



# ***The Constitution's Gift? A deliberative democratic analysis of constitution-making in the European Union***

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*Working Paper*

*No.13, March 2005*

<http://www.arena.uio.no>

## **Abstract**

Our aim in this article is to consider whether the *Union's deliberation over and decision-making on constitutional norms*, can contribute to render it more democratic. From a normative perspective, the way a constitution is forged has deep implications for its democratic legitimacy. In light of recent events, we consider how *procedural changes in constitution-making* might contribute to rectify the Union's democratic deficit. To do so we first develop a *thin* model of constitution-making based on the central tenets of deliberative democracy. We seek to outline how a legitimate constitution-making process will look from a deliberative democratic perspective. Second, we distil out some of the core characteristics of the Intergovernmental Conference (hereafter, IGC) model and assess this against the normative model, to establish the democratic quality of the IGC model. Third, we assess the current Laeken process by means of spelling out the central tenets of this mode of constitution-making, and we assess it in relation to the normative standards of the deliberative model. In the fourth and final step, we consider what contribution constitution-making might make to the handling of the EU's legitimacy deficit(s).

[T]he Union stands at a crossroads, a defining moment in its existence... What might the basic features of such a [European] constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union? (Laeken Declaration)

## I. Introduction

1. The European Union (hereafter, EU) has gradually emerged as a political community in its own right. The EU affects the distribution of power and resources in the Member States, as well as in affiliated states. This comprehensive body of Treaties, regulations and directives covers virtually all areas of public policy. Through this body of law, the Union confers rights as European citizens on the nationals of the Member States. Moreover, the process of European integration has generated a supranational structure,<sup>1</sup> and has spurred a progressive convergence of the Member States' institutional structures.<sup>2</sup> It has become increasingly apparent that the Union's institutions and its laws affect and even shape the daily lives of European citizens in a myriad of ways.

The transformation of Europe has come hand in hand with the realisation that the Union's legitimacy cannot be *exclusively* based on its capacity to solve common problems; neither can it be merely derived from its Member States,<sup>3</sup> which pioneering neo-functional or intergovernmental accounts of European integration tended to assume. The increasingly political nature of the Union has rendered output and indirect

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<sup>1</sup> See Joseph Weiler, 'The Community system: the dual character of supranationalism', 1 (1981) *Yearbook of European Law*, pp. 267-306. *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999; Christian Joerges and Ellen Vos (eds.) *EU Committees, Social Regulation, Law and Politics*, Oxford: Hart Publishers, 1999; Edoardo Chiti, *L'Agenzie Europee*, Padova: CEDAM 2002.

<sup>2</sup> There is a rapidly growing body of literature on Europeanisation. See, for example, Christopher Knill, *The Europeanisation of National Administrations*, Cambridge: Cambridge University Press, 2001; Johan P. Olsen, 'The Many Faces of Europeanisation', 40 (2002) *Journal of Common Market Studies*, pp. 581-602; Kenneth Hanf and Ben Soetendorp (eds.) *Adapting to European Integration – Small States and the European Union*. London: Addison Wesley Longman Ltd, 1998. In the legal literature, Lord Denning aptly described European law as the "incoming tide". See *H P Bulmer Ltd v J Bollinger SA* [1974] Ch 401 at 418.

<sup>3</sup> See Erik Oddvar Eriksen and John Erik Fossum, *Democracy in the European Union. Integration through deliberation?* London: Routledge, 2000; Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, *The Chartering of Europe*. Baden-Baden: Nomos, 2003; *Developing a Constitution for Europe*, London: Routledge, 2004.

legitimacy inadequate.<sup>4</sup> These modes of legitimation, characteristic of classical international organisations, simply cannot cope with the Union's legitimacy needs. The net upshot is that the Union will continue to suffer from a legitimacy gap unless it can establish its own *democratic credentials*. Since the ratification of the Maastricht Treaty in 1992, citizens have repeatedly rendered clear that their commitment to the project of European integration is far from unconditional.<sup>5</sup>

2. In this context, it is widely held that the establishment of a democratically-decided constitution could go far in redressing the democratic deficit. Such a claim has been raised both before, as well as after, the work of the Convention on the Future of the European Union (hereafter, the Convention).<sup>6</sup>

Our aim in this article is to consider whether the *Union's deliberation over and decision-making on constitutional norms*, can contribute to render it more democratic. From a normative perspective, the way a constitution is forged has deep implications for its democratic legitimacy. In light of recent events, we consider how *procedural changes in constitution-making* might contribute to rectify the Union's democratic deficit.<sup>7</sup>

3. We proceed in four steps. First, we develop a *thin* model of constitution-making based on the central tenets of deliberative democracy. We seek to outline how a legitimate constitution-making process will look from a deliberative democratic

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<sup>4</sup> Jürgen Habermas, 'So, why Europe needs a Constitution?', 11 (second series) *New Left Review*, pp. 5-26.

<sup>5</sup> Consider the initial Danish no and the French *petite oui* in the respective Maastricht Treaty referenda, together with the recent "no" in Ireland to the Nice Treaty. For a theoretical analysis of European referenda, see Patricia Roberts Thomson, 'EU Treaty referendums (sic) and the European Union', 23 (2001) *Journal of European Integration*, pp. 105-38.

<sup>6</sup> It goes without saying that one could claim that the European Union *cannot* and/or should not be portrayed as a full-blown political community, but as an international organisation. Cf. Derrick Wyatt, 'New Legal Order, or Old?', 7 (1982) *European Law Review*, pp. 147. The acceptance of such an analysis would necessarily lead to the conclusion that the attempt at reconstructing and assessing Treaty amendment as a matter of *constitution-making* is simply wrong. This is a coherent theoretical position, but we find that it fails to come to grips with the Union's breadth and scope of powers and influence not only upon the Member States, but also upon the citizens.

<sup>7</sup> Thus, in this article we do not deal with the *democratic potential* of the substantive contents of a European Constitution. The new constitutional frame may enhance the democratic character of the Union if it becomes a catalyst for democracy, for example by means of ensuring the democratic character of the ordinary process of law-making. On this, see also the reflections contained in Section V.

perspective.<sup>8</sup> This provides us with the requisite standard to evaluate the democratic quality of actual deliberations and decisions on the basic norms of Union law. Second, we distil out some of the core characteristics of the Intergovernmental Conference (hereafter, IGC) model and assess this against the normative model, to establish the democratic quality of the IGC model. This assessment of the IGC in constitutional terms is premised on our finding that the process of legal integration has been grounded in the constitutional traditions common to the Member States, and in their converging, something which enabled a constitutional reading of Union law. This has come hand in hand with the continual albeit slow constitutionalisation of Treaty amendment procedures. Third, we assess the current Laeken process by means of spelling out the central tenets of this mode of constitution-making, and we assess it in relation to the normative standards of the deliberative model. This assessment enables us to determine how much the Laeken model deviates from the IGC model. Through these steps, we can better locate the present reform process in its *normative* and *historical* context, and assess it accordingly. In the fourth and final step, we consider what contribution constitution-making might make to the handling of the EU's legitimacy deficit(s).

This is thus an *evaluative* article, which assesses empirical instances of treaty-making in relation to an ideal model of constitution making. But it is also a *reconstructive* article, to the extent that we look for possible approximations in relation to the model over time (the standard IGC model, and the Laeken process).<sup>9</sup>

## **II. The normative model established: Deliberative Constitution-Making**

### **A) Deliberative democratic constitution-making**

4. Our deliberative model of European constitution-making speaks to the core normative requirement of realising the public and private autonomies of Europeans.

First, we assume that in a modern society, legal norms play a critical role in social integration, through conflict-solving and action-coordination in order to achieve

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<sup>8</sup> The model is ideal, but not fully abstract, as it takes problems which arise in actual constitution-making into account.

<sup>9</sup> Thus, the emphasis here is on a reconstruction and an assessment of the process in democratic legitimacy terms; our intention is not to establish the causal mechanisms involved.

common, public goals. However, legal norms cannot be legitimated with reference to functional goals only. The key problem associated with the legitimacy of law, and of course also the legitimacy of European law, is indeed normative, not functional. It can be summarised as: *do citizens have an obligation to obey the law?* This can only be answered in the affirmative if the law is deliberated and decided upon through *procedures* which guarantee the public and private autonomies of individuals, that is, democratic law-making procedures, in which citizens can identify themselves as authors, and not only subjects, of the law.<sup>10</sup> Therefore, law must be forged through procedures which respect the basic right of all those affected to participate in the deliberation and decision-making of legal norms.

Second, we claim that the principle of legality needs to be considered in some detail, by means of distinguishing between two main types of laws: the constitution and ordinary statutes. The constitution is conceived of as the supreme and key norm of the legal order, which frames ordinary law-making. The Constitution lays the ground of *political decision-making*, by means of establishing the citizens' rights and duties, and through establishing the basic principles which should program and inspire political decision-making. Thus, the Constitution typically contains: (1) the thin substance which underpins deliberative democracy,<sup>11</sup> or what is the same, the very idea of democratic deliberation; and (2) the most basic (and only the most basic) ethical choices of the political community, which should frame the ordinary legislative process.<sup>12</sup> The distinction between and the hierarchical ranking of the constitution and ordinary laws are intended to allow citizens to concentrate their political virtue on the *constitutional moments* – when the Constitution is being transformed. This not only helps to reconcile private and public autonomy, but is indeed a distinction related to the characteristic features of a modern society based on a division of labour, and to the accommodation of different conceptions of the good life. Indeed, the bifurcation and the hierarchical relationship between the constitution and ordinary laws are normatively grounded. The *legal property of hierarchical superiority* is supported by the normative superiority – in

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<sup>10</sup> This is the hard core of the democratic principle. See Jean Jacques Rousseau, *Oeuvres completes*, III. Paris: Seuil, p.380.

<sup>11</sup> Jürgen Habermas, 'Constitutional Democracy, A Paradoxical Union of Contradictory Principles?', 29 (2001) *Political Theory*, pp. 766-781.

<sup>12</sup> Bruce Ackerman, *We The People*, volume I (Foundations), volume II (Transformations), Cambridge: Harvard University Press, 1991 and 1997. See also (with Neal Kumar Katyal) 'Our Unconventional Founding', 62 (1995) *University of Chicago Law Review*, pp. 475-573; and 'Revolution on a Human Scale', 108 (1999) *Yale Law Journal*, 2279-2349.

democratic terms - of the Constitution.<sup>13</sup> By *constitutionalising* the thin substance of democracy, democratic decision-making is *constituted* in a literal sense, and democratic decision-making is enabled. By *constitutionalising* the most basic ethical choices of the society, such choices are protected from change by *ordinary legislative processes*, which might reflect a purely contingent majoritarian will.<sup>14</sup> By limiting constitutionalisation to the *thin substance of democracy*, and the *most basic ethical choices of society*, the constitution frames, yet does not make, the political law-making process insignificant. The latter should be competent to apply the contents of the constitution to concrete circumstances.

