoughts on the Finality of European Integration', in Christian Joerges, Yves Mény and J H H Weiler (eds.), *What kind of Constitution for what kind of polity?*, European University Institute and the Jean Monnet Chair, Harvard Law School, 2000, pp. 19-30. See also the companion essays.

<sup>22</sup> The text of the Declaration can be found at [http://europa.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm).

<sup>23</sup> A collection of some of the leading speeches can be found at Mark Leonard (ed.), *The Future Shape of Europe*, Brussels: Foreign Policy Centre. See also the Transatlantic edition of *Internationale Politik*. Among the numerous discourses, Jospin's attracted most attention. See also Lionel Jospin, 'Ma Vision de l'Europe et de la mondialisation', Paris: Plon, 2001. An assessment of the set of discourses is to be found in Carlos Closa, 'The Implicit Model of Constitution in the EU Constitutional Project' in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, *Constitution-Making and Democratic Legitimacy*, ARENA Report 8/02, Oslo: Universitetet i Oslo, 2002, pp. 53-74.

<sup>24</sup> See, for example, Report on the Debate on the Future of the European Union, 9520/01, POLGEN 14, Brussels 8 June 2001.

dismal levels of support on the side of citizens.<sup>25</sup> Under such circumstances, it can be argued that the signalling was still democratic enough, because the lack of public mobilisation was compensated by a strong endorsement by directly representative institutions of European citizens (i.e. parliaments, both the EP and national ones). However, if we take the idea of democratic constitution-making seriously, strong publics can act only as temporary substitutes of European citizens. This implies that even if the lack of active support on the side of citizens at this early stage does not undermine the democratic character of the process, it raises the stakes, so to say, and requires that general publics come to clearly endorse the initiative at later stages.

## B) The Convention

The Laeken Convention can be properly characterized as a strong public.<sup>26</sup> This is so because most of its members were elected representatives of European citizens. They were appointed *conventionnels* by the Parliament of which they were members, be it European or national.<sup>27</sup> Moreover, a certain *conventionnel* identity soon emerged, fostered first by the opposition to the rules of procedure proposed by the Praesidium,<sup>28</sup> and later, by a sense of common purpose, namely, the writing of a constitutional proposal.<sup>29</sup> This was, obviously enough, helped by the organisation of informal meetings in which *conventionnels* met in ideological, institutional or national formation, which replicated the formal and informal arrangements characteristic of constitutional

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<sup>25</sup> True, the Euro-barometer reflects a consistent majority in favour of the drafting of a European Constitution. But citizens do not seem to relate very closely their call for a European Constitution with the Laeken process, which is ignored by many and known by few. Although far from being a concluding argument, this provides anecdotal but telling evidence on how Europeans assess the *constitutional* nature of the Constitutional Treaty. Cf. *Flash Euro-barometer 159: The Future European Constitution*, Brussels: European Commission, 2004, available at [http://europa.eu.int/comm/public\\_opinion/flash/fl159\\_fut\\_const.pdf](http://europa.eu.int/comm/public_opinion/flash/fl159_fut_const.pdf), especially at p. 33.

<sup>26</sup> In constitutional terms, as has just been said, it was not strictly speaking a strong public, if only because its proposal would not be the one submitted to the consideration of citizens, but will be analysed and amended at will by the Member States in IGC.

<sup>27</sup> Around sixty eight per cent of the Members of the Convention were nominated by national Parliaments or by the European Parliament.

<sup>28</sup> See, for example, CONV 55/02. See also Koen Lenaerts and Marlies Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy', 39 (2002) *Common Market Law Review*, pp. 1217-53 at 1237ff. A contemporary account in also Arnaud Leparmentier and Laurent Zecchini, 'Première fronde et premières débats sur l'avenir de l'Europe', *Le Monde*, 2 Mars 2002.

<sup>29</sup> See Olivier Duhamel, 'Convention vs. IGC', 11 (2005) *European Public Law*, pp. 55-62.

assemblies.<sup>30</sup> In addition, and in stark contrast with all IGCs, including the Laeken one, the Convention considered general European publics as its natural audience. This was reflected in the facts that most of the Convention documents were rendered public as they were produced, and that most of the meetings of the Convention were open to the public.<sup>31</sup>

Nevertheless, it must be added that the quality of the *democratic credentials of a strong public* is closely dependent on both the degree of interconnection of the strong public with general publics, and on the way in which the strong public deliberates and takes decisions. On the first account, it must be said that the degree to which general publics could shape the agenda and arguments advanced in the Convention was rather limited. Some of the attempts at creating a ‘structured dialogue’ were rightly perceived as rather ineffective, if not a mere matter of image. This was unfortunately the case with the Youth Convention<sup>32</sup> and to a good extent with the Forum.<sup>33</sup> Indeed, the time and resources allocated to hearing non-governmental actors was not much more impressive than the one which characterised similar efforts in Charter Convention.<sup>34</sup> The degree of attention to the labours of the Convention on the side of the general media, and of the publics of Member States and (by then) candidate countries was only slightly better than the one paid before the opening of the works of the Convention.

Moreover, the timing of the Convention itself rendered such interaction unlikely. Whether intentional or not, the choice of the Praesidium to devote a considerable long time to the *listening phase*, and to start considering concrete drafts of the text at a rather late stage, were bound to result in a tight framework in which time prevented the explicit articulation of reasons for the choice of certain alternatives. Thus, it could be

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<sup>30</sup> See, for example, Peter Norman, *The Accidental Constitution*, Brussels: Euro-Comment, 2003; Olivier Duhamel, *Pour L'Europe*, Paris: Seuil, 2003 ; Gisela Stuart, *The Making of Europe's Constitution*, Fabian Society, 2003 and Neil D. MacCormick, *A Union of its own kind?*, Edinburgh: The Greens/European Free Alliance, Edinburgh, 2004.

<sup>31</sup> But the documents internal to the Praesidium and the Secretariat were not public. Of the meetings of the Praesidium, the working groups and the discussion circles we only have *summaries*, which avoid mentioning the name of the member who claimed this or that.

<sup>32</sup> See its results at <http://www.youth-convention.net/en>.

<sup>33</sup> See [http://europa.eu.int/futurum/forum\\_convention/index\\_en.htm](http://europa.eu.int/futurum/forum_convention/index_en.htm).

<sup>34</sup> An assessment of the participation of civil society organisations in the Charter Convention is to be found in Olivier De Schutter ‘Civil Society in the Constitution for Europe’, in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *The Chartering of Europe*, Baden-Baden: Nomos, 2003, at pp. 133-60.

said that timing favoured bargaining, not deliberation.<sup>35</sup> In such a context, it was rather improbable that public debates could result in a transformation of the preferences of *conventionnels*. On the second account, the interaction within the Plenary and the working groups has tended to be described as a deliberative one.<sup>36</sup> Even if partially agreeing (even sympathizing) with such an assessment, two major caveats have to be made. First, voting was excluded from the very start as a technique of decision-making. It has been argued that *voting* would have been impossible, given the very different kinds and degrees of legitimacy of the different members of the Convention (which would have been the proper weight to be assigned to government and parliamentary representatives of a would-be-candidate as Turkey?). Some claim that this *need* actually was a fortunate one, as this enhanced deliberative interaction.<sup>37</sup> However, it can be claimed that voting is actually preferable to other ways of decision-making, especially from a deliberative-democratic perspective. If preceded by a proper deliberation, voting is a *normatively justified* way of adopting a decision.<sup>38</sup> Second, the lack of transparency in the meetings of the Plenary<sup>39</sup> casts the shadow of a doubt about the extent to which the outcomes of the Convention can be said to be the result of *deliberative interaction*. There is anecdotal but strong evidence of the firm hand which the three leading members of the Praesidium had on the unfolding of the Convention, and of some

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<sup>35</sup> An analysis of the issue on what concerns the Charter convention can be found in Justus Schönlaue, 'New Values for Europe? Deliberation, Compromise and Coercion in Drafting the Preamble of the EU Charter of Fundamental Rights', in Eriksen, Fossum and Menéndez, *supra*, fn 34, at pp. 112-32.

<sup>36</sup> Cf., for example, Paul Magnette, 'Deliberation or Bargaining' in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *Developing a Constitution for Europe*, London: Routledge, 2004, pp. 207-25; 'Coping with Constitutional Incompatibilities: Bargains and Rhetoric in the Convention on the Future of Europe', Working Paper 12/03, Jean Monnet Working Paper Series.

<sup>37</sup> Magnette, *ibidem*.

<sup>38</sup> See Joshua Cohen, 'Deliberation and Democratic Legitimacy' in A Hamlin and B Pettit (eds.), *The Good Polity*, Oxford: Blackwell, pp. 17-34; see also Loren A. King, 'Deliberation, Legitimacy and Multilevel Democracy', 16 (2003) *Governance*, pp. 23-50.

<sup>39</sup> No official record of its meetings has been kept, despite the insistence of some *conventionnels*. On this, see the exchange between Giscard and Fayot on the plenary session of May 24th, 2003, especially the reply by the President: "Je vous répondrai en vous disant qu'en fait, les informations sont essentiellement les documents que nous vous adressons. Nous ne faisons pas de compte-rendu des discussions internes. Cela n'aurait d'ailleurs pas grand intérêt : il s'agit d'une sorte de débat interne sur des textes ou des projets de textes. Si le Praesidium prenait une décision sur un point particulier concernant la préparation de l'avis de la Convention, nous pourrions en effet vous en informer. La dernière fois, nous avons débattu sur les documents que nous vous avons adressés, cela n'avait que très peu d'intérêt. S'il y avait des débats sur la méthode, sur le calendrier, nous répondrions, M. Fayot, à votre demande".

*strategic* shifting between voting within the Praesidium, and even on who was entitled to vote.<sup>40</sup>

### C) The (ghostly) first round of national debates

The decision to open the IGC in October 4, 2003 left almost no time for a public debate of the proposals of the Convention before the IGC. The Convention concluded its work at the end of July, and, as well-known in Continental Europe, August and a good part of September are months in which public debate is of a rather low intensity (obviously, due to the holiday period). This damaged considerably the perspective of the European constitution-making process acting as a catalyst of the European public sphere.<sup>41</sup> If the opening of the IGC would have been postponed, it could have been the case that *synchronized national debates* would have unfolded around a common agenda, i.e., the Constitutional Treaty. This could have sparked the emergence of a constitutional common will across national and regional public spheres, and fostered the referred interconnection of European general publics. Indeed, it can be claimed that the existence of two *drafting bodies* (the Convention and the IGC) could only make sense from a deliberative perspective if there was an intermediate deliberative phase.<sup>42</sup>

Democratic-constitution making, very clearly, is among other things a matter of *right timing*. A common constitutional will never falls from the sky, but results from awareness of common problems, and of testing and filtering uncritical preferences. At the same time, the very idea of a constitutional moment in which citizens consciously and intentionally rewrite the fundamental norms of their legal order simply evaporates if a certain *momentum* is not present; this recommends not prolonging too much the time

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<sup>40</sup> On the role of the Presidium and its strong leverage on the Convention, see Carlos Closa, 'Improving EU Constitutional Politics? A Preliminary Assessment of the Convention', CONWEB Papers 1/2003, available at [http://www.unizar.es/union\\_europea/files/conweb1-2003.pdf](http://www.unizar.es/union_europea/files/conweb1-2003.pdf); and Kalypso Nicolaidis and Paul Magnette, 'Bargaining in the shadow of rhetoric', 27 (2004) *West European Politics*, pp. 381-404.

<sup>41</sup> Jürgen Habermas, 'Why Europe needs a Constitution?', 11 (2001) *New Left Review*, pp. 5-26. The convenience of such a lapse between one and the other is defended in Agustín José Menéndez, 'Three conceptions of the Constitution', in Eriksen, Fossum and Menéndez (eds.), *supra*, fn 36, pp. 109-28.

<sup>42</sup> It can be added, although this implies making use of knowledge which could only be had now, that the reasons advocated to *rush into* the Intergovernmental Conference proved to be mere illusions. The way in which the Italian Presidency performed its role almost ensured that the Constitutional Treaty will not be approved by the end of 2003. Thus, postponing the IGC would not have delayed the approval of the Constitution, and it would have allowed for the interconnection of European public spheres.

span between signalling and final decision-making. The rush from Convention to IGC is a paradigmatic example of wrong timing. By not devoting time and efforts to debate the Convention draft, and subject it to the criticism of European public opinions, a major opportunity was lost to forge a genuine European constitutional will. The avoidance of such debate saved time for the IGC. However, national governments not only wasted such precious time, led by the Italian Presidency, but also scenified a deep disagreement at the Brussels Council, dilapidating in one night (so to say) all efforts to build constitutional momentum.

#### **D) The Intergovernmental Conference**

The long shadow of the Convention seems to have introduced some changes in the working methods of the IGC, increasing its exposure to public pressure. It must be noticed that most of the salient issues considered in the IGC had already been debated within the Convention. This entailed that the main arguments for and against a given solution had already been articulated *publicly*, something which created some expectation that solutions will be based on *arguments*, and not on mere *compromise of interests*. This seems a plausible conclusion, but only if not taken too far. First, the actual process of deliberation and decision-making remained rather secretive and baroque. Discussions took place in backrooms, not in public. The rotating Presidency of the Council kept clearly disproportionate influence, if only through the structuring of the debates, the setting of the agenda and its clout to establish agreements among different national representatives.<sup>43</sup> A rather convoluted drafting practice, based on a complex set of documents amending previous amendments, was not the least tool used by the Irish Presidency to increase its influence.<sup>44</sup> Second, and quite relatedly, secrecy diminished the role that general publics could play in forcing national representatives not only to come to an agreement, but also to come to *certain specific agreements*.<sup>45</sup>

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<sup>43</sup> Cf. Magnette, *supra*, fn 36.

<sup>44</sup> Cf. IGC 60/03, with its addenda and CIG 86/04 with its addenda. According to CIG 85/04, the agreement reached in Brussels was to accept a text based on CIG 50/03, of 25 November 2003 and its successive amendments by the legal services (CIG 54/03, of 24 November 2003; CIG 72/04, of 26 March 2004 and 74/04, of 30 April 2004), as amended by CIG 81/04, of 16 June 2004 (a text which evolved out of CIG 76/04, of 13 May; 78/04, of 24 May, 79/04 of 10 June; 80/04, of 12 June), and CIG 85/04.

<sup>45</sup> Widespread social mobilisation in favour of adding a social dimension to the European Union partially explain why a Working Group on 'Social Europe' was finally put together within the Laeken Convention. The (relative) transparency of the Convention actually favoured social mobilisation. In

Third, the actual unfolding of events, with the predictable but not the least damaging failure of the Brussels Summit of December 2003, and the usual exchange of veto threats in the Spring of 2004, contributed to the further dilution of the authority of the Draft put forward by the Convention. This can be empirically proved by the simple expedient of comparing the terms of agreement put forward by the Italian Presidency in December 2003 and the actual contents of the text agreed in June 2004.<sup>46</sup> Timing is, as was just said, essential in politics. Fourthly, the referred failure of the Brussels summit is likely to have diminished the already fragile public support for the Convention proposal; this effect was amplified by the decision to postpone a definitive decision until the holding of the elections to the European Parliament. The Brussels fiasco, and the way in which it was reported, are likely to have weakened popular support for the identification of the Draft Treaty with the constitution of Europe. Indeed, the Brussels summit entrenched the perception of the process of writing primary Union law as a matter of cruel bargaining and pork-barrel politics. By postponing a decision until the holding of the elections to the European Parliaments, a major opportunity was lost not only of fostering debate on the constitution all around Europe, but also of repairing the damaging effects of the Brussels' fiasco.<sup>47</sup> And also of encouraging Europeans to actually vote in the elections to the European Parliament.

## **E) National debates and ratification procedures**

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contrast, the absence of a transparent agenda in the meetings of the European Council favours that people rejects its outcomes when they are publicised, and that it increasingly shows its disagreement through demonstrations organised in parallel to European Councils.

<sup>46</sup> See documents referred *supra*, fn 44.

<sup>47</sup> One might add that if the Constitutional Treaty would already have been approved by the IGC, the elections to the European Parliament would have been much more obviously relevant for European citizens. This might have encouraged them to participate.

On the basis of what has been argued, the democratic legitimacy of the constitution-making process is still to be established. It would critically depend on the degree to which a common constitutional will is articulated in the national debates and ratification processes.

Predictions are likely to demonstrate false. But it might not be unreasonable to suggest that the democratic gap might be filled, but only partially, rendering complicated to situate the European constitution on a par with national constitutions on what concerns its democratic legitimacy. European general publics have played an almost insignificant role in the process of signalling a constitutional moment. The Convention increased the transparency of the whole process, as its transparent and reasoning mode of decision-making (partially) spilled into the IGC. But transparency did not result in political mobilisation, and most Europeans do not know that they are in the middle of constitution-making process. A sudden *awakening of the public* might take place when the time comes to ratify, but seems to me unlikely (especially in Member States where no referendum will be held) or problematic, on account of its suddenness. Indeed, the lack of a previous public debate on the matter renders likely that ratification debates will be *contaminated* by national political agendas, rendering improbable that national public spheres influence each other. This is also not exactly promoted by the fact that the national referenda to be held will be so on a purely national basis, even if it would have been pretty easy to celebrate them the same day, or within a given time limit. Moreover, citizens no longer have the power to *change* the literal text of the draft, but can merely opt between two rather stark choices: to endorse or to reject the Constitution. The fact that a *negative vote* could be interpreted not so much as the disapproval of a specific constitutional text, but as vote of distrust on the process of European integration, guarantees a considerable distortion of the sense and interpretation of the vote.<sup>48</sup>

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<sup>48</sup> Consequently, a robust majority in favour of the Constitutional Treaty could be indicative of a strong support of the process of integration, and not so much of the specific text subject to vote. While a negative vote could be interpreted by some as questioning the process of integration, even if, legally speaking, the Treaties as amended in Nice will still be fully applicable.

### **III. Will the Constitutional Treaty improve the democratic properties of European law-making processes?**

In this section, I will consider the extent to which the European Constitution is likely to improve the democratic character of ordinary law-making process in the Union. The key question is whether the changes introduced by the Constitutional Treaty will be enough to overcome the democratic deficiencies that characterise present law-making procedures, as argued in Section 1. It seems to me that this requires considering in some detail:

- The division of labour between the constitution and ordinary legislation;
- The political rights acknowledged to European citizens, and the effect that this might have in the relationship between *general and strong or institutionalized* publics;
- The design of ordinary law-making sources and processes; democratic decision-making presupposes a *normatively* based distinction and hierarchisation of the sources of law, and presupposes the extension of democratic control over the whole set of Union powers; democracy requires not only that *minorities cannot capture* the legislative procedure, but also that they cannot block the same procedure (under-parliamentarisation and over-parliamentarisation are equally problematic phenomena); similarly, it is important to consider whether there is a sufficient degree of coherence in the assignment of powers to the different levels of government, so that the division of competencies does not render *sterile* public power;
- The scope and bite of *guaranteed substantive contents* of Union law, that is, the set of principles which constitute the benchmark of European constitutionality;
- The procedural rights guaranteed to European residents in the process of implementation of Union law.

#### **A) The Division of Labour between the Constitution and Ordinary Laws**

The democratic dignity of a truly democratic constitution must be founded on its guardianship of the role of ordinary statutes as expression of the common will of citizens.<sup>49</sup> Thus, the European Constitution should be a frame or map which grounds and enables democratic political action, the solving of conflicts and the coordination of action in view of the common interest.<sup>50</sup> The Constitution should open up and frame political decision-making, without exhausting or confining it.<sup>51</sup>

It is thus not surprising that the distinction between the constitutional and non-constitutional parts of the primary law of the Union was one of the objectives the fulfilment of which the Laeken Declaration mandated to the Convention.<sup>52</sup> The Praesidium endorsed such an objective from the very beginning of the labours of the Convention.<sup>53</sup> Indeed, the distinction of at least two parts in the text of the Convention's proposal seems to have been decided at the same time that it was resolved that the outcome of the Convention will be *one single constitutional proposal*. That is, at the very beginning of the Convention's labours.<sup>54</sup> One part of the text will be *constitutional* in a proper sense, implying that its reform would be possible only through a procedure which will ensure a strong democratic support. The other parts will be *non-*

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<sup>49</sup> Ackerman, *supra* 1991, fn 20, at p. 186: "The crucial question is how to organize the electoral system so that, despite the realities of faction, winners may be encouraged to govern in the deliberative, public-spirited way exemplified by the People meeting in constitutional convention during their finest revolutionary hour". See also Francisco Laporta, 'El Ámbito de la Constitución', 24 (2001) *Doxa*, pp. 459-84.

<sup>50</sup> The metaphor of the "map" is borrowed from Carlos Santiago Nino, *Fundamentos de Derecho Constitucional*, Buenos Aires: Astrea, 1992.

<sup>51</sup> To put it differently, the Constitution should be light enough as not to be come an alternative to ordinary politics; it should not turn the ordinary legislature into a mere *implementing agency* of the program contained in the Constitution.

<sup>52</sup> See Laeken Declaration, available at [http://europa.eu.int/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm)

<sup>53</sup> Indeed, Jean Luc Dehaene, as head of a Wise Men Committee, and Giuliano Amato, closely related to the Schuman Centre studies, had been strong advocates of a reorganisation of the Treaties in a constitutional sense. Dehaene was one of the co-writers (together with Richard Von Wizaöcker and David Simon) of the report commissioned by the European Commission, 'The Institutional Implications of Enlargement', available at <http://www.jeanmonnetprogram.org/dehaene.html>. The European Parliament commissioned a draft consolidated Treaty which implemented such a distinction to the Robert Schuman Centre of the European University Institute. See, among other documents, 'A Basic Treaty for the European Union. A study of the reorganization of the Treaties', available at [http://www.iue.it/RSCAS/Research/Institutions/rapport\(2\).pdf](http://www.iue.it/RSCAS/Research/Institutions/rapport(2).pdf). A detailed analysis can be found in the first part of Bruno De Witte, 'Simplification and reorganization of the European Treaties', 39 (2002) *Common Market Law Review*, 1255-87.

<sup>54</sup> Cf. 'Introductory Speech by President Valéry Giscard d'Estaing to the Convention on the Future of Europe', SN 1565/02,, at p.11: "[T]here is no doubt that, in the eyes of the public, our recommendation would carry considerable weight if we could manage to achieve broad consensus on a single proposal which we could all present".

*constitutional*, and open to be reformed through a simplified procedure. In that regard, some proposed,<sup>55</sup> following some academic studies,<sup>56</sup> the characterisation of such parts as organic laws, a legal category with a hierarchical ranking superior to ordinary statutes, but inferior to constitutional norms. Indeed, reorganisation was the main rationale of the key procedural decision of the Praesidium of focusing the labours of the Convention on Part I of the Constitution, and leaving the drafting of most of (what was originally called) Part II to legal ‘experts’. Such a decision was justified on the grounds that once the Constitution was in place, (then) Part II could be amended through a simplified procedure. Thus, it would be better to focus debates on the parts which will not be amenable to such kind of reform.

At the end of the day, the Draft Treaty is split in four, not two parts. The Charter of Fundamental Rights constitutes Part II of the Draft Treaty, a decision closely related to the attempts made by the British and the Irish government to tune down the binding character of the Charter.<sup>57</sup> Such an ordering is peculiar in comparative constitutional terms, given that bills of rights are usually placed at the beginning of the formal constitutional text.<sup>58</sup> Be as it may, what was originally referred as Part II (containing all norms of material infra-constitutional status), is now Part III. Moreover, a new Part IV has been added, containing a reduced number of extremely important general and final provisions.

Quite obviously, the key question is not so much the number of Parts, but the constitutional status and ranking of each of them. The Draft Treaty is silent in this regard. *Prima facie*, everything that is formally speaking part of the Constitutional

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<sup>55</sup> According to CONV 271/02, p. 8. Among them, Duff was rather vocal. See Verbatim report of the Plenary session of May 23rd, 2002.