Third, the two previous premises imply that the process of forging the constitution must be subjected to *thorough* public debate and scrutiny. This serves both epistemic and political purposes. In epistemic terms, the intention is to generate improvements in information as well as in judgement: to produce reasons and assessments of their merits. In political terms, this implies a special intensity and quality of public participation and is what establishes the difference between the constitution and ordinary statutes. The constitution-making process should aim not only at the formation of a coherent constitutional will, but the intensity and strength of such a will should be checked through demanding decision-making processes. The actual forging of a draft has to be properly institutionalised because a final decision is needed. This calls for a major role for representative institutions, ‘strong publics’,<sup>15</sup> but an active ‘public sphere’ must be well-connected to the process (‘general publics’), and the latter should have the *last word* in the decision-making upon constitutional reforms.<sup>16</sup> Democratic constitution making, therefore, entails *multiple* publics, because multiplicity ensures a

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<sup>13</sup> This normative grounding of the superiority of the Constitution also explains the *democratic dignity* assigned to statutes. The questioning of the constitutionality of a statute does not generally result in the suspension of its application, because Constitutional Courts must assume, until proven to the contrary, that parliaments comply with the Constitution in the exercise of their law-making powers. Similarly, Courts make use of the room to construct statutes in such a way that they will be in compliance with the Constitution.

<sup>14</sup> Carlos Santiago, ‘A Philosophical Reconstruction of Judicial Review’. 14 (1993) *Cardozo Law Review*, pp. 799-846.

<sup>15</sup> *Strong publics* refer to institutionalised deliberations whose discourse encompasses both opinion formation and decision making. In institutional terms, *strong publics* alludes to parliamentary assemblies and discursive bodies in formally organised institutions imbued with decision-making power, yet constrained by the logic of arguing and impartial justification.

<sup>16</sup> Weak or general publics refer to public spheres “whose deliberative practice consists exclusively in opinion formation and does not also encompass decision making.” See Nancy Fraser, ‘Rethinking the public sphere. A contribution to the critique of actually existing democracy’, in Craig Calhoun (ed.) *Habermas and the Public Sphere*. Cambridge, The MIT Press, pp. 109-42, at p. 134.

better testing of democratic legitimacy. Institutionalisation is intended to ensure the formation of a coherent constitutional will at the end of the day.<sup>17</sup> There is to be a vital interplay between the public sphere based in civil society and in institutionalised will-formation.<sup>18</sup>

5. Our ideal model is thus closely connected to a normative conception of the constitution. It deals with a process of *overt* and *intentional* constitutionalisation. In that sense, the model stands in some contrast to the processes of evolutionary constitutionalism, where the material constitution emerges through a slow process in which legislative and judicial decisions cumulate over time so as to establish a new legal order, or to actually change the contents of the material constitution<sup>19</sup>. Arguably, up until recently, the EU has embraced – through default and not through design – an evolutionary constitutionalism.<sup>20</sup>

Note that *overt* and *intentional* constitutionalisation does not lead to *decisionism*, according to which constitution-making is mainly a matter of reflecting the popular (or, in non-democratic variants, the leaders') will at a particular point in time.<sup>21</sup> We claim that, if framed in the spirit of deliberative democracy, constitution-making must be conceived of as a *process*, it cannot be confined to the mere moment of decision.

Indeed, constitutional norms enjoy what may be termed *reinforced democratic legitimacy* because they have been developed through a proper process of clarification, filtering and testing of differences, through which a strong constitutional will might emerge. The different phases of the process can be constructed as a series of increasingly demanding examinations, devised so as to test the depth and breadth of the common will in favour of constitution-making or reform, both in terms of consistency

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<sup>17</sup> But notice that institutionalisation is not co-terminous with a formally labelled procedure of constitution-making. Constitution-making and constitutional amendment can be *unconventional* in that sense. See Ackerman, *supra*, fn 13 and Akheel Reed Amar, 'The Consent of the Governed; Constitutional Amendment Outside Article V', 94 (1994) *Columbia Law Review*, 457-508.

<sup>18</sup> See Habermas, *Between Facts and Norms*, Cambridge: The MIT Press, 1996, at pp. 306-8.

<sup>19</sup> See Ackerman, *supra*, fn 13 (1999). For a defence of EU evolutionary constitutionalism, see Joseph Weiler, 'In defence of the status quo: Europe's constitutional *Sonderweg*', in Joseph Weiler and Marlene Wind, *European Constitutionalism beyond the State*, Cambridge: Cambridge University Press, 2003, pp. 7-23.

<sup>20</sup> The path-breaking reference here is Joseph Weiler, 'The Transformation of Europe', 100 (1991) *Yale Law Journal*, pp. 2403-83.

<sup>21</sup> On decisionism, the leading reference is, obviously enough, Carl Schmitt. See the reprinting of his *Verfassungslehre*, Berlin: Duncker and Humblot, 1993.

(support must converge around a *single constitutional proposal*) and in terms of intensity (support must be as large as possible, verging on supermajorities).

We claim that the democratic process of constitution-making can be reconstructed around five main phases:

- Signalling
- Initial Deliberation
- Drafting
- Agenda-settled Deliberation
- Ratification

6. Before considering each of these phases in detail below, we should like to stress that *democratic constitution-making* adheres to two central logics: deliberation and decision-making. Deliberation, both in strong and in general publics, stimulates inputs, fashioning and vetting of proposals and forging of views, opinions and stances, thus opening of the process, whereas decision-making ensures choice among alternatives and thus closure of the process.<sup>22</sup> An adequate interplay between strong and general publics is essential for the legitimacy credentials of the constitution-making process to come to fruition.

## **B) The Phases of Deliberative Constitution-Making in detail**

7. *Signalling*. To get about writing or amending a Constitution, a decision must first be reached on the actual need for doing so. A ‘constitutional impetus’ is necessarily the result of somebody *explicitly* claiming that there is a widespread social demand for establishing a written constitution (or for amending the existing one). This opens up the democratic process of constitution-making, but the democratic support for the signalling group or individual is to be tested in the successive steps of the process. The signalling has, then, something of an anticipatory character, as those signalling claim to articulate a diffuse feeling within the community, while the very act of signalling might contribute to create the *momentum* for such an initiative.

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<sup>22</sup> From a deliberative perspective, however, decision-making closes the process *for the time being*. Deliberative democracy endorses both the need for having fixed common action norms and the reflective capacity to amend such rules if their normative correctness is proven wrong. The *authority* of the decided norm can be withdrawn through a new instance of the constitutional or legislative process.

Three questions need addressing: (a) *why* forge or amend the constitution; (b) *why* do so *now*; and (c) *how* to go about doing it? Signalling reflects an element of leadership, (a ‘top-down’ logic), but only to an extent. The signalling has to come hand in hand with the reasons that the promoters give to speak in the name of *We the People*, and which serve to mobilise the requisite popular support for the proposals. To put it differently, the individual or group signalling the constitutional moment only has a claim to articulate a diffuse social feeling, a claim which has to be redeemed by means of eliciting wide public support as early as possible in the process.

8. *The initial deliberative phase.* The initial deliberative phase is where the claim raised by those launching the constitution-making process is put to the test of public opinion, and where (eventually) an agenda for constitutional reform starts to take shape.

Consequently, we can distinguish between two main questions, which are simultaneously put to public examination. First is the claim that there is a widespread social demand for a new constitution. But is this so? The litmus test is wide social mobilisation in favour of launching the process of constitution-making, preferably through a decision with an institutional dimension. A standard case is that of a landslide electoral victory for the party or the parties that stand for constitutional change. Second, the claim to reform the constitution is always based on a reform agenda, which gets increasingly detailed as discussion proceeds. The process must be based on open deliberation, so as to bring forth all the relevant arguments and positions on all the three questions posed in the signalling phase. Third, the second phase is brought to an end with an institutional decision to prepare a draft constitutional project. This explains why low public mobilisation in favour of constitution-making could be compensated for, at least temporarily, by representative institutions (strong publics) committing themselves to constitutional reform. The latter could claim that such a will exists, even if it remains unarticulated.<sup>23</sup>

9. *The drafting phase.* The first victory for those standing for constitutional change is to convince the public of the need to actually *consider* constitutional change *in-depth*. This is synthesized in the decision of *strong publics* to open an explicit process of

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<sup>23</sup> The democratic validity of such a claim is critically dependent on the representativeness of the relevant strong public(s) involved.

constitutional reform by means of an institutionalised debate on the contents of such a change.

This phase speaks to the articulation of the will to have constitutional reform, i.e., to forge a coherent will to have a specific new constitution. Strong publics are responsible for this step. They explore how to render the will of citizens coherent through public debates. Their deliberations result in the designation of a specific representative body (a Constitutional Assembly, hereafter Assembly) or an already existing body that is to be convened to draft a constitutional proposal.

Two basic conditions must be met for an Assembly to be legitimised as a Constitutional Assembly. First, such an Assembly must have a *direct sanction from the people*. Direct, unmediated representation is necessary with reference to the usual understanding of the principle of legality, but even more so, on what concerns the drafting of a constitution. In its strongest version this implies that the Assembly's composition be determined through a direct, polity-wide election.<sup>24</sup> Second, the election of the Assembly must take place with a clear proviso that the mandate be that of writing a constitution. Only in such a case would there be assurance that the public deliberations preceding the election (by the people or by the strong public representing the public) be focused on candidates' ideas and views on the concrete exercise and drafting of the constitution.

The activities of that strong public are aimed at establishing agreement on a specific constitutional project. The original platform of constitutional reform is considered in depth, on the basis of the deliberations of the representative institution itself, and on the input which comes from civil society, expressed in phase two, and which keeps on circulating from general to strong publics in this phase.

Put broadly and schematically, the deliberations of the Assembly, follow the shape of a tract, i.e., they start out very broadly – in terms of subject, and with reference to matters of principle – and as the process unfolds, brings these agreements to bear on more specific matters. In overarching terms, the process sees a shift from an initial logic of justification, to a much stronger subsequent focus on the logic of application.<sup>25</sup> The

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<sup>24</sup> A weaker version would entail election by strong publics. Certainly, in a case of low popular mobilisation, and absence of an adequate signal, (as cited in §11), direct polity-wide election would be very much needed to redeem such a claim. As already indicated, the weaker the signal the greater the need to obtain direct popular support at this critical stage of the process (cf. §9)

<sup>25</sup> For these terms see Klaus Günther, *The Sense of Appropriateness – Application Discourses in Morality and Law*, New York: State University of New York Press, 1993 and

process clarifies basic principles, as well as, their practical-institutional manifestations and implications.

A proper balance between forging a common will and openness to general publics can only be established by means of ensuring the proper transparency of the work of the Assembly or Asembly-like body. As has been stated, the Assembly acts as a strong public, but one which should be closely attentive to the proposals and reactions of general publics. Only then can we be sure that the constitutional proposal has been properly tested through deliberation informed by public preferences and concerns.

In Table I, we have spelled out some of the requirements to be placed on such a deliberative body. These are suggestive rather than exhaustive, and must be seen in light of the broader normative requirements placed on the entire process.

#### TABLE 1

#### FEATURES OF THE STRONG CONSTITUTIONAL BODY: THE CONSTITUTIONAL ASSEMBLY

- The Convention's agenda is set by the popular mandate.
  
- The Convention is an independent body. This means among other things that:
  1. It appoints its own leadership;
  2. It organises its own work;
  3. It decides its own timeframe;
  4. Members should be popularly elected
  5. Members are fully committed to the constitutional process (in terms of time and resources allocated)
  6. No Convention member is subject to tight bootstrapping or is pre-committed to defend a particular societal interest

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Jürgen Habermas, *Justification and Application – Remarks on Discourse Ethics*, Cambridge: The MIT Press, 1994. More specifically, the initial stage identifies the general principles and explores how they are related to each other, so as to establish a clearer sense of their relations. In the next stages, the most important principles are contextualised and empirical implications are derived. In practice, this involves going back and forth between matters of principle and matters of practice and context.

- The Convention's deliberations are open and transparent. This means among other things that:
  1. Its documents are available to the public;
  2. General publics have direct access to the forum;
  3. There are no constraints on the public interaction of individual Convention members
- The proposal must comply with the general requirements of democratic constitution-making (but precisely how these are applied to this process is left to the Convention to decide)

The work of the Assembly ends when a draft constitution is put forth. This reflects the consensus among the members of the Assembly that they have managed to synthesize the citizens' desire for constitutional change into a coherent will, in draft proposal form. Because of the democratic legitimacy of *constitutional norms* (cf. § 4), a consensus or a reinforced majority support for a proposal among the members of the strong public is *insufficient* to render such a proposal into a *binding Constitution* (while it suffices to render bills into statutes in the ordinary legislative process). A new process of deliberation and decision-making of *general publics* is needed to achieve the *enhanced democratic legitimacy* associated with constitutional norms.

It goes without saying that the third phase ends up in failure if it is agreed or acknowledged that there is not sufficient support for any single draft constitution.

10. *The agenda-settled deliberative phase.* In the fourth phase of the constitution-making process, a wide debate on what is now the draft constitutional proposal forms centre-stage. The debate has to be focused on the overall merits of the draft constitution, so that the final decision as to whether to endorse it or to reject it can be properly made.<sup>26</sup> Strong publics should be committed to spark debate in civil society, but quite obviously they cannot in themselves replace the legitimacy input stemming from actual deliberation in civil society. It goes without saying that there is a difference

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<sup>26</sup> A negative position towards the draft constitution could very well be based on a different platform of constitutional change, so that *those opposing the draft text* could aim at defeating the present draft in order to signal a new constitutional moment afterwards.

between fostering debate and co-opting civil society. The debate is carried further by general publics, organised ones in social movements, as well as un-organised ones.

The debate must go on for long enough time so as to allow the public to assess the constitution in a proper manner.<sup>27</sup>

11. *The ratification phase* Democratic legitimacy does not stem from the mere fact of decision, even of majoritarian decision (cf. 5 above). The legitimacy of a constitution rests to a large extent on the richness and quality of the debate *prior to voting*,<sup>28</sup> from the reasons that move people to vote. However, there is no alternative to the testing of the common will that is normatively superior to voting.<sup>29</sup> Thus, a proper form of consultation is required in order to determine what the common will is. The standard form of such a consultation is a referendum. However, it can take other forms, such as a parliamentary election, the campaign of which has been basically devoted to the constitutional draft (or, in exceptional cases, a special vote in Parliament, preceded by widespread social debate can also be legitimate). At any rate, a proper and thorough previous deliberation must precede it.

In particular, if the referendum form is the one opted for, the referendum question must be clear and committing in the sense that it ensures that all those partaking, consider themselves to make an unambiguous decision in favour of or against a specific proposal. In order to ensure that the referendum reflects the single political will to accept or reject the constitutional proposal, it must be a polity-wide referendum, and one that is held at the same time throughout the entire polity, on the basis of the same question. These features help avoid the possibilities for strategic decisions and manipulative interpretations of the results in other parts of the polity (both in favour of and against the proposal). The purpose is to ensure, as far as possible, a common focus and a common attention throughout the process. So, for example, if there are time differences, they must be such timed as to be simultaneous in actual terms – to avoid results from one part affecting those elsewhere.

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<sup>27</sup> The duration of this period is important for the question of accountability – if it is too short, accountability suffers; if it is too long, transparency might suffer, as it might become difficult to sort out the relationship between the constitutional proposal and the final decision.

<sup>28</sup> Habermas, *supra*, fn 12.

<sup>29</sup> Such a test can also be justified with reference to the need for common action norms to avoid conflicts and to coordinate action.

The choice of procedure could be made to depend on the intensity of constitutional change: the more comprehensive the type of change, the more need there is for the referendum option.<sup>30</sup>

### **C) The rationales for a democratic constitution**

12. In our view, a democratic constitution contributes to the democratic legitimacy of a polity in three ways. First, a *democratic* process of drafting the constitution is a major achievement that can in itself consolidate democratic decision-making. This is due to the central role played by the constitution as a reference point in symbolic, political and legal terms. The analysis of unconventional constitutional moments by Bruce Ackerman is indicative of such possibilities.<sup>31</sup> Second, the constitution, by defining the process of constitutional amendment, could increase the chances for any future amendment to satisfy the highest democratic standards of legitimacy. In that respect, it is important to notice that this is essential in order to avoid the undemocratic reform of the constitution, which could easily lead to the subversion of democratic life *in general*. In that sense, it could be argued that, whilst it constrains democracy, the constitution, paradoxically, also enables democratic constitutional change/amendment.<sup>32</sup> Third, the constitution could be such framed as to enhance the democratic standards of the process of ordinary legislation. Even if ordinary statutes cannot be expected to meet with the same degree of legitimacy as the constitution, when the processes of law-making *in the constitution* meet with democratic requirements, the support for ordinary legislation is also likely improved.

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<sup>30</sup> The complex nature of political communities, such as the EU, raises particular questions pertaining to both options listed above. On the referendum requirement, it might be necessary to have some form of double majority arrangement; i.e., both a majority of EU citizens, and a certain minimum threshold of states. The second majority requirement – a majority of states - would be fulfilled by parliamentary ratification in the states. With regard to the second, the parliamentary ratification option, the same double majority requirement applies. This could be formulated in the following manner: It must include ratification by the EP, and supplemented with ratification in national parliaments. These also have to take place on the same day to avoid the problems listed above. The threshold for the EP could be simple majority, combined with for instance 4/5 of the national parliaments.

<sup>31</sup> Ackerman, *supra*, fn 13.

<sup>32</sup> Habermas, *supra*, fn 12.

### III. Constitution-making EU style: Intergovernmental Conferences

13. In this section, we postulate that it is possible to reconstruct one model of treaty change in the EU, which we call the IGC model. We further claim that the IGC model was initially a process of interstate diplomacy<sup>33</sup>, but has over time developed into a quasi-constitutional process.<sup>34</sup> We see a connection between the *emerging constitutional reading of Community law*, especially noticeable in judicial rulings (15), and the *constitutional framing* of Treaty reform.

These premises explain why we try to highlight the features of the model that the various instances of treaty change share, while emphasising the slow but steady transformation of the process, from a framework for intergovernmental bargaining into a process with quasi-constitutional features.

#### 1. The material constitutional law of the Union, between constitutional traditions and Treaties

14. It is widely agreed that the EU lacks a formal constitution. However, it is possible to construct Union law as a system of norms on top of which we find a set of *primary* or *constitutional norms*, which are considered to be binding on *secondary norms*. This line of interpretation, hinted at by the European Court of Justice in the leading cases *Van Gend en Loos*, *Costa and Internationale*,<sup>35</sup> and explicitly affirmed later on,<sup>36</sup> has become accepted by national courts and governments.<sup>37</sup> The whole set of

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<sup>33</sup> Curtin, Deirdre, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces,' 30 (1993) *Common Market Law Review*, pp. 17-69.

<sup>34</sup> Budden labels the 1985 SEA as the first of the 'quasi-constitutional' IGCs. See Philip Budden "Observations on the Single European Act and 'relaunch of Europe': a less 'intergovernmental' reading of the 1985 Intergovernmental Conference", 9 (2002) *Journal of European Public Policy*, pp. 76-97, at p. 77. In our view, Maastricht was the most obvious turning point, with subsequent events, in particular Amsterdam and also Nice, having become more explicitly focused on the political-institutional and even constitutional dimensions of the EU. They took place in a setting, where it was widely held that the EU had a material constitution. For this term see Agustín José Menéndez, 'Three Conceptions of the European Constitution', in Eriksen, Fossum and Menéndez, *supra*, fn 4 (2004), at pp.109-128. For similar arguments, see Weiler, *supra*, fn 2.

<sup>35</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Judgment of 5 February 1963, [1963] ECR 3 and Case 6/64, *Flaminio Costa v E.N.E.L.*, Judgment of 15 July 1964, [1964] ECR 1141.

<sup>36</sup> Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament*, [1986] ECR 1357, paragraph 23.

<sup>37</sup> Cf. for example, 22 BverfGE 293 at 296. The European Communities were said to have a constitution of their own laid down in the Treaties. See also Karen Alter, *Establishing the Supremacy of European*, Oxford: Oxford University Press, 2001; and Lisa Conant, *Justice*

primary norms thus plays, in a *material* sense, a role similar to that of *national constitutions*.<sup>38</sup> However, this *material constitution* has emerged in the absence of constitutional politics, and therefore, without forging a constitution in a proper democratic sense.<sup>39</sup>

15. On what concerns the structure of the material constitution of the EU, the Treaties tend to be regarded as *its core component*. This might be true in quantitative, but not in qualitative terms. Instead, the *constitutional traditions common to the Member States* are the most fundamental norms of the material constitution of the Union, for two main reasons. Firstly, this allows us to produce a convincing explanation (and legal justification) of the three major judgments of the Court, the “troika” of the said *Van Gend en Loos*, *Costa* and *Internationale*. It is usual to interpret them as instances of judicial quasi-constitution-making, as the Court would have decided the cases not on a legal (Treaty?) basis, but on its *certainie idée de l’Europe*.<sup>40</sup> If we hold that the common constitutional traditions are the *founding basis* of the Union’s material constitution, and that the Treaties are merely a first attempt at specifying such traditions in the specific context of the process of European integration, the referred leading judgments can be reinterpreted as attempts at further specifying the structural principles required by the *law of integration*. Thus, the affirmation in *Internationale* that the protection of fundamental rights is an unwritten principle of Community law is no longer to be interpreted as an argumentative trick in order to entrench the *supremacy* of Community law, but as a reflection of the grounding role played by *common national constitutional traditions*.<sup>41</sup> In brief, this interpretative standpoint allows us a better interpretation of the basic case law of the Court, at the same time that it explains how, in

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*Contained, Law and Politics in the European Union*, Ithaca: Cornell University Press, 2002.