<sup>56</sup> Cf. Roland Bieber and Bettina Kahil, “Organic Law” in the European Union’, in Gerd Winter (ed.), *Sources and Categories of European Union Law. A Comparative and Reform Perspective*, Baden-Baden: Nomos, 1996, pp.423-51.

<sup>57</sup> Cf., for example, CONV 659/03 of 14 April 2003. The contribution was supported, among others, by the main and alternate representatives of the United Kingdom, Ireland, Sweden, Netherlands and Denmark.

<sup>58</sup> From the standpoint of deliberative democratic theory, such an option is preferable on two grounds. First, it corresponds to the *constituting* character of the mutual acknowledgment of rights among citizens. Fundamental rights are thus to be conceived as enabling the creation of a constitutional order and its proper functioning, and not as *substitutes* of democracy. Second, reflecting such status in the ordering of materials in the Constitution is to be preferred, as renders visible such an option to citizens. There is also a

Treaty (helas! protocols included) is to be regarded as part of the *primary law of the Union*. This entails that Part III is on a par with the other parts of the Draft Treaty, if only because *all parts* of the Constitutional Treaty are subject to amendment procedures which require ratification by *all Member States* according to *their own constitutional requirements*.

Against such a conclusion, it could certainly be argued that the final text contemplates three different amendment procedures: (1) an *ordinary conventional one*, in which amendments are to be approved by a Constitutional assembly (with a composition rather similar to the Laeken one), an IGC, and finally by Member States (cf. arts. IV.443, sections 1, 2 and 3); (2) an *ordinary simplified one*, in which no Constitutional assembly is not convened, and changes are to be approved by an IGC and ratified by the Member States (cf. arts. IV.443, sections 1, 2 and 3); the choice between (1) and (2) lies in the hands of the European Council *and* the European Parliament (deciding by simple majority in both cases, according to IV.443.2, second indent) (3) a *special simplified one*, applicable to Part III, Title III (*Internal Policies and Actions*), in which the amendments are decided by the European Council, and then ratified by the Member States (cf. IV-445). The distinction of these different *amendment procedures*, and especially, between on the one hand (1) and (2), and on the other hand (3), could be seen as a clear indication of the different hierarchical status of each part. A perhaps decisive argument is that the articles that can be amended through the *special simplified amendment procedure* are precisely those which were not drafted by the Convention, but consolidated by *legal experts*. This would entail a hierarchical ranking based on the intensity of the democratic legitimacy of the parts of the Constitution.<sup>59</sup> However, the fact remains that the Constitutional Treaty does not *explicitly* state that there is a hierarchical ranking between the Parts, and, moreover, that in all cases amendment requires unanimous ratification (pace the riddle of IV-443.4)<sup>60</sup> in accordance with

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long historical tradition in favour of such an option. After all, the *Declaration des Droits de l'Homme et du citoyen* came first, and the Constitution afterwards.

<sup>59</sup> The legitimacy of Title III of Part III will not stem from the legal expertise of its drafters, but from the fact that it consolidates existing Union law, which has been elaborated through *standard* IGCs.

<sup>60</sup> “If, two years after the signature of the treaty amending this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”.

national constitutional requirements. This advises concluding that the jury is still out on the issue, but *prima facie* all Parts have equal constitutional status.

This is problematic in democratic terms, for two related reasons. First, it creates a serious risk of *over-constitutionalisation*, and consequently, of substantively undermining the democratic decision-making process.<sup>61</sup> If all the provisions of Title III of Part III are to be considered as being part of the European constitution, then we will have to come to the conclusion that all of them frame the action of European, national and regional legislatures. Given the rather concrete detail at which policies are defined in Part III, the European Constitution would then be a straitjacket upon the action of European, national and regional legislatures, who will be reduced to condition of executors of the extremely detailed programme articulated in the Constitution. Second, it must be kept in mind that the reason why the Convention was not supposed to debate in detail Part III was that it would be amenable to amendment through a non-constitutional procedure. If, contrary to such an expectation, it must be considered *on a par* with other parts of the Constitution, we are then faced with a text which claims to be a Constitution, but most of which (at least quantitatively) has not been subject to debate and deliberation in the Convention, but merely to allegedly technical consolidation. Which basically leaves us where we started, thus, with a constitution in a material sense, which cannot be said to be a democratic constitution.<sup>62</sup>

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<sup>61</sup> An argument which was taken seriously, one might be allowed to remember, by the German Constitutional Court in *Brunner*. See *Manfred Brunner*, of 12 October 1993, BVerfGE 89, 155 and [1994] 1 CMLR 57, reproduced in *The Relationship between European Community Law and National Law: The Cases*, Cambridge: Cambridge University Press, 1994, pp. 526–75: ““The right guaranteed by Article 38 of the Basic Law, to participate via elections in the legitimation of State authority and to gain influence over the exercise thereof precludes, within the scope of Article 23 of the Basic Law, that right from being undermined by the transfer of tasks and powers of the Bundestag to the point where the principle of democracy, in so far as Article 79(3) in conjunction with Article 20(1) and (2) of the Basic Law declares it inviolable, is violated (cf. B.I (a) above) (...) For democracy not to remain merely a formal principle of accountability, it requires the existence of certain prerequisites such as a constant free exchange of views between opposing social forces, interests and ideas, in the course of which political objectives also become dear and change (cf. BVerfGE5,855 (135, 198, 205); 69, 315, (344 *ff*)) and from which public opinion gives initial shape to the political will. *It also implies that the decision-making processes of the institutions exercising sovereign authority, and the political objectives pursued at any given time, must be generally clear and understandable. Equally, the citizen who is entitled to vote must be able to communicate in his own language with the sovereign authority to which he is subject*”. (my italics). The argument from over-constitutionalisation makes a central part of the arguments in favour of voting *no*, even of Euro-philés. Cf. Laurent Fabius, *Une certaine idée de l'Europe*, Paris: Plon, 2004, pp. 21–3 and 45–52.

<sup>62</sup> Indeed, we might not even be back to square one, given that the *claim to constitutionality* on the side of the Constitutional Treaty might impair national constitutions from playing the same role they used to. Moreover, the *political opportunity* of constitution-making would have been wasted.

One might still argue that the question will not be left undecided for very long. That, indeed, the very interpretation of many provisions contained in Part I will require elucidating their hierarchical status *vis-à-vis* specific provisions of Part III. This is the case, among others, of Title III (competences) and Chapter I of Title V (legal instruments). Part I imposes a *general normative framework* in both cases, the consequences it has for the peculiar normative framework resulting from the evolution of EU law, as consolidates in Part III, is far from obvious. Whether all EU competences are to fall under the mould of exclusive, shared or complementary, or other *in between categories* might subsist (as seems to be granted by I-12.6), or which specific status is to be given to *autonomous regulations* (e.g. art. III-231.3) may depend on what kind of relationship exists between Parts I and III of the Constitutional Treaty. If Part I is *hierarchically superior* to Part III, we will have to interpret the provisions in Part III in the light of Part I. But if both have the same *hierarchical status*, then the opposite might be true, as provisions of Part III are more specific and, as is well known, *lex specialis derogate lex generalis*. Finally, Article II-112.2 seems *prima facie* to restrain the breadth and scope of all the fundamental rights provisions of Part III to the conditions and limits enshrined in all other Parts of the Constitution,<sup>63</sup> while Article II-112.5, whatever the intention of the drafters, reinforces the arguments in favour of considering all fundamental rights affirmed in the charter as possible exceptions to the economic freedoms enshrined in Part III.<sup>64</sup> There is a clear tension here, and the constitutional solution given to it very much depends on the question of the ranking of Parts of the Constitutional Treaty.

If this is true, then, courts would not only feel tempted, but might sooner or latter be asked to settle the question. Perhaps unavoidably, the first court of call will be the European Court of Justice. However, this might again be unfortunate from the standpoint of democratic theory. Not only this would entail leaving such a *decisive political question* in the hands of the judiciary (thus betraying one of the main rationales

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<sup>63</sup> It states that “Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions, and within the limits defined by these relevant Parts”.

<sup>64</sup> A rather different construction of II-112-5 in the forthcoming Pedro Cruz, ‘La Carta o el Convidado de Piedra’, en Carlos Closa and Natividad Fernández (eds.), *El Tratado Constitucional de la Unión Europea*, Madrid: Centro de Estudios Políticos y Constitucionales, 2005.

of the writing of a European constitution)<sup>65</sup> but it might actually damage the *effectiveness* of Union law. Questions such as the ones just referred might seem rather abstruse, but they are of major importance, and should be decided *politically*, not *judicially*.

Thus, the Draft Treaty, by *formally distinguishing between different parts of the text*, seems to follow the reorganization logic, and thus invite questions on the constitutional status of each Part. However, the Treaty is formally silent on the hierarchy among parts, and thus does not provide clear answers. The distinction of three amendment procedures, basically corresponding to the breadth and scope of the constitutional deliberation on the norms, seems to hint at a distinction, but is somehow contradicted by the subjection of all amendments to the requirements of unanimous national ratification in accordance to national constitutional requirements. The question, however, is bound to be brought before the European Court of Justice, sooner or later, and the judges might be inclined to affirm that such a hierarchical ranking exists, if only for purely *pragmatic reasons*.

## **B) Rights to political participation and the interaction between strong and general publics**

Deliberative democracy considers general publics as an essential part of democratic politics, and their influence over strong publics a basic precondition of legitimacy. This requires equal opportunities of political participation, which have their paradigmatic embodiment in the right to vote, but which should extend beyond it to ensure that citizens influence decision-making, and are not limited to throw the rascals out every certain number of years.

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<sup>65</sup> Critics of the European Court of Justice have repeatedly accused it of “judicial activism”, of exceeding the role proper of a Court. The classic indictment remains that of Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy-Making*, Dordrecht: Nijhoff, 1986. Whether one agrees or not with the gist of such a line of criticism, one might concede that it would be rather incoherent to oppose a clarification of the relationship between the different parts of the Constitutional Treaty and *later* blame the Court of Justice for undertaking such a differentiation, if not decided in the Draft Treaty.

A first reading of the Constitutional Treaty might incline the reader to come to the conclusion that the Constitution comes close to such an understanding of democracy, and of the relationships between strong and general publics. Indeed, Title VI of the first Part of the Draft Treaty is actually entitled “The Democratic Life of the Union”. While Article I-47 refers to the “principle of participatory democracy”.

However, one might also notice that the actual substance of Title VI is somehow different.

Firstly, the Constitutional Treaty shirks the question of the actual political rights to be acknowledged to citizens as Europeans. True, Article I-45 proclaims that democratic life is a matter of “democratic equality”. However, this seems to be taken to mean “equal attention from the Union’s institutions” (as can be read in the very art. I-45) and an open, and close to the citizen, decision-making procedure (Art. I-46.3). One should keep in mind that the latter two principles do not require the explicit assignment of *any* political right to citizens *qua* Europeans.

Secondly, the Constitutional Treaty seems to establish a very close relationship between political rights and “the principle of representative democracy” (Art. I-46.1), while it remains silent on the relationship between the former and democratic political equality. This is a reason for concern, especially given the fact that the Constitutional Treaty also affirms that the principle of democratic representation is the grounding principle, not only of the election of the members of the European Parliament by universal suffrage, but also of the central role played by the Council in the law-making process.<sup>66</sup> This is rather problematic and worrisome from a democratic standpoint, given that the type and intensity of democratic representation is rather different in each case. *Indirect representation through national governments*, within the institutional set-up foreseen in the Treaty might be said to be *a source of the democratic deficit* of the European Union, as it reinforces *executive dominance* both at the Union and at the national level. At any rate, it is rather wrong to pretend that the insufficient set of powers assigned to the

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<sup>66</sup> Indeed, the affirmation of the political rights of European citizens is to be found somewhere else, more precisely, in Article I-10 (citizenship of the Union) and (not surprisingly) in the Charter of Fundamental Rights. Articles I-10.2(b) and Article II-99 establish the principle of direct universal suffrage in the election of the members of the European Parliament, and the right to vote and stand as a candidate of all European citizens. Article I-10.2(b) and II-100 extend to all European citizens the right to vote in local municipal elections.