<sup>38</sup> See Menéndez, *supra*, fn 36, at pp. 116ff.

<sup>39</sup> Martin Shapiro, “Comparative Law and Comparative Politics”, 53 (1980) *Southern California Law Review*, pp.537-42.

<sup>40</sup> The leading article is Eric Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75 (1981) *American Journal of International Law*, pp. 1-27.

<sup>41</sup> Similarly, the affirmation of the principle of the direct effect of Treaty provisions or of the supremacy of Community norms within the fields of Community competence can be reinterpreted as an attempt by the Court to determine what the common constitutional traditions required in those regards, and not as an act of quasi-constitutional will not based on the law.

many other instances, the Court put, so to say, the flesh of the legal system onto the bones of the three founding Treaties.<sup>42</sup>

Secondly, the characterisation of the common constitutional traditions as laying the ground for the European Constitution corresponds to the *understanding* of the process of integration in most if not all *national constitutional traditions*, and in the interpretation of them provided by national Constitutional or higher courts.<sup>43</sup> National constitutional courts tend to see the process of European integration as one where the horizons of national constitutional traditions move closer, although this need not entail losing their particular constitutional identity. National constitutional courts have over and over again reiterated that Union law *cannot* but be based on national constitutional traditions (even if they have sometimes failed to realise that it is the *common* national constitutional traditions *as a whole*, and not any single tradition, that found Community law).

From this reading, the Treaties, we insist, are to be regarded as a partial albeit incomplete attempt at rendering *some* of the principles of the common constitutional traditions explicit. Consequently, Treaty amendment is to be considered as *the functional equivalent* of constitution-making in the Union *because* through it the common constitutional traditions are specified in the context of the process of integration, and, as the *constitutionalisation of the Treaty amendment process* becomes more explicit, the *common constitutional traditions themselves could be revised*.

16. Thus, the *material constitutional law of the Union* is to be found, first and foremost, in the *common constitutional traditions of the Member States*. The process of explication and specification of such traditions has proceeded through the ratification of the founding Treaties, and indeed, through their successive reforms, but also through leading judgments where the Court of Justice was forced to *fill in* some of the gaps left by the Treaties.

The process of progressive constitutionalisation of Union law has been fuelled by two concerns. First, the Treaties were written in the template of international law,

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<sup>42</sup> On the comparative approach followed by the Court, see, among others, Koen Lenaerts, 'Le droit compare dans le travail du juge communautaire', 37 (2001) *Revue Trimestrelle du Droit Européen*, pp. 487-527

<sup>43</sup> On the different perspectives of reconstruction of Union law, see Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European law', 16 (1997) *Law and Philosophy*, pp. 377-420; Neil D. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Union*, Oxford: Oxford University Press, 1999, especially chapters 6 and 7.

and they contain norms of a constitutional nature, and others, which are ordinary legal provisions. This explains why there have been numerous proposals to rewrite the Treaties, distinguishing between a constitutional and a non-constitutional part. Aspects of this line of thinking are also found in the convoluted delineation of four parts in the Laeken Convention's proposed Draft Constitution.<sup>44</sup> This means that only parts of the Treaties are regarded as being *materially part* of the constitutional or primary law of the Union. Secondly, and more importantly, the process of explication of what is common to the common constitutional traditions has become increasingly related to *democratic constitution-making* on account of the growing legitimacy concerns with the EU.

17. An exhaustive analysis of Treaty amendment procedures would require considering all instances of Treaty amendment<sup>45</sup> (and of drafting or amending of *norms with material constitutional status*).<sup>46</sup> In the following we focus on what has until now

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<sup>44</sup> CONV 850/03, of 18 July 2003.

<sup>45</sup> Major instances of Treaty-making and Treaty amendment are the Paris Treaty of 1951 establishing the European Coal and Steel Community, the Rome Treaties of 1957 establishing the European Economic Community and EURATOM, the Single European Act of 1986, The Maastricht Treaty of 1991, and the Treaties of Amsterdam of 1996 and of Nice of 2000. Minor Treaty amendments include the Saar Treaty of 1956, the Convention on Certain Institutions Common to the European Communities of 1957, the Merger Treaty of 1965 and the Budget Treaties of 1970 and 1975. For this latter category see Christian Franck, 'New Ambitions: From the Hague to Paris Summits, 1969-72' in Roy Pryce, *The Dynamics of the European Union*, London: Routledge.

<sup>46</sup> To be precise, we must say that there are a few but relevant norms which must be characterised as constitutional, on an equal footing with the common constitutional traditions and the (constitutional parts) of the Treaties. A clear example is the Decisions on Own Resources,<sup>46</sup> which actually fills in the gap voluntarily left in the Treaties in Article TEC 269. See '70/243/ECSC, EEC, Euratom: Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources', OJ L 94, p.19 of 28.4.70 and the Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, OJ L 336, p. 1, of 27.12.77; See 85/257/EEC, Euratom: Council Decision of 7 May 1985 on the Communities' system of own resources', OJ L 128, p. 15 of 7.5.1985; See '88/376/EEC, Euratom: Council Decision of 24 June 1988 on the system of the Communities' own resources', OJ L 185, of 15.7.88, pp. 24-8 and Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources; OJ L 155, of 7.6.89, pp. 1-18; '94/728/EC, Euratom, Council Decision of 31 October 1994 on the system of the European Communities' own resources', OJ L 293, of 12.11. 94, pp. 9-13; Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996 amending Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, OJ L 175, of 13.7.96, at pp. 3-6; Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources, OJ L 130, of 31.5.00; 2000, at pp.1-12, /597/EC, Euratom: Council Decision of 29 September 2000 on the system of the European Communities' own resources, OJ L 253, of 7.10.2000, at pp. 42-46. The same can be said of the Act on Parliament Elections of 1976, which implemented the provisions contained in Article 138.3 TEC, concerning the election of members of the European Parliament by

served as the *canonical* procedure of material constitution-making in the Union, namely, the Intergovernmental Conference. This is the *main path* that the Union can follow to alter its material constitution, to render more precise (or eventually alter) the common constitutional traditions and their bearing on the institutional and factual realities of Europe.<sup>47</sup>

## 2. Intergovernmental Conferences

### A) The underlying rationale: executive treaty-change

18. To assess the IGC method,<sup>48</sup> we cannot focus on only one single case of treaty-making or change,<sup>49</sup> as the treaties are forged through a series of such processes, each of

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direct suffrage. Cf. Act concerning the election of the representatives of the Parliament by direct universal suffrage, annexed to the Council Decision of 20 September 1976, OJ L 278, of 8.10.1976, pp. 5-11. These atypical constitutional acts are the result of two factors: first, the lack of a complete formalisation of the system of sources of law in Union law, and second, the international origins of the legal order of the Union. The process through which they are debated and decided is an abridged instance of the Treaty amendment procedure, and it reflects the unanimous will of all Member States.

<sup>47</sup> Placing the focus on intergovernmental conferences entails that the Court's vital interpretive actions are somehow sidelined in our model. It is true that the general principles of Community law have been elucidated by the Court on the basis of the national constitutional traditions, but it is no less true that, once established by the Court, their status can be further acknowledged and specified by means of their formal inscription in the Treaties, which then becomes authoritative and binding, even upon the Court. Thus, the jurisprudential distillation of the contours of the general principle of protection of fundamental rights can be portrayed as having prepared the ground on which the Charter of Fundamental Rights of the Union was subsequently built. But once the latter is fully inscribed into primary law (by the Intergovernmental or the Convention model), the Court will have to reconsider its approach to the common constitutional traditions in line with the text of the Charter.

<sup>48</sup> Formally speaking, the IGC method has grown out of the system of intergovernmental conferences, which the EU has used since its inception. The IGC is a specially convened set of European Council meetings explicitly set up to deal with treaty reform. Partly on the basis of the cumulated experience with the drafting of the Paris and Rome Treaties, the IGC procedure was explicitly referred to in Article 236 of the Treaty of the European Economic Community. In the first thirty years of European integration, the process foreseen in Article 236 was followed only once, as a way of preparing the 1965 Merger Treaty. In those years, there were hardly any significant changes in the primary law of the Communities, except for the budgetary reforms of 1970 and 1975, which were negotiated in a very speedy manner. It was only in the eighties that Article TEC 236 was made use of, and only once then. After the fruitless (in the short term) constitutional initiative undertaken by the European Parliament in the early 1980s, an IGC was called for in 1984, to consider Treaty reforms. In substantive terms, that conference resulted in the signing and ratification of the Single European Act (SEA). In procedural terms, it signalled the rediscovery of the IGC, which opened the way to an especially intense period of Treaty reform since then.

<sup>49</sup> For accounts of the SEA, Maastricht, Amsterdam and Nice Treaties, see Finn Laursen and Sophie Vanhoonacker, *The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Community*, Maastricht: European Institute of Public Administration, 1992; Finn Laursen (ed.) *The*

which can run over several years, and the accumulated momentum of which has by now taken the EU into the realm of constitutional politics proper.<sup>50</sup> To develop the model we have to distil out what the various instances share. As indicated, in reconstructing the IGC model we have kept in mind our normative model, in the sense of looking for *functional equivalents* of the five-phased constitution-making process.

## **B) The Phases of treaty-making/change**

19. *Signalling.* The functional equivalent of signalling in Union law is the call for amending the Treaties. This requires the establishment of an IGC, with the Member States as the formal initiators; however, Union law stipulates that the European Parliament (hereafter, EP) and the Commission are to be heard.<sup>51</sup> The threshold for initiating such a process is low (an IGC can be established if a simple majority of the European Council decides to do so).

The IGC model does not ensure a clear and explicit signalling, however. The impetus for treaty change does not derive from an election or an ideological program,<sup>52</sup> but rather from the dynamics of the process of integration. It can be argued that the process of integration has been *the* vital impetus for treaty reform.<sup>53</sup> This has also meant that the Union's legitimacy problems have increasingly come to drive the agenda of IGCs. But this has *not* meant that these challenges have given rise to constitutional signalling.

The main reasons for this are institutional and political. The European Council, whose institutional role is to define "the general political guidelines of the European

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*Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome*, Odense: Odense University Press, 2002; Desmond Dinan, 'Treaty Change in the European Union: The Amsterdam Experience', in Laura Cram, Desmond Dinan and Neill Nugent (eds) *Developments in the European Union*, Basingstoke: Macmillan, 1999, 290-310.

<sup>50</sup> Cf. Budden *supra*, fn 36; John Erik Fossum, 'Constitution making in the European Union', in Eriksen and Fossum, *supra*, fn 4. Morten F. Greve and Knud Erik Jørgensen, "Treaty reform as constitutional politics – a longitudinal view", 9 (2002) *Journal of European Public Policy*, pp. 54-75.

<sup>51</sup> Cf. Article 48 TEU.