European Parliament can be compensated by the central legislative role of the Council of Ministers.

Thirdly, any eventual thickening of the political rights granted to European citizens would have to be unanimously approved by the Council. The Parliament would not have any say on such a decision, ex article III-126.

Fourthly, the Constitution basically identifies democracy with *accountability* and *good governance*. A systematic reconstruction of Articles I-46 and I-47 reveals that the active participation of citizens is not regarded as an end in itself, realising the political rights of citizens, but as a means to enhance the efficiency of executive decisions. It is pretty revealing that the main interlocutor of general publics is not the Parliament (the European strong public *par excellence*) but the Commission (the *technocratic*, efficiency-seeking institution). This is indicative of the true purpose of increasing citizens' participation in the law-making process. Indeed, it is efficiency which explains the double filtering of citizens' input, first by "representative associations", and then by the Commission (Article I-47.3). It is efficiency which explains the role attributed to "representative associations and civil society" in the process of elaboration of Commission's legislative proposals (Article I-47.2). It is efficiency again which explains that *popular initiatives* are reduced to the status of mere invitations to the Commission, which remains free to do whatever it finds fit with them<sup>67</sup> (Article I-47.4, the one million plus citizens can only "invite" the Commission to put forward a legislative proposal, a meagre outcome for such an initiative).<sup>68</sup>

## C) Law-Making Processes and Legal Categories

### a) Transparency of Council Meetings

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<sup>67</sup> It cannot be ruled out that *customary practice* will considerably transform the sense of Article I-47. Nothing prevents the European Parliament from supporting popular initiatives, and making sure that they are taken seriously. Such line of reasoning is reflected in Ben Crum, 'Can Governance and government be reconciled? The EU Constitution and the efficacy of EU policy-making', paper read at the workshop 'Making the Constitution Work', Institut Européen d'Administration Publique, Maastricht, 19 November 2004.

<sup>68</sup> Indeed, the Treaty citizens' initiative might seem far more generous than the legislative initiatives proposed by several authors, typically requesting a higher number of votes, necessarily split between a number of Member States (cf. in that regard Lars P. Feld and Gebhard Kirchgässner, 'The Role of Direct Democracy in the European Union', in Charles B. Blankart and Denis C. Mueller (ed.) *A Constitution for the European Union*, Cambridge and London: The MIT Press, 2004, pp. 203-235). But one should not be misled by names. What was usually proposed was a *genuine citizens' initiative*, which would put in motion the law-making process of the Union. This clearly is not the case with what is contemplated in I-47.4.

The Draft Treaty confirms a decision already taken in the European Council of Seville,<sup>69</sup> namely, to require the Council to move from backrooms to daylight when examining and adopting legislative proposals (Article I-50.2). This is very likely to increase the democratic legitimacy of Union law.<sup>70</sup> Two are the main reasons that this will be so.

First, transparency of Council meetings is likely to enhance the effectiveness of the monitoring of national executives by national parliaments. National parliamentarians will have the chance to contrast the account of Council meetings provided by the ministers with the complete minutes and transcript of the sessions, and will be certain about the position adopted by their ministers. Present secrecy makes national parliaments fully dependent upon the word of the members of the national executive. Quite obviously, it is within the realm of possibilities that ministers either lie or, more piously, strategically reconstruct the record.

Second, transparency is likely to increase the actual bite of the law-making power of the European Parliament. Public meetings of the Council within the co-decision procedure are likely to be ‘contaminated’ by the discussion and debates taking place in the European Parliament.

#### b) Legal categories and law-making procedures

As was already indicated in Section 1, the typology of legal acts in Union law is rather confused and confusing, with around twenty different “typical” legal categories, and many more atypical ones.<sup>71</sup> To make things even worse, the *legal* construction of *regulations and directives* followed by Member States, the ECJ and national courts<sup>72</sup> resulted in the absence of a specific Union legal category referring to statutory

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<sup>69</sup> See President Conclusions of the Seville European Council, June 2002, Annex 2, points 10-11, ‘Opening Council meetings to the public when the Council is acting in accordance with the procedure for co-decision with the European Parliament’, available at [http://www.europarl.eu.int/summits/pdf/sev2\\_en.pdf](http://www.europarl.eu.int/summits/pdf/sev2_en.pdf).

<sup>70</sup> Some will claim that secrecy improves efficiency, and even that it fosters deliberative interaction among the members of the Council. But this does not take seriously the connection between democratic legitimacy and political participation. One thing is deliberation as a mode of interaction, and a very different, even if related one, deliberative democracy.

<sup>71</sup> On this, see Gerd Winter, ‘Reforming the Sources and Categories of Legal Acts’ in Winter, *supra*, fn 56, pp. 11-65. A helpful table in Working Document 4 of Working Group IX, Simplification, of 11 October 2002, available at <http://european-convention.eu.int/docs/wd9/3585.pdf>.

instruments or decrees. This was partially compensated by the emergence of a customary distinction between *mother* and *daughter* regulations and directives. Moreover, and as is also well-known, the Treaty did not contain any specific procedure to be followed in the elaboration of *statutory instruments*, even if it hinted at them in ex Article 155 TEC. This resulted in the operationalisation of such practice through the notion of delegation of powers.<sup>73</sup> This further increased complexity, and further blurred the differentiation between statutes and statutory instruments.

At the same time, the number of law-making procedures is considerable, clearly over twenty five.<sup>74</sup> Thus, it is not surprising that one of the questions addressed by the Working Group on Simplification<sup>75</sup> and by the Convention as a whole was that of the system of sources of law in European Union law.<sup>76</sup>

Following the suggestions of the said Working Group,<sup>77</sup> the Draft Treaty introduces two major changes. First, it translates into *constitutional language* the terms by which reference is made to legal norms in Community law. Thus, the Treaty speaks of *laws* and *framework laws*, and not of regulations and directives, which is the well-known terminology enshrined in present Article TEC 249. Second, the Draft Treaty aims at a

<sup>72</sup> Definitively consecrated in the judgment in Case 25/70 *Köster*, ECR [1970] 1161.

<sup>73</sup> On the original practice, see Francis Snyder, 'The use of legal acts in EC agricultural policy', in Winter, *supra*, fn 56, pp. 347-84.

<sup>74</sup> Thirty according to the legal secretariat of the Convention. See Working Document 3 of Working Group IX, Simplification, of 1 October 2002, available at <http://european-convention.eu.int/docs/wd9/3244.pdf>.

<sup>75</sup> See CONV 271/02, mandate of the Working Group on Simplification, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00271en2.pdf>, and the secretariat working documents (1, 2, 3, 4 and 12). See also WD 9 (submitted by Koen Lenaerts), available at <http://european-convention.eu.int/docs/wd9/4352.pdf>.

<sup>76</sup> Indeed, the Laeken Declaration suggested the following questions to the Convention: "Who does what is not the only important question; the nature of the Union's action and what instruments it should use are equally important. Successive amendments to the Treaty have on each occasion resulted in a proliferation of instruments, and directives have gradually evolved towards more and more detailed legislation. The key question is therefore whether the Union's various instruments should not be better defined and whether their number should not be reduced. In other words, should a distinction be introduced between legislative and executive measures? Should the number of legislative instruments be reduced: directly applicable rules, framework legislation and non-enforceable instruments (opinions, recommendations, open coordination)? Is it or is it not desirable to have more frequent recourse to framework legislation, which affords the Member States more room for manoeuvre in achieving policy objectives? For which areas of competence are open coordination and mutual recognition the most appropriate instruments? Is the principle of proportionality to remain the point of departure?" It must be added that Amato exerted quite some influence over the text of the Declaration, as one of the five personal advisers to Prime Minister Verhofstadt who prepared the draft text which the Belgian Presidency presented to the governments of Member States. On this, see Hendrik Voss and Emilie Bailleul, 'The Belgian Presidency and the Post-Nice Process after Laeken', Working Paper C 102/2002, ZEI, available at [http://www.zei.de/download/zei\\_dp/dp\\_c102\\_voss-bailleul.pdf](http://www.zei.de/download/zei_dp/dp_c102_voss-bailleul.pdf).

more systematic regulation of the whole set of *legislative acts* into clear-cut set of categories, which basically correspond to a standard law-making procedure in each case(see Article I-33).<sup>78</sup> Thus, there is a clear three-fold distinction between statutes (European laws, European framework laws and, apparently, delegated regulations), statutory instruments or decrees (regulations and framework regulations) and administrative acts (European decisions).

The more comprehensive and simple characterisation of legal categories contained in the Constitution Treaty clearly avoids a good deal of the difficulties of the present system of Article TEC 249. It creates the conditions under which a clearer and better cut allocation of powers between different decision-making procedures is possible.<sup>79</sup> Thus, it is instrumental both to democratic and efficient law-making.

What is intriguing is what relationship there exists between the simplification of legal categories and the change of names. This are two rather different, even if related, problems. Besides some generic reference to widespread support for such a change (historically a vindication of the Italian and the Dutch governments) and the claim that it will render easier to citizens to understand Union law, the Working Group did not provide solid arguments in its defence. Moreover, while there was a very good *democratic* case for the clarification of the system of sources of law, there was *no good*

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<sup>77</sup> See the Conclusions of the Working Group on Simplification, CONV 424/02, available at <http://register.consilium.eu.int/pdf/en/02/cv00/00424en2.pdf>.

<sup>78</sup> Article I-33.1: “In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions” And then I-33.2: “A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States”. I-33.3: “A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result”; I-33.4: “A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as regards the result to be achieved, on all Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result”. I-33.5: “A European decision shall be a non-legislative act, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them”.

<sup>79</sup> Even if it is not clear what kind of legal act delegated regulations are, more precisely, whether they are to be regarded as *laws* or as *statutory instruments*. Substantively, the former option is arguably the most convincing. If Council and European Parliament have call back powers and they can review the outcome of the procedure, then it seems that *legislative power* is being delegated. Moreover, the Treaty now clearly distinguishes between regulations and delegated regulations. However, the Constitution keeps on labelling this act as a *regulation*. The question is one of the many which would be in the agenda of the ECJ immediately after the entry into force of the text.

*democratic case* for the re-labelling of the sources of law in Union law *in the absence of a further democratisation of law-making procedures*.

The term *laws* has always had, and keeps on having, a clear connection with the democratic genesis of common action norms in the constitutional traditions of the Member States of the European Union. Laws are those norms, and only those, which can be said to constitute *an expression of the general will*. Indeed, the concept of law, in the tradition of democratic constitutionalism, is not only *normatively loaded* (the law as the expression of the *volonté générale*),<sup>80</sup> but such normative characterization explains many of the *technical features assigned to statutes*, such as the presumption of constitutionality. First, democratic statutes are assumed to be in compliance with the constitution, until prove to the contrary, *given that they express the general will*. This explains why in most constitutional systems, Constitutional Courts do not generally suspend their application when their constitutionality is under review; it also explains why are not declared unconstitutional, and therefore void, if they *can be interpreted in a way which renders them compatible with the Constitution*. Thus, the democratic dignity of statutes proves determinant in the resolution of constitutional conflicts.

But when the Constitutional Treaty enters into force, we will have European laws and framework laws on tax matters or police co-operation. Both civil rights and taxes are subject matters which the national constitutional traditions *reserve to democratic laws*, approved by Parliament. Under Treaty provisions, however, European laws and framework laws on the referred subjects can be approved by the unanimous will of twenty five executives. It is hard not to conclude that there is a risk of undermining the normative underpinnings of the *principle of legality*. Moreover, this implies a considerable degree of constitutional asymmetry, and is bound to leave many practical and normative questions, indeed the most important questions, unresolved. It might be the case that regulations and directives might have to prevail over national laws, among other reasons to uphold the principle of equality before the law of European citizens, but one can doubt whether we can get rid of the underlying democratic tension

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<sup>80</sup> See Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat*, Paris: Dalloz, 2003, §109; and *La loi, expression de la volonté générale*, Paris : Economica, 1984.

stemming from the insufficient democratic legitimacy of the *superior norm* through a mere exercise in re-labelling.