<sup>52</sup> In contrast to for instance Reagan's attempt to revoke the New Deal, where his election provided such an impetus. See Ackerman, *supra* (1998), fn 13, at p. 390.

<sup>53</sup> If we look at the concrete dynamics of recent treaty changes, we observe that it has become a pattern to call for a new round of treaty changes to deal with 'left-overs', even before the ink of the last Treaty reform has dried. The most explicit such a case was the Maastricht Treaty (TEU), which had a provision (Article N, 2) that stated that an IGC was to be held in 1996; Laursen, *supra*, fn 51.

Union”,<sup>54</sup> consists of *national* executives. Despite their European mandate, the executives’ main line of accountability is to their national constituencies. Each national contingent in the European Council serves as *that nation’s* representative, and can define, articulate and pursue its version of the national interest (with different degrees of leverage to the national constituency).<sup>55</sup> The consistent and adamant refusal on the part of some Member States to acknowledge that there is an explicit constitutional dimension to treaty reform, combined with national veto at the end of the process, help explain why the issue of the Union’s democratic deficit was not cast in explicit constitutional terms until the Laeken process (where the *constitutional character* of the process has been affirmed quite clearly and from the very beginning).

20. *The initial deliberative phase.* The absence of a clear-cut constitutional signal makes it more difficult to establish what this phase consists in. The closest functional equivalent to the initial deliberative phase could be said to be the *preparatory phase of the IGC*, which starts with the appointment of a preparatory body.<sup>56</sup>

This process is *not* set up to test the popular support for a constitutional initiative. Rather, it is directly oriented at deciding on the specific issues to be dealt with during the IGC, and occurs at three levels: official, ministerial and summit meetings. Much of the work to prepare the treaty is undertaken by officials.<sup>57</sup> These bodies are not strong publics. They are closed bodies that deliberate in secret. Their membership is institutional participants, and they do not include representatives from civil society.

Those strong public that the normative model considers essential to the mobilisation of popular opinion in support of a constitutional proposal (, such as the EP

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<sup>54</sup> Cf. <http://ue.eu.int/showPage.asp?id=429&lang=en&mode=g>.

<sup>55</sup> For accounts of IGCs that highlight the role of national executives, consider Andrew Moravcsik, ‘Negotiating the Single European Act: national interests and conventional statecraft in the European Community’.45 (1991) *International Organization*, pp. 19-56; and *The Choice for Europe*, London: UCL Press, 1998

<sup>56</sup> See Table 2 for a list of the preparatory committees since the SEA. The committees generally consist of appointed experts, high-ranking staff and politicians (as appointed personal representatives of heads of state and EU institutions, This was the case with the Dooge Committee (Single European Act) and Westendorp Group (Amsterdam).

<sup>57</sup> The General Affairs Council, which is made up of the Member States’ foreign ministers is politically responsible for the IGC. This body is assisted in its work by the Committee of Permanent Representatives (COREPER), which undertakes the preparatory work. This body consists of the Member States’ permanent representatives in Brussels. The General Secretariat of the Council assists these bodies in their work. The relative weight of experts and national representatives has varied with IGC, so that in some cases the European Council has merely rubber-stamped the work of the preparatory bodies, and in other cases, extensive negotiations have taken place. See Derek Beach, ‘Towards a new method of constitutional bargaining?’, The Federal Trust Constitutional Papers 13/03, available at [http://www.fedtrust.co.uk/uploads/constitution/13\\_03.pdf](http://www.fedtrust.co.uk/uploads/constitution/13_03.pdf).

and national parliaments), are *not* assigned such a role in the IGC model (see Table 2 for more details on the role of the EP over time). Nevertheless, the EP has, since Maastricht, played an important agenda-setting role. It has “managed to establish a link between a general public discourse about European democracy and a specific programme of institutional reform.”<sup>58</sup> National parliaments have strengthened executive monitoring and control, although this has not extended to a popular mobilising role (see Table 3, annexed, on national parliamentary monitoring mechanisms).

TABLE 2

Preparatory bodies and the role of the EP

IGC	Preparatory work	EPs role
Single European Act	Dooge Committee	No representation as an institution in the preparatory committee. The treaty revision initiative was nonetheless inspired by the EP’s Spinelli Draft Treaty. Two EP representatives (President Pflimlin and MEP Spinelli) met at some ministerial meetings of the IGC
Maastricht (Economic + monetary union)	Delors Committee/Report (and the Guigou Report)	No representation in preparatory work, although it adopted several resolutions (based on the Martin and Colombo reports). The President (Baron) was present at some meetings of the IGC, and the IGC participants had various meetings with a EP delegation
Maastricht (Political union)	No institutionalised preparatory work	No part in preparatory work.

<sup>58</sup> Thomas Christiansen 'Supranational actors in EU treaty reform', 9 (2002) *Journal of European Public Policy*, pp. 33-53, at p. 45.

<p>Ámsterdam</p>	<p>Reflection Group/ Westendorp Group (Member States’ representatives and representatives from Commission and EP)</p>	<p>2 full members (Brok and Guigou) in Reflection Group. Not formally a part of the IGC, but briefed regularly, represented at ministerial meetings (by the President, Hänsch, then Gil- Robles) and having meetings with the Group of Representatives</p>
<p>Nice</p>	<p>No institutionalised preparatory work, but reports among others by the EP and the Commission (the Dehaene Report)</p>	<p>Presented a report in advance of the IGC. Represented by 2 MEPs (Brok and Dimitris) at all meetings of the national representatives, and the President of the EP (Fontaine) exchanged views with the IGC at all ministerial sessions</p>

Prepared by Geir Kværk

TABLE 3

## European Affairs Committees in the national parliaments

Country	Chamber in parliament	Established	Number of Members	Weeks between meetings	Scrutiny power:
Denmark	Folketinget	11.10.72	17	1	Requires mandate from committee for all decisions
UK	Commons	7.5.74	16	1	Obligated to consult parliament
	Lords	10.4.74	20	2	Obligated to consult parliament
Germany	Bundestag	14.12.94 (91)	50 (11 EP)	1	Government is bound by a position if it is adopted by the Bundestag.
	Bundesrat	20.12.57	23	3	Obligated to respect the views of the Bundesrat
Austria	Nationalrat	15.12.94	27	2	Minister bound by mandate if given
	Bundesrat	14.12.94	21	On request	Minister bound by mandate if given
Sweden	Riksdagen	16.12.94	17	1	Not formally binding , but parliamentary binding
Finland	Riksdagen	1.1.95	25	1	Not formally binding , but parliamentary binding
France	Assemblée Nationale	6.7.79	36	1--2	Government may request suspension in Council with reference to parliament
	Senat	6.7.79	36	2--3	Government may request suspension in Council with reference to parliament
Spain	Congreso/Senado	27.12.85	39	4	Congress can postpone the adoption of a position in Council

Netherlands	Tweende Kam.	18.5.94	26	2	No general scrutiny power
	Erste Kam.	June 70	13	4	No general scrutiny power
Italy	Camera dei deputati	10.10.90	50	1/2	May ask government to postpone adoption of council's position. No formal parliamentary scrutiny power
	Senato	17.7.68	24		No formal parliamentary scrutiny power
Belgium	La Chambre/ Da Kamer	25.4.85	20 (10 EMP)	4	No scrutiny power
	Senat/Senaat	29.3.90	22	3	No scrutiny power
Greece	Voulliton ellinon	13.6.90	31 (10 EMP)		Government does not have to consult or inform parliament.
Ireland	Dàil /Senad	14.3.95 (joint)	17	2	Government does not have to consult or inform parliament.
Luxembourg		6.12.89	11		No scrutiny power
Portugal	Assembleia da República	29.10.87	27	1	No scrutiny power

Source: Lars Blichner, 'The anonymous hand of public reason: Interparliamentary discourse and the quest for legitimacy' in Erik Oddvar Eriksen and John Erik Fossum (ed). *Democracy in the European Union. Integration through Deliberation*. London, Routledge, 2000, pp. 145-6

21. The IGC structure is not very conducive to a coherent European or Europe-wide debate. There are no Europe-wide elections. National elections are also not called for in a coordinated way, so as to permit the people to assess and sanction the signals provided by the Council. Electoral sanction is coincidental and dependent on national election cycles. Thus, none of the two basic public tests that the normative model presupposes for this phase is passed.

22. *The Decision-Making Phase.* The drafting phase is based on the work of the expert groups and formalised in the European Council, which produces the official text that is submitted for ratification. At such meetings the heads of government and their supportive staffs meet at various intervals to negotiate the new treaty/treaty changes. This might take one to two years, and up to six meetings.

A European Council meeting consists of the Heads of State or Government from all the Member States and the president of the Commission.<sup>59</sup> Attendance at European Council meetings is strictly regulated, with a limited number of participants. These meetings are closed and highly secretive. It is worth quoting a summary description of European Councils at length:

“There is no verbatim report or record of proceedings. The lack of an official record is at times an irritation and a frustration, and it can give rise to ambiguity about what was decided, but it is also an important guarantee for frank discussions.”<sup>60</sup>

In addition, there is no special procedure to single out or to amplify some concerns or items as constitutional. This is so because the procedures used to organise the European Council meetings during the IGC follow those set up for an ordinary European Council meeting. Moreover, the drafting process is also closed. The Council presidency draws up drafts of the treaty amendments, when the process permits doing so. The actual drafting work is undertaken by the Council Secretariat. Beach notes that

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<sup>59</sup> For a detailed account of the European Council, see Martin Westlake, *The Council of the European Union*, London: Catermill, 1995 supra, fn X, at pp.26ff. For other earlier comprehensive accounts of the European Council, see Jan Werts, *The European Council*, Amsterdam, 1992: Elsevier Science Publishers; and Simon Bulmer and Wolfgang Wessels, *The European Council: Decision-making in European Politics*, Palgrave Macmillan, 1987

<sup>60</sup> Westlake, *Ibidem*.

“the Council Secretariat’s Legal Services provided sole legal advice to the IGC in the past four IGCs, giving it a monopoly of authoritative legal advice to the IGC.”<sup>61</sup>The final text of the treaty is negotiated at the final European Council meeting, often in marathon sessions. The format of the meeting is such as to permit the heads of state and government to speak freely. But the limited time available, the high political stakes, the expectation of results, the lack of detailed expertise at hand during meetings, and the often very comprehensive agendas, inject the process with a strong bargaining impetus.

Throughout the IGC process, any Member State or the Commission is permitted to table amendments (at virtually any time). The agenda, as noted, can be quite wide or comprehensive, so that the IGCs may consider many amendments, and there is considerable scope for fashioning package deals. As already noted, the IGC model is marked by a weak institutional separation between constitutional matters and more routine matters. Thus, this method is not very conducive to the singling out and amplification of constitutional issues and concerns.