#### **D) Parliamentarisation: Appearances, realities and imbalances**

It is usually assumed that successive Treaty amendments have resulted in a progressive democratisation of the Union law-making procedures. The European Parliament would have seen its powers slowly but steadily strengthened. From being a merely advisory institution, almost on a par with the Social and Economic Committee in the founding Treaties, the Parliament would have emerged as a central institution in the law-making process, equipped with the right to veto any piece of legislation which has to be approved through the co-decision procedure, the one through which a majority of secondary Community norms are approved. The first step would have been taken in the 1970 and 1975 Treaty amendments, which granted the Parliament limited but far from negligible powers in the budgetary process. The Single European Act turned Parliament into a decisive institution in the law-making process, by means of introducing the co-operation legislative procedure. The Maastricht Treaty increased the salience of Parliament's role by means of granting it a veto power in the new co-decision procedure, the scope of application of which was successively increased in the Treaties of Amsterdam and Nice.

The Draft Treaty further confirms the decisive role played by Parliament by means of turning co-decision into the standard law-making procedure in Union law (cf. Articles I-34 III-396).<sup>81</sup> To put it differently, what was introduced as an exception to the rule in the Treaty of Maastricht has now become the rule itself.

It is very likely that this will result in an increase of the percentage of legal acts approved through the co-decision procedure, and consequently, in a furthering empowerment of the European Parliament. However, even if that would be the case, the democratisation of the procedures of law-making in the Union would still be rather

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<sup>81</sup> It must also be stated that the Draft Treaty requires the consent of the European Parliament before an international treaty is ratified by the Union in terms rather similar to those in which national constitutions require the consent of national parliaments (Article III-325.6; it is especially noticeable the

incomplete for three related reasons. First, Parliament would be assigned a right to veto, on a par with the Council, and not the power to pass legislation even against the will of the Council; second, co-decision might become the standard law-making procedure, but the number and relevance of the exceptions to this rule is so high to require qualifying the conclusions to be drawn from article I-33; third, the simplification of law-making procedures renders even clearer the existence of a division of labour between different procedures which structurally favours a ‘liberist’ or ‘neo-liberal’ interpretation of the political and economic constitution of the Union.

Firstly, the characterisation of co-decision as the default procedure of Union law-making strengthens the legislative power of the European Parliament, but does not assign to it the full range of powers characteristic of democratic strong publics. Among which, the power to pass legislation, to have the *last legislative word*, which is considered as part and parcel of the democratic principle by the constitutional traditions common to all Member States. As it is well-known, democratic parliaments have the positive power to turn into law any set of norms which is supported by the required majority of its members (provided that it complies with the relevant substantive and procedural constitutional principles), and not only the negative power to veto legislative bills. The increase of the breadth and scope of the right to veto clearly results in the further empowerment of the European Parliament, but falls clearly short of the assignment of positive legislative powers to the Strasbourg assembly. This is extremely relevant, given that deliberative democracy cannot be reduced to a matter of negative powers, but it mainly establishes procedures through which a positive common will can be forged.

Second, the affirmation of co-decision as the default legislative procedure is more formal than substantive, given that the number of exceptions to the rule is not only high, but corresponds to subject matters of high political relevance. A systematic reading of the Constitutional Treaty allows us to distinguish three main groups of exceptions to co-decision:

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reference to “agreements covering fields to which the legislative procedure applies”, which translates into proper constitutional language the terms used in present Article TEC 300).

a) The European Parliament has no say on the legislative procedure, and it is merely to be consulted. The power to enact new laws is assigned to the Council, which is to decide unanimously. This is the case of legislation on:

- Citizenship rights (art. III-126: right to vote and stand as candidate in elections to the European Parliament and in municipal elections; art. III-125.2: measures concerning passports, identity cards, residence permits or any other such document, measures concerning security or social protection; measures to secure diplomatic and consular protection of citizens of the Union in third countries: III-127.1),<sup>82</sup>
- Some key norms defining the single market, such as a) the regime of the free movement of persons (III-172.2), b) rights and interests of employed persons (III-172.2), c) social security and protection of workers, protection of workers when their employment contract is terminated, representation and collective defence of the interests of workers and employers, including co-determination, conditions of employment for third-country nationals legally residing in Union territory (III-210.3, c, d, f and g, and III-210.1);<sup>83</sup>;
- Norms concerning the harmonization of tax measures (III-171);<sup>84</sup> and constraints to the free movement of capital to third countries (III-157.3)
- Linguistic regime of uniform intellectual property rights protection and centralized Union-wide authorization (III-176)
- Family law norms with cross-border implications (Article III-269.3)<sup>85</sup>

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<sup>82</sup> Moreover, Article III-129 subjects the extension of the rights of European citizenship to (1) unanimous consent among Council members; (2) approval by the European Parliament; (3) ratification by each Member State in accordance with national constitutional provisions. This amounts to specifying a rather ad hoc procedure of constitutional reform.

<sup>83</sup> The Article subjects Community legislation to the further requirement of respecting the basic principles of national security systems and financial equilibrium. However, the Council can decide by unanimity to subject the approval of some of these norms to the ordinary legislative procedure (III-210.3, second indent), funnily enough by means of a decision.

<sup>84</sup> Cf. also Article III-157.3, concerning the enactment of measures which constitute a step back in Union law as regards liberalization of the movement of capital to or from third countries. The Draft put forward by the Convention included two rather modest inroads into the principle of unanimous decision-making on tax issues. Article III-62.2 opened the way to qualified majority voting on tax measures related to administrative cooperation or combating tax fraud and tax evasion, while Article III-63 did the same for “measures on company taxation relating to administrative cooperation or combating tax fraud and tax evasion”. In both cases, it was necessary that the Council agreed unanimously that such measures were necessary for the internal market and to avoid distortion of competition beforehand. Both norms have been deleted by the IGC, apparently under heavy pressure from some national delegations (which would probably include the United Kingdom, Ireland and Letonia). But one wonders whether such norms were

- Environmental policy, and more precisely, (1) measures of a primarily fiscal nature; (2) measures affecting town and country planning, quantitative management of water resources, or affecting, directly or indirectly, the availability of such resources, land use; (3) measures significantly affecting the choice of each Member State between different energy sources and the general structure of its energy supply (III.234.2);<sup>86</sup>
- Police cooperation, where the Council needs only consulting Parliament on (a) Operational cooperation between police authorities (Article III-275.3), (2) the operation of police forces in the territory of another MS in liaison and in agreement with the authorities of that State (Article III-277).

b) The European Parliament has no say on the legislative procedure, and it is not even required that it be consulted. This is the case of legal norms dealing with:

- Common foreign and security policy (Article III-300)
- Common security and defence policy (Article III-309.2).
- Common commercial policy negotiations, as Article III-315.3 keeps on limiting the power to establish a mandate to the Council, as well as the ratification of agreements)
- The domains where the Union operates through the so-called *open method of coordination*, that is, social policy, employment, but also economic policy coordination through the Broad Economic Policy Guidelines.
- Monetary policy, where powers are monopolized by the European System of Central Banks, with the European Central Bank at its head.

c) The budgetary procedure, which is subject to a specific procedure of great complexity, in which the allocation of powers extends to national parliaments.

There are three main budgetary legislative acts:

(aa) The Decision on own resources, now named as Own Resources Law, which is required to enumerate the sources of Union revenue and to cap the total amount at its

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not a rather modest specification of Article 96 TEC, basically reproduced in Article III-66 of the Constitutional Treaty, both in its Convention and IGC versions.

<sup>85</sup> Although the Council could unanimously decide to subject some family law norms with cross-border implications to the ordinary legislative procedure (III-269.3)

<sup>86</sup> It is also possible in this subject matter to move to the ordinary law-making procedure.

disposal (in actual practice, this is done by reference to a percentage of the total wealth of the Union) (art. I-54.3). This amounts to the full constitutionalisation of the own resources decision, the approval of which follows at present a procedure which is formally considered an amendment of the Treaties, even if in an abridged and simplified form. In the Constitutional Treaty, the Own Resources Law would be approved if there is unanimous agreement in the Council of Ministers, and if the Law is ratified by all Member States in accordance with their national constitutional provisions. This clearly compromises the characterization of the Union's resources as its *own* resources, and leads, with all probability, to the granting of a veto right to each and every national parliament (a tall decision in a European Union with a membership of twenty five plus);

(bb) The *Financial Perspectives*, which originated customarily out of the mismatch between the spirit of the Treaty reforms of 1970 and 1975 which granted budgetary powers to the European Parliament and the literal tenor of the said Treaties which limited the effective power of the European Parliament on the matter. Such *practical arrangements* are now fully given constitutional resilience, and redefined as "Multiannual Financial Frameworks". They are expected to "determine the amounts of the annual ceilings for commitment appropriations by category of expenditure" (Art. I-55.1 and III-402), thus *framing* to a considerable extent the shape of the decisions contained in the annual budget. The Constitution renders clear that the first financial framework law should be approved by the Council acting unanimously, jointly with the European Parliament acting by a majority of its component members. Successive financial framework laws would have to be jointly approved by the Council and the Parliament, but the Council could act by qualified majority;

(cc) Finally, the annual budget (I-56) determines the revenue and expenditure of the Union for the fiscal year.

Given the extremely limited amount of the resources in the hands of the Union at present (the current Own Resources Decision caps Union revenue at 1.27 of the Gross National Income of the Union), and given the sheer number of national parliaments that would have to accept the increase of such a ceiling, any policy measure which will require an increase of the revenue of the Union (it does not take much ingenuity to realize that redistributive measures at the European scale will fall under such a heading) will be dramatically constrained by the number of actors with a veto power. This entails

that the powers of the European Parliament over European budgetary norms are probably weakened, not strengthened by the Constitutional Treaty.

On such a basis, if we assess the Draft Treaty from the standpoint of the present assignment of powers to the European Parliament, it is clearly the case that its legislative veto powers would be extended to many policy areas were the Constitutional Treaty to enter into force. But if we assess the Draft Treaty from a *critical normative standpoint*, it is clear that it falls very short of structuring a law-making process in which the institution which embodies representative democracy at the European level is assured the last word (or at least, a joint last word) in the legislative procedure. To reiterate it, it might be the case that the *co-decision* procedure is the *standard legislative procedure*, but the exceptions to the rule, even if quantitatively minor, are of such an importance as to require questioning the extent to which I-33 really transforms the legitimacy basis of European law-making.

Third, the *rationale* of the exceptions to co-decision, and the implications that they have *as a whole*, should not be ignored, but *systematically explored*. A political economy, so to say, of those exceptions is bound to be rather telling. Indeed, the co-existence of a plurality of legislative procedures, and furthermore, the division of labour among them, gives rise to a further democratic deficit of Union law. The Constitutional Treaty renders clearer the two-fold distinction between legislative procedures in which supra-national institutions are decisive, and in which the forging of a majority sufficient to pass the bill into law is relatively easy, given the reduced number of veto points (hereafter, majoritarian European law-making procedures, the paramount example of which is the co-decision procedure) and law-making procedures in which national institutions keep on playing a central role, and in which numerous agents are granted a veto power (hereafter, minoritarian national legislative procedures, of which paramount examples are the various budgetary procedures and unanimous decision-making in the Council). Market-making and regulatory measures, which implement and give concrete shape to the four economic freedoms and free competition, are adopted through majoritarian European legislative procedures, redistributive measures tend to be subject to minoritarian national legislative procedures. *The clearer and wider the divide between the different law-making procedures, the bigger the democratic deficit of*

*Union law*. The set of exceptions to which reference has just been made *supra* is telling in itself, and should not be repeated here.

Still, one could think that the main consequence of the increased breadth and scope of co-decision is to render possible that *market integration* proceeds more quickly, and that this is bound to lead to *social integration*. Politically if not legally, *market integration* could not but lead to the strengthening of social integration.<sup>87</sup> However, such a claim does not take into account that the analytical differentiation between market-making and market-correcting norms does not reflect the necessary substantive implications that market-making and market-correcting norms have over the others. Thus, it is possible to claim that market-making and market regulation at the European level might *factually* undermine the conditions under which redistribution can be strived for at the national level.<sup>88</sup> The rather formalistic approach to the competences of Member States focuses attention on the impact that the enlargement of competencies on taxation and social policy of the Union might have on the sovereignty of Member States to define their tax and social policy.<sup>89</sup> It neglects a most clear and present development, the most obvious impact of the economic constitution of Union law on national competences on the very same taxation and social policy competences, periodically stressed in Court judgments.<sup>90</sup> Perhaps the clearest example is the co-relation between the redefinition of free movement of capital as a self-standing economic freedom in

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<sup>87</sup> An authoritative opinion of this kind is to be found in Jacques Delors, *Mémoires*, Paris: Plon, 2004, pp. 203, 223, 235, 304 and 312. The former President of the Commission is duly concerned about the fact that we surely have got market integration, and social integration is not yet in sight.

<sup>88</sup> While in national law-making procedures it was not only possible but rather typical to pass laws which openly established connections between market-making and market-correction, this is rendered structurally difficult in Union law. In fact, it can be claimed that the Draft Treaty, by granting constitutional status to such a split, aggravates a problem which was already visible in Union law.

<sup>89</sup> One can object to the granting of any tax powers to the European Union. This is a coherent and respectable position. But its implementation would entail unravelling a good deal of Community law *as it stands*. While the Union has *few tax collecting powers*, it has broad constitutional powers over taxation at all levels of government, and Union legislation frames, to different degrees, at least one third of the amount paid in taxes by Europeans. On this, see my 'The purse of the polity' in Erik Oddvar Eriksen (ed.), *Reflexive Integration*, London: Routledge, 2005.

<sup>90</sup> This explains the success of the British government when considering that qualified majority voting on tax matters was a "no-go" because it would undermine national sovereignty. Such an argument is empirically dubious, to the extent that the actual breadth and scope of national tax sovereignty is rather limited on what concerns capital income. The sovereignty loss is closely related to the interpretation given to free movement of capitals in Union law, and indeed could only be regained by means of, at the very least, coordination of national tax administrations and a common definition of tax bases at the European level. These arguments are put forward in my chapter 'The purse of the polity' in the forthcoming book *Conceptions of the EU-Polity* edited by Erik Oddvar Eriksen for Routledge, to be published in late 2005.

Directive 88/361 and the virtual de-taxation of savings income in almost all Member States from the entry into force of the Directive.<sup>91</sup> After the entry into force of the Single European Act, the Council could approve a directive which dramatically transformed the breadth and scope of the freedom to move capitals. It was obvious from the very beginning of the legislative procedure that such a new definition of free movement of capitals would create new possibilities of avoiding national income taxes by means of placing savings in third country financial institutions. However, the effective prevention of such dangers would require the adoption of measures fighting tax avoidance, which could only be approved unanimously. The consequence was that the Directive was approved, that its Preamble and Article 6.5 reflected the commitment of Member States to adopt the necessary measures to avoid tax evasion stemming from the larger freedom to move capitals, and that nothing was actually done. As a direct result, Member States entered into a competitive race to attract savings from other Member States, which resulted in the de-taxation of savings income of non-residents.<sup>92</sup> This implies a virtual de-taxation of this type of income. Despite this, no action was taken until... 2003, the year in which the Savings Income Taxation Directive was approved, which contemplates the automatic exchange of information among the tax administrations of the Member States.<sup>93</sup>

## E) National and regional parliaments

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<sup>91</sup> Sideek Mohamed, *European Community Law on the Free Movement of Capital and the EMU*, Dordrecht and Stockholm: Kluwer and Norstedts Juridik, 2000.

<sup>92</sup> It suffices to compare the withholding taxes in force in 1989 and 1993 to have a clear picture of the race to the bottom. See for example the statistical evidence compiled by the *Banca Commerciale Italiana*. See also Steven Olof Lodin, 'What ought to be taxed and what can be taxed', 54 (2000) *Bulletin for International Fiscal Documentation*, pp. 210-7; Julian S. Alworth, 'Taxation, Financial Innovation and Integrated Financial Markets: Some Implications for Tax Coordination in the European Union', in Assaf Razin and Efraim Sadka (eds), *The Economics of Globalisation*. Cambridge: Cambridge University Press, 1998, pp. 187-221.

<sup>93</sup> Directive 2003/48/EC of 3 June 2003, OJ L 157, pp. 38-48. See also 'Council Decision of 19 July 2004, on the date of application of Directive 2003/48/EC on taxation of savings income in the form of interests payment', OJ L 257, p. 7. See Barry Larking, 'Another go at the Savings Directive: third time lucky', (2001) *EC Tax Review*, pp. 220-34 and Marc Dasse, 'The EU Directive on taxation of savings: The provisional end of a long journey', (2004) *EC Tax Review*, pp. 41-6. A well-argued criticism in Manuel Pires, 'The wrong path for the European Union- or do the stork and the fox have the same possibilities', (2002) *EC Tax Review*, pp. 160-1. A political science analysis in Katharina Holzinger, 'Tax competition and tax co-operation in the EU: the case of savings taxation', Robert Schuman Centre Working Papers, 2003/7.

One of the most publicized innovations of the Draft Treaty is the conferral of certain powers to national parliaments within the European law-making process. In this section, I will consider whether this is likely to increase the democratic legitimacy of Union laws.

At present, national parliaments play a rather small role as European law-givers, confined to the transposition of directives, which are, formally speaking, binding on their goals, but not on what concerns the choice of means.<sup>94</sup> However, the normative density of directives has grown dramatically since the 1970s, a phenomenon not unrelated to their use in the field of harmonisation of indirect taxation,<sup>95</sup> and to the development of the doctrine of their direct effect by the ECJ the role played by national parliaments in the European law-making process is fully determined by *national constitutional provisions*.<sup>96</sup> This normative density has reduced, if not eliminated, the discretion left in the hands of national parliaments.<sup>97</sup> In addition to that, parliaments exert a controlling role over the national executive when acting as national representative in the European Council. Indeed, and following the German example, all national parliaments have ended up establishing committees specialized on following European decision- and law-making processes.<sup>98</sup> The explicit and specific aim of such committees is to ensure that European integration does not result in the avoidance of parliamentary control, or what is the same, in a net *executive empowerment*. The strengthening of such a *supervisory* role of national parliaments would clearly contribute to avoid the undermining of democracy at the national, but also at the European level.

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<sup>94</sup> Cf. Article 249 TEC.

<sup>95</sup> Robert Schütze, 'Reformed Inter-Institutional Relations Through a New Hierarchy of Norms? Sharpening the Separation of Powers Principle in the European Union', paper read at the workshop 'Making the Constitution Work', Institut Européen d'Administration Publique, Maastricht, 19 November 2004.

<sup>96</sup> See Pierre Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community Law' 8 (1985) *European Law Review*, pp. 155-177).

<sup>97</sup> G Dyonissis, 'The Transposition of EU Law: post-decisional politics and institutional autonomy', 7 (2001) *European Law Journal*, pp. 442-58.

<sup>98</sup> Eivind Smith, *National Parliaments as cornerstones of European Integration*, London: Kluwer, 1996 y Richard Katz y Bernhard Wessels, *The European Parliament, the National Parliaments and European Integration*, Oxford: Oxford University Press, 1999. On what regards the relationship between European committees and democracy in the Union, see Herman Schmitt and Jacques Tomassen (eds.), *Political Representation and Legitimacy in the European Union*, Oxford University Press: Oxford, 1999 and Thomas von der Vring, 'On legitimation of the European Union. National Parliaments and the European Parliament', in Winter, *supra*, fn 56, pp. 385-408.

The Protocols ‘on the Role of National Parliaments in the European Union’ (hereafter Parliaments’ Protocol) and ‘on the application of the Principles of Subsidiarity and Proportionality’ (hereafter, Subsidiarity Protocol) would give national parliaments several powers:

(1) as individual chambers, to issue an opinion on the compliance of each and every European legislative proposal with the principle of subsidiarity; moreover, all the institutions which participate in the process of European law-making “shall take account of the reasoned opinions” of national parliaments (Subsidiarity Protocol, point 5)

(2) as a collective (one third of national parliamentary chambers<sup>99</sup>), to request the review of the legislative proposal to the Commission; such a review might lead to maintaining, amending or withdrawing the proposal; the Commission can decide what to do, but should always “give reasons” grounding its decision;

(3) to challenge European legislative acts on account of the infringement of the principle of subsidiarity before the European Court of Justice; however, the literal tenor of the Subsidiarity Protocol leaves to the *constitutional order* of each Member State to determine the specific terms according to which national governments should *bring the question before the Court* on behalf of national Parliaments (“notified by [national governments] in accordance with their legal order on behalf of their national Parliament or chamber of it”).

Additionally, the Parliaments’ protocol imposes upon the Commission the obligation to transmit *directly* the annual legislative program, all Commission consultation documents, all legislative proposals, and any other documents which it transmits to the European Parliament and the European Council (see points 1 and 2 of the Parliaments’ Protocol).

The powers assigned to national parliaments have been saluted as one of the main (positive) changes introduced by the Constitutional Treaty. This might be the case, but

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<sup>99</sup> Both protocols define the “third” by reference to a vote system. In such a system, each chamber of a bicameral Parliamentary system has a vote (the Bundestag and the Bundesrat have one vote each) while single-chambered Parliaments in unicameral Parliamentary systems have two votes (the Finnish Parliament, thus, has two votes). This assigns the same number of votes to each Member State, but might lead to rather peculiar results.

not for the reasons which are usually referred to. Indeed, the Protocols can be criticised on several accounts.

First, the scope of application of the Protocol is clearly not wide enough. There are many legislative and para-legislative activities of the Union which will not be covered by the Protocol and, consequently, over which national parliaments will have no control, such as foreign and security policy, or the whole area where decision-making proceeds according to the open coordination method. This is so because the Protocol on Subsidiarity and Proportionality refers specifically to “legislative proposals”, a term which has to be constructed in line with Article I-33, which draws a clear line between legal and non-legal instruments.<sup>100</sup>

Second, the delay within which national parliaments have to raise their objections is extremely short (six weeks). Tight timing might be justified to reconcile subsidiarity monitoring and legislative efficiency. In the long run, this might force a “Europeanisation” and “specialisation” of national parliaments, which will have to become more active in the law-making process (as six weeks is too short a time to afford a mere reactive role). But in the short run, it is likely to increase the number of “preventive” warnings, to retain the right to bring the case before the Court of Justice. Thus, the power might remain more formal than substantial.<sup>101</sup>

Third, the exclusive objects of the monitoring exercise are Commission proposals. However, nothing prevents Council and Parliament, under the co-decision procedure, or the Council in other procedures, to amend Commission proposals, rendering them incompatible with the principle of subsidiarity.

Fourth, it might not be wise to forget that the widespread executive dominance over national parliaments entails that in all those Member States where the governments enjoys an absolute majority, it is very likely that the Protocols will result in multiplying the means through which the government can oppose Community legislation. To voice such opposition through the Congress or the Senate would be, moreover, a democratically dignified alternative to mere opposition in the Council.

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<sup>100</sup> However, it must be added that the IGC inserted a larger definition of “draft European legislative act”, which covers “Commission proposals, initiatives of groups of Member States, initiatives of the European Parliament, request from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act”.

<sup>101</sup> Manuel Delgado Iribarren, ‘El control de la subsidiariedad: El sistema de alerta temprana en el proyecto de Constitución Europea’, paper presented at the workshop ‘La Democracia Parlamentaria en la Unión Europea’, Congreso de los Diputados, Madrid, 27 May 2004, *mimeo*, on file with the autor.