The structure of the IGC process is such that, whereas the meetings themselves are closed and secretive, there is some scope for public deliberation, in-between the meetings, as these are generally months apart. National governments are required by their own constitutions to report to their parliaments, where debates can take place and this can elicit further discussion in the national public spheres.<sup>62</sup> Further, during both the Amsterdam and the Nice IGCs, public information campaigns were launched, and an internet homepage was established which held a wealth of documents on the IGC.<sup>63</sup> Nevertheless, the public has limited means of conveying their opinions and views to the participants in the process. Further, the very structure of the IGC process is particularly conducive to deliberation in relatively separate or distinct national settings, as well as within the EU institutions, rather than to a European-wide debate. It tends to fragment debates, as issues are often framed in terms of *national interests*.

The EP is not formally a part of the decision-making phase. Some instituted means of consultation have emerged, however. For instance, each IGC meeting at ministerial level is preceded by a discussion with the President of the European

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<sup>61</sup> See Beach, *supra*, fn. 59, p.9.

<sup>62</sup> COSAC serves as a vehicle to foster strong public interaction. See Andreas Maurer, ‘The European Parliament’, in Laursen, *supra* fn 51., pp. 405-50.

<sup>63</sup> The Presidency report to the Feira European Council (CONFER 4750/00) notes that “For the sake of transparency, all official documents of the Presidency, the Member States and the other institutions and bodies as well as the other official contributions to the proceedings of the Conference have been made available to the public via the Internet.” <http://db.consilium.eu.int/cig/>

Parliament. This does not amount to the sparking of a wider debate, but need not prevent the EP from wielding influence.

We have seen that formally speaking, executives dominate the decision making-phase, without an explicit constitutional mandate or popular sanction. However strong public intervention, combined with negative referenda results have injected democratic legitimacy considerations into the process. Their constitutional implications have become more readily apparent over time.

23. *The agenda settled deliberative phase.* This phase precedes the actual ratification and is dependent on several variables exogenous to European institutions. As we will see below, the design of ratification procedures is left to national constitutions. In this system it is hard to foster a Europe-wide debate. European institutions are also hard pressed to foster or influence national debates on ratification, and even less so, *synchronised national* debates, with a common reform agenda and where these can mutually influence each other.

24. *The ratification phase.* Treaty reform keeps on being partly based on the template of international law. This is very obvious at the ratification stage. The entering into force of any Treaty amendment requires that each Member State ratifies it in accordance with its national constitutional provisions. This, quite obviously, implies that ratification procedures vary across states. However, it might be argued that there are two main models:

- national referenda (a model constitutionally mandated in Ireland and Denmark, and constitutionally inhibited in Germany)<sup>64</sup>
- national parliamentary sanction, which in some cases is given by special parliamentary formations

In some cases the ratification of the new Treaty might require the amendment of the national constitution, given that the substantive contents of the new Treaty provisions might be in conflict with national constitutional provisions.

25. *Ratification.* Each and every Member State must ratify the proposed Treaty amendments for the latter to gain legal force. Thus, one single “no” prevents the treaty

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<sup>64</sup> On European referenda, see Thomson, *supra*, fn 6.

from entering into force. Having said that, it must be added that the evolution of the process of Treaty making has resulted in the search for temporary measures which can prevent the failure of constitutional reform, provided only one Member State rejects treaty change (consider the Danish rejection of the Maastricht Treaty in 1992, and the initial Irish ‘no’ to Nice). This tendency to provide alternative solutions in case of negative votes might be said to point to the evolving constitutionalisation that has emerged out of the IGC model. In federal or federal-type systems, constitutional amendments generally require some kind of a qualified majority of the states or provinces to enter into effect, whereas amendments to the charters of international organisations can only be effected through unanimous ratification in all the Member States. The *ad hoc solutions* arbitrated in the Maastricht and Nice processes might suggest a further step in the Union’s gradual transition from the latter to the former model of law-making.

26. Moreover, the template of international law implies that the procedure of national ratification is within the province of the exclusive competencies of each national legal order. This entails that the European Parliament has no formal role in the ratification process. However, its *informal* role has varied considerably. As its weight in the institutional system of the Union has increased, its *legally non-binding* resolutions on Treaty amendments have come to play a major role in shaping the attitudes of national parliaments and of public spheres. The EP, via this national parliamentary channel, has obtained what amounts to as an ‘informal veto’.<sup>65</sup>

### **C) Summing up: the model evaluated**

27. In this section, we have distilled out some common features of the last four IGCs and evaluated these against the normative model. This reconstruction is premised on the

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<sup>65</sup> During the Maastricht negotiations the Italian and Belgian parliaments formed an agreement, which stated that they would only ratify the accord if the EP had given its assent. This also applied to Amsterdam (Interview with Commission official, January 1998). On ‘indirect veto’ see Christiansen, *supra*, fn.60, p.45. The EP also affects the ratification through the requirement of EP assent to enlargement. The EP’s threat to withhold assent on the 1995 enlargement provided it with 2 members in the 1995 Reflection Group. Cf. Maurer *supra*, fn 64.

notion that these IGCs could be reconstructed as *functional equivalents* to constitution-making processes.<sup>66</sup>

The IGC model has permitted the gradual specification and thickening of the Union's material constitution, but our main finding is that this has taken place largely *without* an attendant constitutional politics. In other words, the structure that has been wrought has *not* been made subject to popular scrutiny in the way that democratic constitution making presumes this. The IGC model contains no assured provision for constitutional signalling, in the sense that there are no provisions for amplifying the *constitutional* dimension and its implications for the work that is undertaken.

Second, we also found that the paucity of an explicit constitutional commitment on the part of those calling for reform, did not prevent the reforms from becoming increasingly constitutional in substance, and many of the terms actually used should rightly be associated with 'constitution'. Further, the very *reasons* for why such IGCs were convened have increasingly come to relate to the Union's *legitimacy problems*. We attribute this largely to the success of the efforts of those strong publics whose formal role is marginal - to open up and redirect the process in an explicit constitutional direction.

Third, the efforts of these bodies meet with a model that privileges executives and elites, who operate in formally closed bodies, at most stages of the process. This system contains no explicit provisions for ascertaining that there is popular support for the work that is undertaken. The central defining feature of the IGC model is the intergovernmental conference itself. IGCs are *not* strong publics, due to their quasi-intergovernmental, 'diplomatic', character, and the secretive manner of their work and deliberations.

Fourth, we observed some patterns of heightened transparency and accountability to national and (increasingly so) European strong and less so general publics. This development was not enough to abrogate the strong *national imprint* on the process, however. This ensures that the results would be seen, interpreted and ultimately ratified from the vantage-point of the national constituencies.

Fifth, and finally, this privileging of the national has not precluded common bodies and networks from emerging that operate within the mindframe of *common constitutional traditions*. In other words, despite the democratic limitations inbuilt in the

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<sup>66</sup> For one such account, specifically applied to the Amsterdam treaty process, see Fossum, *supra*, fn 52.

model, patterns of interaction have grown up that help sustain the fusion of the common constitutional traditions. This also lends a further democratizing impetus to the process.

#### **IV. The Laeken process**

##### **A) The underlying rationale – a distinct model?**

28. In the below, an attempt is made to reconstruct the Laeken process, along the lines of the five phases of the normative model of constitution-making that we put forth in section II.<sup>67</sup> We seek to establish whether or the extent to which it complies with deliberative-democratic requirements, and whether it represents an improvement on the IGC in legitimacy terms.

In doing so, we considered the Laeken process *as a whole*, that is, assuming that the Convention and the IGC are parts of a wider constitutional process.<sup>68</sup> We thus adopt a *comprehensive approach*. This does not require assuming that the process *would be fruitful*, that is, that it will bring about a constitutional change in the Union. The assumption we make is a far more modest one, namely, that it only makes sense to reconstruct and assess the different parts of the Laeken process *as parts of a constitution-making process aimed at constitutional change*, that is, as a process aimed at leading to a *final ratification stage*. Whether such a stage will be reached or not *does not* change the fact that all parts are *aimed* at it.

This allows us to do two things. First, to consider the similarities and differences between the IGC model and the Laeken process. We argue that the Laeken process is innovative, but not in a radical sense, as it builds on and extends the IGC model. However, we can claim that it is likely to emerge as a qualitatively different process of amendment of the primary law of the Union.<sup>69</sup> Second, to assess the Laeken process in light of the normative model put forward in **II (§§4-11)**.

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<sup>67</sup> The open constitutional character of the process, and the explicit definition of the steps of the process in the Laeken Declaration render such reconstruction rather plausible.

<sup>68</sup> If the Convention fails to alter the subsequent process, or if its proposal is completely taken apart by the IGC, or rejected during ratification, we can conclude that this addition did not amount to much.

<sup>69</sup> This is consistent with many of the analyses of the Laeken Convention process. See, for instance Paul Maignette, 'Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe', in Eriksen, Fossum, Menéndez, *supra* (2004), fn 4.

## B) The Phases of constitution-making

29. *Signalling*. The first statement of the need to change the Union's material constitution, the first signalling act, was Joschka Fischer's Humboldt lecture in May 2000.<sup>70</sup> He made an explicit connection between Europe's legitimacy crisis and the need for a European Constitution. By doing this, he sparked a willingness to consider the constitutional dimension of the European integration process.<sup>71</sup> A series of speeches followed in which European political leaders addressed Fischer's main claim. Tellingly, these 'Responses to Fischer' were characterised by being addressed to European audiences, and not only to the usual national ones.<sup>72</sup>

The case for reform gained momentum after the limited results of the Nice IGC in December 2000.<sup>73</sup> Relative failure was acknowledged by the *Masters of the Treaties* by annexing the short but important Declaration 23 to the Treaty of Nice.<sup>74</sup> The Declaration is the first *institutional* expression of an explicit commitment to address the constitutional dimension of the Union. It calls for "a deeper and wider debate about the future of the European Union". The platform for constitutional reform was delineated, with reference to: (1) the legal status of the Charter of Fundamental Rights of the EU; (2) the distribution of powers between the EU, the Member States and regions; and (3) the role of national Parliaments in the resultant institutional architecture. Tellingly, the ultimate goal was "to improve and monitor the democratic legitimacy of the Union and its institutions, in order to bring them closer to the citizens of the Member States".

Contrary to expectations<sup>75</sup>, the *public* debate which followed all through 2001 was conducted around strong, not general publics.<sup>76</sup> However, European leaders seem to

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<sup>70</sup> See Christian Joerges, Yves Mény and J.H.H. Weiler (eds.), *What kind of constitution for what kind of polity? Responses to Joschka Fischer*, Florence and Cambridge: Robert Schuman Centre and the Harvard Law School, 2000.

<sup>71</sup> 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*, Oslo: University of Oslo, 2002, pp. 53-74.

<sup>72</sup> A collection of some of the leading speeches can be found in 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.

<sup>73</sup> See, for example, Florence Delouche-Gaudez, 'La Convention pour l'élaboration de la Charte des droits fondamentaux : une méthode «constituante »', in Renaud Dehousse, *Une Constitution pour l'Europe ?*, Paris : Presses de Sciences Po, 2002, pp. 177-226.

<sup>74</sup> OJ C 80, of 10 March 2001, pp. 85-6.