Fifth, the Protocols basically ignores all those regional parliaments with full-blown law-making powers. It is rather obvious that Community legislation can impinge upon their competencies, and that subsidiarity can be infringed also with regard to the powers allocated to such regions by national constitutions. The Protocol only mandates each national parliament to consult with regional parliaments with law-making powers, *where appropriate*. Such a formulation is remarkable, to the extent that it manages to interfere in the national configuration of relationships among levels of governments and be so imprecise as to provide no indication of the adequate procedure to be followed.<sup>102</sup>

Indeed, it can be claimed that the latter criticism reflects what is perhaps the major shortcoming of the Protocols, namely, an unresolved tension between the respect of the sovereignty of Member States on what concerns the definition of the relationships between its institutions, and the obvious need to establish a European constitutional framework of such relationships to ensure the effectiveness of parliamentary monitoring. The Working Groups on National Parliaments and on Subsidiarity claimed to put forward proposals which will be fully compatible with the national constitutional sovereignty. However, the Protocols will clearly affect the configuration of relations between national institutions. Another question is whether they will affect it in a proper way. On the one hand, national parliaments will have not much of a choice but to review their own rules of procedure, and in bicameral systems, the terms of their mutual relationships. Moreover, the power to question the validity of European norms before the European Court of Justice will require reconsidering the relationship between parliament and executive. Finally, the establishment of a direct relationship between the Parliaments and the Commission has also considerable constitutional implications; even if, by all measures, it does not add much in substantive terms.<sup>103</sup> On the other hand, the effective democratic sovereignty of national parliaments, one could claim, depends on the existence of common norms established at the European level framing their relationship with national governments. Such norms can be seen as *formally* impinging

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<sup>102</sup> Declaration 49 attached to the Constitutional Treaty renders things even more unclear. Belgium affirms that the two national parliamentary chambers *and* the three regional ones will be considered as parts of the national parliamentary system. So, who will have the two votes in Belgium? And is it acceptable that regional parliaments are given voice in Belgium, and are silenced elsewhere? Or would this lead to a practice according to which either the national government or the national parliament will act as spokespersons of the regional parliaments?

upon national democratic sovereignty, but in *substantive* terms they render possible to establish the preconditions for the exercise of national democratic sovereignty. Indeed, the effectiveness of national parliamentary control depends on two conditions being fulfilled. First, a certain degree of Europeanisation of the pattern of relationship between national governments and national parliaments. It is only if *all* national parliaments are given effective powers according to national constitutional provisions that the chances of effective control will be maximized, if only because of the complexity of European legislation renders simply impossible that each national parliament follows closely each piece of legislation (indeed, national governments do not, even if they have much wider human and material resources at their reach, through the ministries). It is rather plausible to claim that the protocols would only be effective if national parliaments start seeing themselves as acting not only on behalf of the rights of national citizens, but as part of a system of national parliaments which share the common goal of disciplining executives, of ensuring that decisions adopted at the European Council reflect the will of European citizens, as expressed in the European and the national parliaments.

Second, national parliaments should establish operative protocols for the mutual exchange of information, and perhaps even consider a certain division of labour among themselves. As one *conventionnel* claimed rather insightfully, a better control does not depend on access to information, but on the way in which the information is processed by national parliaments. Size, economic and human resources, and a long-term strategy are key factors in that respect.<sup>104</sup> In that regard, the European Parliament should be seen more as a coordinator than as a rival. After all, national executives have already an institutional structure in place (the Council of Ministers) within which they can coordinate their action. National parliaments lack comparable institutional arrangements. And indeed, such structural imbalance might be at the root of the problem, and not be a mere symptom.

## F) Legitimacy through substance

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<sup>103</sup> After all, most, if not all, of the information to be sent by the Commission to national parliaments *should be publicly available* in the official publications of the Union and at its web site.

<sup>104</sup> Hans Van Baalen, 'On time is too late', WD 11 of the Working Group on National Parliaments, 15 July 2002.

It can be argued that the *main* legal consequence of the solemn proclamation of the Charter of Fundamental Rights of the European Union in 2000 was rendering possible a shift in the balance between fundamental rights and economic freedoms in Union law.<sup>105</sup> The Charter opened up the way to an increased abstract weight of fundamental rights<sup>106</sup> in cases of conflict with the basic economic freedoms enshrined in the Treaties (the so-called four economic freedoms, and the principle of free competition laid down in Articles 81 and 82 TEC). This is based on the fact that the Charter grants *fundamental status* to what are usually labelled as civic, political and social rights, while denying such status to the four basic economic freedoms, which are to be seen as *concretizations* of wider and more abstract rights, such as the right to private property. This has the consequence of shifting the scope of what can be said to be constitutionally mandated by Union law. As a consequence, the Charter has the potential of providing critical guidance to the European Court of Justice, and also national courts, in determining which are the reasonable exceptions to economic freedoms. Since the late seventies,<sup>107</sup> the European Court of Justice has tended to argue that, next to the explicit exceptions enumerated in the Treaties, the canon of exceptions to economic freedoms should be determined through a *systematic* interpretation of Community law as a whole.<sup>108</sup> The Charter seems to reinforce such an approach, by means of providing simultaneously normative guidance and certainty (as fundamental rights provisions could be read as a *numerus clausus* of exceptions).<sup>109</sup> This approach can already be seen at work in the opinions of Advocates General and in the judgments of the Court published after the solemn proclamation of the Charter. This is clearly the case with the judgment and the Opinion in *Schmidberger*<sup>110</sup>, and might lead to a similar result in

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<sup>105</sup> Agustín José Menéndez, 'The Sinews of Peace', 16 (2003) *Ratio Juris*, pp. 374-98.

<sup>106</sup> Robert Alexy, 'On Balancing and Substitution. A Structural Comparison', 16 (2003) *Ratio Juris*, pp. 433-49, especially at p. 440.

<sup>107</sup> More specifically, since the judgment in *Cassis de Dijon*, Judgment in Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

<sup>108</sup> Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, London: Sweet and Maxwell, 1999, pp. 135ff. They label as the rule of reason the set of exceptions which the Court has referred as "reasonable" national measures in restraint of economic freedoms.

<sup>109</sup> Menéndez, *supra*, fn 103.

<sup>110</sup> See Case C-112/00, Opinion of the AG Jacobs delivered on July 11, 2002, judgment of the court was delivered on 12 June 2003. See 2003 [ECR] I-5659. See par. 89: "This appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty. Such cases have perhaps been rare because restrictions of the fundamental freedoms of the Treaty are normally imposed not to protect the

Omega<sup>111</sup> and Grøngaard.<sup>112</sup> Moreover, the different abstract weight of fundamental rights and economic freedoms propitiated by the Charter might lead to a different structuring of the weighing and balancing of them in case of conflict, and more specifically, to shifting the burden of argumentation in favour of fundamental rights, and against economic freedom. Advocate General Geelhoed seems to be pointing in this direction in her Opinion in *American Tobacco*.<sup>113</sup>

The reformulation of the substantive values at the foundation of Union law does not lead in itself, quite obviously, to the establishment of different economic and social policies, neither at the European nor at the national level. But it can be fairly said to open *political space*. A clear example in that regard would be provided if Finland, after

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fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection. It is however conceivable that such cases may become more frequent in the future: many of the grounds of justification currently recognised by the Court could also be formulated as being based on fundamental rights considerations” and par. 95: “In such a case the Court in my view should follow the same two-step approach as the analysis of the traditional grounds of justification such as public policy or public security which are also based on the specific situation in the Member State concerned. It must therefore be established (a) whether in relying on the particular fundamental rights recognised in Austrian law in issue, Austria is, as a matter of Community law, pursuing a legitimate objective in the public interest capable of justifying a restriction on a fundamental Treaty freedom; and (b) if so, whether the restriction in issue is proportionate to the objective pursued”.

<sup>111</sup> Affaire C-36/02, *Omega Spielhallen- und Automatenaufstellungsgesellschaft mbH contre Oberbürgermeisterin der Bundesstadt Bonn*, opinion of AG Stix-Hackl, delivered on 18 March 2004, not yet reported. The case concerned the conflict between the right to provide services (more specifically, the service of playing a game in a ‘laserdrome’ where players obtained points when ‘killing’ human targets) and the right to dignity, as interpreted within the German constitutional tradition. In general, theoretical terms, paragraph 50 of the Opinion is of special interest, to the extent that there the AG hints at the question of the higher abstract value of fundamental rights: “Cependant, il vaudrait la peine de se demander si, eu égard aux valeurs protégées par les droits de l'homme et les droits fondamentaux, à l'image de la Communauté en tant que Communauté fondée sur le respect de ces droits et, surtout, à la référence – imposée par l'opinion actuellement prévalente – à la protection des droits de l'homme en tant que condition de la légitimité de toute forme d'organisation de l'État, il ne serait pas possible de reconnaître aux droits fondamentaux et aux droits de l'homme une certaine primauté sur le droit originare «général». Toutefois, les libertés fondamentales peuvent, au moins dans une certaine mesure, parfaitement être considérées sur un plan matériel comme des droits fondamentaux: en tant qu'elles énoncent des interdictions de discrimination par exemple, elles doivent être considérées comme des expressions particulières du principe général d'égalité. Ainsi, un conflit de normes entre les libertés fondamentales consacrées par le traité et les droits fondamentaux et droits de l'homme peut, dans certains cas au moins, également être un conflit opposant des droits fondamentaux.”

<sup>112</sup> Case C-384/02, *Anklagemyndigheden v Knud Grøngaard Allan Bang*, Opinion of Advocate General Poiras Maduro, of 25 May 2004, not yet reported.

<sup>113</sup> Case C-491/01, *The Queen v. Secretary of State for Health ex parte: American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by: Japan Tobacco Inc. and JT International SA*. Opinion delivered on September 10, 2002, [2002] ECR I-11453. Cf. paragraph 106: “In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, the interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded” (my emphasis).

having been forced under the principle of free movement of goods to reduce the duties on alcoholic beverages, would increase them again in the name of public health, a national policy objective now sheltered by Article II-95.

In stark contrast with the Charter, the Constitutional Treaty closes political space.<sup>114</sup> This is so for two main reasons. First, and as already indicated, the Constitutional Treaty defines too widely the scope of *what is constitutional*, something which cannot but reduce the scope of what is to be politically decided through ordinary statutes, be them European or national. Second, the old Article 52 of the Charter is substituted in the Treaty by Article II-112, which might be read as confining the Charter to a subordinate position within the primary law of the Union.<sup>115</sup> Third, the Constitutional Treaty formally incorporates the Charter to the primary law of the Union, but does so at the same time that it reinforces the protection offered to values which undermine the actual *legal force* of socio-economic fundamental rights and principles. Two main observations are due in this respect: (a) While the Preamble of the Charter<sup>116</sup> enshrined dignity, freedom, equality and solidarity as the grounding principles of Union law, Article 2 of the Constitutional Treaty offers a longer, more prolix and at the same time narrower definition of such principles (“respect of human dignity, liberty, democracy, equality, the rule of law and respect of human rights, including the rights of persons belonging to minorities”). This is so because solidarity is excluded, now relegated to the condition of a second-rank principle, together with pluralism, tolerance, justice, and equality between men and women.<sup>117</sup>; (b) Article I-3 tilts the balance in favour of economic freedoms when determining the objectives to be aimed at by the Union. Such a *market bias* was already present in the draft put forward by the Convention, but not so much in this Article, but, as already indicated, in the assignment of constitutional status to Part III. It must be granted that the formula “social market economy” was rather

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<sup>114</sup> This is so despite the fact that the Charter is integral part of the Draft. The Charter has now to be interpreted together with the other parts and contents of the Constitutional Treaty, something which undermines the effects stemming from the solemn proclamation of the Charter.

<sup>115</sup> Cruz, *supra*, fn 64.

<sup>116</sup> It goes without saying that the Charter, preamble included, is part and parcel of the Draft Treaty. However, the Convention rejected the suggestion made by some members of the Charter Convention of making use of the preamble to the Charter as preamble to the Constitutional Treaty and, obviously enough, the Charter is Part II of the Draft Treaty, as there was no agreement, but open opposition, to its inclusion *within* the text of Part I.

bland and a trifle ambivalent (as it was qualified by the reference to the simultaneous aim of high competitiveness).<sup>118</sup> The IGC Draft has further decaffeinated the Article, by means of requesting the Union to strive at “a highly competitive social market economy”, and by means of inserting a specific reference to the objective of “price stability”. It is difficult not to come to the conclusion that this indicates a rather *thickening* of the definition of the socio-economic model of the Union when compared with the drafting of the present Treaties, a thickening that shifts the balance in favour of the market dimension of the Union, to the detriment of its *political and social* dimensions.

### G) Procedural rights

A major issue of contention in the Convention (and less so in the IGC) was the changes to be introduced in the procedural rights of European citizens at the stage of implementation of, and adjudication on, Union law.