<sup>75</sup> Report on the Debate on the Future of the European Union, 9520/01, POLGEN 14, Brussels 8 June 2001.

have considered that the undoubtedly *strong institutional support* was enough to launch a constitution-making process. This was done in the Laeken Declaration of December 2001. This Declaration provided a diagnosis of the EU's problems (democracy and efficiency), and presented a menu for reform, which further elaborated on the one contained in Declaration 23. More to the point, it determined the basic lines of the reform process, which would not be exactly the same as those followed in the previous IGCs. The main novelty was the convening of a Convention, partially modelled on the Charter one, to *prepare* the work for the IGC.

As a result, the signalling phase was marked by a clear contrast between the strong mobilisation of political elites and 'strong publics' *and* a very low level of participation of general publics. The decision to convene a Convention and to equip it with a mandate was taken by the European Council, in line with the IGC model, and not in response to a significant popular endorsement of the claim, as would be required by democratic standards.

30. *The initial deliberative phase.* The Convention was required by the Laeken Declaration to be the central actor in the *initial deliberative phase*. The Declaration aimed at defining with some precision the framework within which the Convention should act, something which stood in *some tension* to the *constitutional mission* assigned to it. The members of the Convention had to live with the ensuing tension between *its constitutional role* and the *constraints imposed upon it* by the European Council, if only because the process was so defined that the European Council, within the IGC, would retain actual decision-making power through the IGC.

On the one hand, the Convention was outlined in considerable detail by the Laeken Declaration. First, its composition was precisely defined. The Convention was characterised as a strong public representative of European strong publics. The Laeken Declaration assigned a majority of the seats in the Convention to parliamentarians, European and national ones,<sup>77</sup> who entered as delegates of the institutions from which

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<sup>76</sup> The "deeper and wider [national] debate(s)" cannot be said to have resulted in national public spheres being coordinated, in the sense of discussing simultaneously around a common agenda. The problem seems to have been not so much the lack of convergence, as the absence of discussion.

<sup>77</sup> The actors present were mainly institutional (national parliaments and governments, the EP, and the Commission), including observers from institutions and social movements. The applicant countries were represented in the same way as were the Member States. For assessments of its representative character, see Carlos Closa, 'The Convention Method and the Transformation of EU Constitutional Politics', in Eriksen, Fossum and Menéndez

they had originally been elected.<sup>78</sup> Representatives of national governments and of the institutions of the Union were assigned the remaining seats. The European Council went so far as to decide *the identity of* the three leading members of the Convention, its President and its two Vice-Presidents.<sup>79</sup> Second, it was clearly expected that debate within the Convention would spark discussion in national public spheres<sup>80</sup>, and thus place the Convention itself as an adequate interlocutor of European civil society.<sup>81</sup> General publics would thus feed back onto the strong public, i.e. the Convention. Third, the Laeken Declaration defined the Convention's mandate in some details, through posing a lengthy set of questions. The Convention was requested to consider them, and formally speaking, to deliver its reply through one or several proposals. This meant assigning the Convention with an agenda-setting role, whilst decision-making was left to the European Council. Fourth, The Convention was given a year to deliver its proposal(s)<sup>82</sup>. The setting of a time limit, which was only very modestly increased, was a major constraining factor. The *exhaustion of time* to explore differences obviously fosters certain types of actors and patterns of interaction.<sup>83</sup> Fifth, the Convention was set up to meet on an intermittent rather than on a continuous basis. The Secretariat, and the president and the two vice-presidents, were full-timers. All the others held other full-time tasks (national parliamentarians were provided with additional resources, however<sup>84</sup>). The full-timers, concentrated in the Praesidium and Secretariat, which were

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(eds.), supra (2004), fn 4, pp. 183-206; and Jo Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism', 9 (2003) *European Law Journal*, pp. 45-68.

<sup>78</sup> Thus, quite a few of the members of the Convention had some kind of popular mandate, but they were not elected as members of the Convention by citizens directly. Consequently, their election was not linked directly to their views on the constitutional future of the EU. Convention membership was not subject to any electoral contest. Their chain of legitimacy as members of the Convention was long; moreover, the criteria according to which election took place were dependent on each nominating institution, and consequently, varied considerably.

<sup>79</sup> Valéry Giscard d'Estaing was nominated President, and Giuliano Amato and Jean Luc Dehane Vice-Presidents.

<sup>80</sup> Some observers went as far as claiming that this could have a catalytic role, and lead to the interconnection of European public spheres. See Habermas, fn 5.

<sup>81</sup> This was to be done through the Forum, see [http://europa.eu.int/futurum/forum\\_convention/index\\_en.htm](http://europa.eu.int/futurum/forum_convention/index_en.htm).

<sup>82</sup> "The Convention will hold its inaugural meeting on 1 March 2002, when it will appoint its Praesidium and adopt its rules of procedure. Proceedings will be completed after a year, that is to say in time for the Chairman of the Convention to present its outcome to the European Council." See the *Laeken Declaration on the Future of the European Union*. 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>83</sup> Justus Schönlaue, 'New Values for Europe. Deliberation, Comprize and Coercion in Drafting the Preamble of the Charter of Fundamental Rights', in Eriksen, Fossum, Menéndez, supra, fn 4 (2003), pp.112-32.

<sup>84</sup> Interview with National Parliamentary Member of the Convention, Spring 2003.

closest to the Council, obviously were also able to influence and guide the process far better than were the part-timers. Sixth, whilst it does not appear from public sources that any Convention Member was equipped with a fixed and/or rigid mandate, it was rather predictable that government representatives would be equipped with a rather *strict* mandate which would prevent them from *revising* their preferences in view of the arguments put forth by other Convention members.<sup>85</sup> By assigning a central role to those national government representatives, the Council *reduced* the deliberative potential of the Convention, which was even further reduced once many Member States replaced their initial representatives with their Foreign or European Ministers, hence shifting some of the inevitable intergovernmental bargaining onto the Convention. Seventh, and finally, the sequencing of the Laeken process was bound to result in problems of ‘forward-linkage’. At least formally, whatever the Convention would decide would be open to revision or even rejection by the IGC.<sup>86</sup>

On the other hand, the Convention tried to increase its *autonomy* and take its *constitutional* identity as seriously as possible. First, it soon redefined its role in an unambiguous constitutional sense. There was a diffuse feeling, prominent among Members of the European Parliament and also of the Member States which most openly supported the Laeken Declaration, that the Convention should work *as if it was a Constitutional Convention*, thus emulating the basic assumption of the Charter Convention (*writing as if the outcome would be bound to become the Constitution of the Union*). This explains why Valéry Giscard d’Estaing claimed at the opening of the Convention that its proper task was to elaborate one draft Constitution, and not a collection of vague diagnoses;<sup>87</sup> and why he ended up being supported by a vast majority of Convention members.<sup>88</sup> Second, the Convention exploited all opportunities provided by the silence or lack of clarity of the Laeken Declaration to increase the

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<sup>85</sup> Interview with National Parliamentary Member of the Convention, Spring 2003.

<sup>86</sup> That this has coloured the work of this Convention is quite apparent. Consider the behaviour of its president who throughout the process has been actively seeking support among the government representatives. He has done this through consultation, through visits in national capitals and through biasing his assessments of the deliberations in the Convention in a direction favourable to their interests and positions. Cf. Paul Magnette, ‘The European Convention: Constitutional Deliberation or International Negotiation?’ and Renaud Dehousse and Florence Deloche-Gaudez, ‘La genèse d’une constitution transnationale: éléments d’analyse’, papers delivered at the workshop *European Integration and Constitutionalism after the European Convention*, Sciences Po, Paris, 18 and 19 December 2003, on file with the authors.

<sup>87</sup> V. Giscard d’Estaing, ‘Introductory speech to the Convention on the Future of Europe’, SN 1565/02, available at <http://european-convention.eu.int/docs/speeches/1.pdf>.

<sup>88</sup> This could be seen as a response to many of the expectations that had been built up since the Fischer speech, although these differed greatly in constitutional terms.

salience of their role. For example, the Convention established its own rules of procedure, which went quite a long way to ensure the transparency of the process.<sup>89</sup> In doing so, its members affirmed themselves not only *vis-à-vis* the Member States, but also *vis-à-vis* the Praesidium. Giscard d'Estaing tried to impose rules of procedure which followed the Council's template. This proposal met with strong opposition from Convention members, and resulted in major amendments.<sup>90</sup> Third, the Praesidium used the decision to set it up as a deliberative body to avoid the emergence of strong factions within the Convention.<sup>91</sup> This was why voting was generally ruled out as a means of determining whether a common will has been formed among the Convention members.<sup>92</sup> Fourth, the Praesidium determined the sequencing of the Convention's work. This had a considerable impact on the way its work was conducted. The Convention was said to have undergone three distinct phases: (1) an initial listening phase; (2) a subsequent so-called deliberative phase (with 11 working groups);<sup>93</sup> and (3) a final proposal phase. Such an ordering of the debates was important, in at least two ways. First, the listening phase gave time for the members to become socialised into and to identify themselves as Convention members, with increased *support* for the Convention's constitutional role as its result. Second, the rather short time allocated to the third phase explains the shift from deliberation to bargaining at the very end of the process.

All these traits taken together reveal that through the Laeken Declaration, Member States placed significant constraints on the Convention. Under such circumstances, it would not be convincing to consider it as an independent body. It must also be noted that the Convention cannot be equated with the constitutional assembly,

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<sup>89</sup> With some limitations, though. The meetings of the Praesidium took place behind closed doors, and no proper *compte-rendu* was rendered available afterwards. The meetings of the Working Groups and the Discussion Circles were summarised in an anonymous way, with no reference to the identity of those arguing (by means of using the *style formulae* of 'one Member says...').

<sup>90</sup> Olivier Duhamel, *Pour L'Europe*, Paris: Seuil, 2003.

<sup>91</sup> Voting actually did take place in the Presidium, on April 23<sup>rd</sup>. 2003. This episode has been considered by some as revealing the *authoritarian (and strategic) style of the Praesidium*.

<sup>92</sup> Deliberationists disagree on the deliberative quality of voting. Some see it as destructive to the forging of consensus, whereas others see voting as the only assurance of accountability. Applied to the Convention, it could be argued that in the absence of voting, the Presidium could become the authoritative interpreter of the common will of the Convention, without reference to any intersubjective test of the quality of such a common will, which is problematic.