The realization of the right to effective judicial protection, affirmed in its jurisprudence by the European Court of Justice,<sup>119</sup> and enshrined in the Charter of Fundamental Rights of the Union,<sup>120</sup> sparked a considerable debate within the Convention. After all, it was realized by many that the move from Treaty to Constitution might require a thorough reconsideration of the judicial review of the law-making and the administrative power (*de jure* or *de facto*) in the hands of Union institutions. In that regard, it is clear that procedural guarantees do not only protect the *private autonomy of individuals*, but they also aim at ensuring their *public autonomy*. Individual challenges to the constitutionality and legality of general European norms can be instrumental to ensuring the respect of democratic law-making procedures.<sup>121</sup>

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<sup>117</sup> The IGC substituted “non-discrimination” by “equality between men and women”, something which, in my view, has the positive effect of highlighting the importance of sex equality, while constraining the scope of the inequalities which should be fought the legal order of the Union.

<sup>118</sup> See Christian Joerges and Florian Rödl, ‘Social Market Economy as Europe’s Social Model?’, Working Paper 8/2004, European University Institute, Department of Law, Florence: European University Institute.

<sup>119</sup> Leading cases are 222/84, *Johnston*, [1986] ECR 1651 and 222/86, *Unectef*, [1987] ECR 4097.

<sup>120</sup> See Article 47 of the Charter, now Article II-107 of the Draft Treaty.

<sup>121</sup> On the locus standi of private parties, and the need for reform, see among others Sergio Neri, *La protection juridictionnelle des particuliers*, Heule: UGA, 1965 and Albertina Albors-Llorens, *Private Parties in European Community Law*, Oxford: Oxford University Press, 1995. More recently, Phil Syrpis, ‘Social

First, on what concerns the judicial review of legal acts, the Draft Treaty as put forward both by the Convention and the IGC shies away from granting private parties the direct right to request the judicial review of their (European) constitutionality.<sup>122</sup> The underlying rationale of such denial seems to be that the *effective judicial protection* of private parties is to be ensured within the European legal order by national courts. If doubts on the (European) constitutionality of general norms would gather in the mind of national judges, they could always request a preliminary ruling from the European Court of Justice, in application of now Article III-369. Consequently, the literal tenor of Article III-365.4 basically reiterates, in more clear terms, the interpretation of Article 230 TEC prevalent in the jurisprudence of the European Court of Justice. Thus, the *locus standi* of private parties is basically limited to challenging measures which are either (a) a decision, either formally, or substantially (that is, even if they do not come in the vest of a decision, they are substantially so, as they are of direct and individual concern to the party in question); (b) regulations which do not entail implementing measures, and as such, their (European) constitutionality and legality would be difficult to contest before national courts.

It can be doubted whether such a solution actually satisfies the right to an effective judicial protection *within a legal order such as the European one*.<sup>123</sup> It can be questioned whether the array of remedies before national courts satisfies the right to an effective remedy when the *European constitutionality* of European law and framework laws is being contested. This is so because it is far from obvious that national courts are

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Democracy and Judicial Review in the Community Order', in Claire Kirpatrick, Tonia Novitz and Paul Skidmore (eds.), *The Future of Remedies in Europe*, Oxford: Hart Publishers, 2000, pp. 253-66; Koen Lenaerts, 'The Legal Protection of Private Parties under the EC Treaty: A coherent and complete system of Judicial Review?', in *Scritti in onore di Giuseppe Federico Mancini*, Milano: Giuffrè, 1998, pp. 591-624; Koen Lenaerts and Tim Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism', 22 (2003) *Yearbook of European Law*, pp. 1-43; Francis Jacobs, 'Necessary changes to the system of judicial remedies', Working Document 20 of Working Group II (Charter) of the European Convention. Available at <http://european-convention.eu.int/docs/wd2/3222.pdf>, p.2: "It will be widely accepted that there is a close link between the effective protection of fundamental rights and the legitimacy of the European Union".

<sup>122</sup> The existence of a constitutional yardstick of judicial review in European law was implicit in the characterisation of the Treaties as the basis of the material constitution of the European Union, and in the characterisation of certain substantive norms of European Union law as the grounding principles of the legal order. This was the case with the economic freedoms, and since *Stauder*, with fundamental rights. On this, see Menéndez, *supra*, fn 41.

ready and capable of exerting a diffuse control of the European constitutionality of the said European laws and framework laws. As things stand, the right to an effective remedy is made dependent not only on the discretionary decision of national courts to request a preliminary ruling on the constitutionality of the European law or framework law to the Court of Justice, but more basically, on the very awareness of national courts to the *European constitutional dimension* of the problem.

Second, on what concerns the judicial review of administrative acts of the Union, the Draft Treaty simply does not consider the implications that the *binding character* of the Draft Treaty, and especially the Charter of Fundamental Rights, should have over the exercise of administrative power by the institutions of the Union. The tendency of the Court to consider that the discretionary powers of the Commission as *guardian of the Treaties* are not subject to judicial review should be open to reconsideration *once Union law has been formally constitutionalised*.<sup>124</sup>

## V. Conclusion

If a political community is characterised by serious democratic shortcomings, citizens are confronted with two options. The first one is to make use of their political rights to change the institutional and substantial features which are problematic from a democratic standpoint.<sup>125</sup> The second option is to adapt their standards of judgment, so that they can come to the conclusion that the political community is a democracy *even if it is not so*. In a distant past, some claimed that this could be labelled as *false consciousness*, and in a perhaps even more distant past it was found that such false consciousness was essential in allowing citizens to appease their moral conscience, and make things easier to the ruling few,<sup>126</sup> which are after all so dependent on common

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<sup>123</sup> The ratification of the European Convention of Human Rights would only render the conflict between the right to effective judicial protection and the system of remedies in Union law more vivid.

<sup>124</sup> See the recent Ordonnance du Tribunal de Première Instance, of 2 December 2003, in case T-334/02, *Viomichania Syskevarias v. Commission*. The Court could afford to avoid the issue, on the basis of the late character of the action.

<sup>125</sup> From the Levellers onwards. See Andrew Sharp (ed.), *The English Levellers*, Cambridge: Cambridge University Press, 1998.

<sup>126</sup> See Harold D. Laswell, 'Propaganda' In *Encyclopedia of the Social Sciences*, vol. 11, London: MacMillan, pp. 521-528; On these matters, see Noam Chomsky, *Necessary Illusions*, Boston: South End Press, 1989 and Noam Chomsky and Edward S. Herman, *Manufacturing Consent*, New York: Pantheon, 1988.

opinion. No doubt citizens will be helped, in case they opt for the second alternative, by a whole array of intellectuals, ready to claim that *what at first look seem as democratic deficiencies* are in fact *democratic virtues*.<sup>127</sup>

It is hard not to conclude that the Draft Treaty has to be considered as falling short of what deliberative democratic standards require of a text in order to assign it the dignity proper of a democratic constitution.

On the one hand, the Constitutional Treaty is unlikely to be approved through a procedure meeting the demanding criteria of deliberative democracy. The European people or peoples played almost no role in the signalling, where all the initiative was in the hands of political leaders and strong publics. Even if the Convention had some of the features characteristic of a democratic constitutional strong public, it did not only fail to stand in a vibrant relationship to European general publics, but also it was not able to exceed its mandate of preparing the ground of the IGC. Moreover, a major democratising opportunity was lost by means of proceeding from Convention to IGC without interruption. After all, the Constitutional Treaty as proposed by the Convention could have served as a catalyst of a synchronised, Euro-wide constitutional debate. Finally, the IGC, even if marginally influenced by the unfolding of the Convention, remained a secretive and diplomatic event, almost completely divorced from European publics. It is extremely improbable that national ratification debates will manage to mobilise European publics. At the end of the day, and for all these reasons, it would be hard to claim that the constitutional moment signalled at Laeken has actually led to the writing of a European constitution *in a deliberative-democratic sense*.

On the other hand, the Constitutional Treaty is unlikely to ensure the full democratic character of European Union laws. By means of assigning constitutional status to all the four parts of the Constitution, the Convention and the IGC give rise to a serious risk of *over-constitutionalisation*, which would result in the closing of the political space open to European and national legislatures. Moreover, the Constitutional Treaty only marginally improves the position of the European Parliament in the law-making process. This is so because, even if quantitatively on the decrease, the issues to which co-decision does not apply, and regarding which Parliament has consequently a mere

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<sup>127</sup> See Edward Said, *Representations of the Intellectual*. Reith Lectures, London: Vintage, 1994; Alex Carey, *Taking the Risk Out of Democracy: Corporate Propaganda Versus Freedom and Liberty*,

advisory role, are of extreme political importance, including citizen rights, social policy and taxation. Moreover, the Constitution consolidates and amplifies the *unbalance* which prevails between the simplified law-making procedures on issues related to the actual construction of a single market, and the extremely demanding procedures, with multiple veto points, which apply to market-correcting measures. This is amplified by the reinforced protection which the Draft Treaty offers to economic liberties, and values associated to them (such as price stability).

This basically implies that it will be wrong, and even pernicious, to consider that the Constitutional Treaty is a constitution, in the same sense that the German, Czech or Portuguese fundamental laws are said to be constitutions.

But such a conclusion derives from assessing the Constitutional Treaty with the wrong standards. The very term of Constitutional Treaty evokes the very process through which what once were international treaties were transformed into the material constitution of the Union. The Constitutional Treaty is a further and major step in this process. By consolidating the primary law of the Union, by its modest but relevant substantive reforms, the Constitutional Treaty lays the ground of a future democratic constitution-making process. Indeed, the Laeken process resembles more closely a deliberative-democratic constitution-making process than Treaty amendments through IGCs, despite all its shortcomings referred in Section II. Moreover, the Draft Treaty will entrench the transparency of the meetings of the Council when sitting in a legislative formation. The involvement of national parliaments through the monitoring of subsidiarity and proportionality has several shortcomings, but it will surely foster the Europeanisation of national parliaments and publics. It must be granted that there is a tension between, on the one hand, the incorporation of the Charter and the characterisation of co-decision as the standard law-making procedure and, on the other hand, many specific provisions in the Treaty, and especially its third part, which seems in occasional stark contradiction with the former. But it is also true that such a tension implies a democratic potential which European citizens could exploit. But it is necessary to reiterate that all these changes can only be regarded under a positive light if we do not make the crucial confusion of placing the Constitutional Treaty on a par

with national democratic constitutions. The first commandment of a democrat keeps on being not taking the name of the Constitution in vain.<sup>128</sup> And the Constitutional Treaty moves us closer to the Constitution of Europe, but *is not* a Constitution yet.

This is an ambivalent conclusion, which some might find convenient to the author but useless to the readers (if any). European citizens are, after all, called to endorse or reject the Constitutional Treaty, either directly or through their representatives. They have to make their minds, and vote yes or no (or be silent through abstention or blank vote). There are no other options. However, the stubbornly binary code of referenda and parliamentary votes hides a very important fact, namely, that the legitimacy of such decisions crucially depends on the breadth and quality of the debate which precedes them. Indeed, the outcome of a referendum or a vote would be a democratically legitimate decision if, and only if, votes are something else than mere decisionistic exercises: That is, if voting has been preceded by a debate in which citizens discuss what to vote, and why, i.e. the reasons underpinning the yes or the no. This is a first reason why a nuanced analysis of the Constitutional Treaty is not futile.<sup>129</sup> A second one is that after the dust will have settled, and the Constitutional Treaty will be approved or rejected, European citizens will be in high need of devising political strategies for the Union. Whatever the outcome of the ratification process, a thorough and nuanced debate will place European citizens in a better position to decide what Union they want for the coming years than a mere episode of public relations.

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<sup>128</sup> Menéndez, *supra*, fn 41.

<sup>129</sup> It seems to me that there is a strong affinity with Neil Walker's defence of the "sincerity of reasons". See 'The EU as a Constitutional Project', Federal Trust Paper Online 19/04, available at [http://www.fedtrust.co.uk/uploads/constitution/19\\_04.pdf](http://www.fedtrust.co.uk/uploads/constitution/19_04.pdf).