<sup>93</sup> The members of the Convention succeeded in influencing the choice of subject matters to be discussed by working groups, as a bottom-up initiative was behind the convening of a working group on Social Europe. See Agustín J. Menéndez, 'Rights to Solidarity: Balancing Solidarity and Economic Rights', in Eriksen, Fossum, Menéndez, *supra* (2003) , fn 4, at pp. 196ff.

which plays such a central role in our normative model. As an Assembly, it is configured as a strong public; but contrary to the requirement of the normative model, the Convention *does not make a constitutional proposal directly* to the people. At least prima facie, the IGC retains the actual decision-making power. Therefore, the Convention is a strong public, the main goal of which is to set an agenda for constitution-making and to explore the potential outcomes of such an exercise, rather than a constitutional assembly proper. Finally, the Convention did not perform very brilliantly in its role as catalyst of a wide public debate in European general publics. It awoke some, but minoritarian debates, which remain fragmented.<sup>94</sup>

31. *In between deliberation and decision-making.* After the conclusion of the Convention's work, and before the opening of the IGC, there was further room for deliberation. This aspect of the second phase was (unduly) neglected, even if it carried considerable democratic potential. The Draft Constitutional proposal could have served as a common agenda for overlapping public discussions in all the Member States. A synchronised public debate in all present and future Member States would have allowed a major *democratic* feedback. But the Member States agreed to hurry up from the end of the Convention' work, officially on July 18th, and to the opening of the IGC on October 4th.

32. *The decision-making phase.* In principle, the decision-making phase in the Laeken model does not depart from that of the "classical" IGC, as described above. As just said, the Laeken Declaration foresaw a purely advisory role for the Convention, and reserved the true decision-making role to the IGC. Thus, once the Convention produced its final work, the IGC dynamics got started. However, the key question posed by the

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<sup>94</sup> True, the Eurobarometer reflects a consistent majority in favour of the drafting of a European Constitution. But citizens do not seem to relate their call for a European Constitution very closely 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 Draft Constitution. Cf. Flash Eurobarometer 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: "Results show that a large majority of the European public still feels badly informed on questions relating to the draft of the future European Constitution (...) Results show that a majority of the public supports the idea of a Constitution for the EU: a clear majority of citizens throughout all 25 countries are of the opinion that the European Union must adopt a Constitution and that it is necessary for the well-functioning of its institutions".

Laeken process is: how much of a change to the IGC model will the injection of the Convention into the process be?

There are two main dimensions to be considered. One is procedural, and the other is substantive. First, the Convention increased the degree of transparency and involvement of societal actors in Treaty reform processes, even if it fell short of what would be required by our *normative model*. This modest but decisive improvement has rendered increased transparency of the IGC unavoidable, at least with regard to the circulation of documents,<sup>95</sup> and on the need for national representatives to give reasons and justifications. True, documents were also available during the last two IGCs, and some national governments *went public* with their positions. But the *deliberative* style (§30) has made a two-fold difference as compared to previous processes: (i) it has revealed the reasons or lack of them behind the preferences of *all* national governments; and (ii) it has undermined strategic appeals to the *national interest*, by revealing the plurality of preferences among national actors (national parliamentarians, MEPs, national government representatives in the Convention and heads of state and government at the IGC). As a result, the secretive character of *negotiations* has been mitigated, while national governments have increased their efforts to justify their positions within the IGC before the public(s). It goes without saying that all this does not necessarily translate into greatly increased public *influence* at the *negotiating stage*, however. Second, it is not yet clear what impact the substantive choices of the Convention will have on the results of the IGC. The IGC did adopt the Convention's text as its basis for negotiations, thus the Convention did succeed in determining the basic agenda for the IGC. However, the concrete extent and relevance of the substantive influence could only be determined when, and if, the IGC approves the Draft Constitution. In doing this, one would have to take into account the *extent to which the Convention restrained itself* from proposing certain things in *order to maximise chances* of getting the Draft Constitution accepted by the IGC, while avoiding a rash judgment based on the final solution adopted for the most salient issues on the public agenda, such as the Union's institutional structure.

Finally, the symbolic aspect of framing the draft in constitutional terms could be *highly relevant*, as it could trigger a change in people's self-conception as European citizens. The symbolic significance of the elaboration of a "Constitution" is, in this

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<sup>95</sup> The circulation of documents has been rendered easier by the spread of Internet. However, this is an exogenous factor.

regard, undeniable.”<sup>96</sup> When people are told and recognise that they are involved in a constitutional debate, their expectations change, in line with the changes to the standards that they use to assess both the process and the result. This could (eventually) act as a constraining factor on the IGC, if its members felt that citizens could not identify the Draft Treaty with a Constitution unless the Convention’s basic choices were respected.

33. *The Second Deliberative Phase.* There will be time for a new deliberative phase between the completion of the IGC and the start of the ratification stage. This phase will be crucial in order to ensure the democratic legitimacy of an eventual new Constitutional Treaty, on three counts. First, the degree of political mobilisation and the intensity of the debates will be essential in order to ensure a proper discussion of the proposals and of the underlying issues. Given the democratic shortcomings of all previous phases (when assessed against our normative model), a strong democratic input is needed at this stage to make the Constitution a democratic one. Second, the degree to which the different European public spheres will interlock will help determine the *European character* of the debate. A simultaneous debate on the same agenda, established by the draft constitutional proposal would constitute a unique test of the actual degree of interconnection of the different European public spheres.<sup>97</sup> Third, the sense and direction of the debates could help determine the content to be given to the ratification provisions of the Draft Treaty.

34. *The ratification phase.* In principle, this phase might be similar to the ones in the IGC model. However, two questions have emerged which might require qualifying such a claim, if and when the ratification phase is reached.

First, the *general rule* seems to keep on being that the entry into force of the Draft Treaty would require unanimous ratification by all Member States, as is the case with *international treaties*, but not with constitutions, not even federal constitutions. However, the Declaration on the Final Act of Signature attached to the Draft Treaty indicates that if four fifths of the Member States would have ratified it, and one fifth

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<sup>96</sup> Juliane Kokott and Alexandra R  th, “The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?”, 40 (2003) *Common Market Law Review*, pp. 1315-1345.

<sup>97</sup> See Habermas, *supra*, fn 5 and fn 12; Klaus Eder and Hans J  rg Trenz, ‘The Making of an European Public Space. The Case of Justice and Home Affairs’, in Beate Kohler-Koch (ed.), *Linking EU and National Governance*, Oxford: Oxford University Press, 2002, pp. 51-68.

would *not*, the Council would have to consider *what to do*. It is not far-fetched to claim that such a provision will be interpreted as suggesting that ratification would be possible *even if not* unanimously, thus, as characterising the Draft Constitution *as a Constitution*, not a Treaty.<sup>98</sup>

Second, the ratification procedure is supposed to be governed by national constitutional law. However, we could wonder whether the constitutional dimension of the new text might not make it advisable and perhaps compulsory for each Member State to inject a stronger test of the support of its national citizens than was the case with previous Treaty amendments. To put it more specifically, it might be advisable to have referenda even in those states where such were not called upon for previous Treaty amendments.<sup>99</sup>

### C) Summing up: the Laeken model assessed

35. When compared to the *standard* IGC model, the Convention *cannot but be seen* as a major step in the direction of *constitutionalisation* of Treaty amendment procedures. The *explicit* character of the signalling, and the *transparent* and *open* way in which most of the work of the Convention was conducted have increased (even if modestly) the *inclusivity* of the process.<sup>100</sup> As was argued, this has not failed to have its impact on the unfolding of the Laeken IGC. Although a fully conclusive argument could not be made if, and until, the IGC *agrees* on a constitutional bill, there are clear indications that the *argumentative* logic of the Convention has increased resort to arguments *even in the midst of intergovernmental negotiations* (§32). And, despite

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<sup>98</sup> Cf., for example, the debate which followed the 'Conference de Presse de Monsieur Jacques Chirac, President de la Republique, sur l'Europe', 29 April 2004, available at [http://www.elysee.fr/cgi-bin/auracom/aurweb/search/file?aur\\_file=discours/2004/CP040429.htm](http://www.elysee.fr/cgi-bin/auracom/aurweb/search/file?aur_file=discours/2004/CP040429.htm), summarised in 'L'unanimité demeure la règle pour la ratification et la révision du texte', *Le Monde*, 17 May 2004.

<sup>99</sup> For a defence of a synchronised European constitutional reform to tackle with the issue, see Francisco Rubio Llorente, 'Constitutionalism in the Integrated States of Europe', Working Paper 5/98, Jean Monnet Program, Cambridge: Harvard and also in 'El referendum necesario y el superfluo', *EL PAÍS*, 11 de Julio de 2003. A first analysis of national debates can be found in <http://www.euobserver.com/index.phtml?print=true&sid=9&aid=11413>.

<sup>100</sup> Kokott and Ruth, *supra* fn 98 at 1316; Angelo Antonio Cervati, 'On the Consolidation and Simplification of the European Treaties and the Convention Procedure' in Roberto Miccu and Ingolf Pernice (eds.) *The European Constitution in the Making*, Baden-Baden: Nomos, 2004, at pp. 121. See also Closa, *supra* fn 79; Erik Oddvar Eriksen and John Erik Fossum, "Europe in Search of Legitimacy: Strategies of Legitimation Assessed", 25(2004) *International Political Science Review*, forthcoming.

having missed the first opportunity in-between the end of the Convention and the opening of the IGC, an eventual Draft Constitution might become the catalyst for a Euro-wide *synchronised* debate after the IGC will (eventually) put forward a constitutional proposal. National publics will be discussing on the basis of a common agenda (the Draft Treaty) and at the same time, something which could lead to *common learning* and *redefinition of preferences* in line with arguments made in other countries. Finally, the *ambiguity* of the *ratification provisions* could lead to a debate on the *terms upon which* constitution-making should be undertaken in Europe *from a European, democratic perspective*.

36. The assessment cannot be equally positive when we compare the Laeken process to our *normative ideal model*. First, the *signalling* was characterised by the contrast between *strong institutional* commitment and *dismal popular mobilisation*. This casts the shadow of ‘top-down orchestration’ upon the process, and requires later *infusions of democratic legitimacy*. Second, the Convention cannot be properly described as a constitutional assembly. It was required to perform some of the duties which will be characteristic of one (as a strong public which should mobilise and interact with general publics), at the same time that it was severely constrained in the performance of such a role. Even if the Convention made use of quite a bit of its room of manoeuvre to reaffirm its *constitutional identity*, several problems remained, among which, as noticed, was *the forward-linkage* to the IGC. Third, a major opportunity to increase the democratic standing of the process was lost by rushing from the end of the Convention to the beginning of the IGC. As indicated in the previous paragraph, a Euro-wide debate could have been sparked, from which *a political mandate to national representatives in the IGC* could have emerged. To this we must add, fourthly and lastly, that *even a successful constitution-making process* is not devoid of risks. One such is that the process might never acquire a high democratic dignity. In that case Europeans would have to face a text claiming the *dignity proper of a constitution*, but without the relevant credentials. This might undermine further democratization in the EU, through the misuse of the *evocative power* of the Constitutional term.

## **V. Can a constitution render the Union legitimate?**

37. A final caveat. The democratic writing of a Constitution for Europe, when it will take place, will constitute a major contribution to mending the democratic deficit of the Union. If European citizens can see themselves as authors of the grounding norms of Community law, it cannot be doubted that a major step will have been taken towards reducing the degree to which Europeans regard their law as externally imposed upon them, or to put it more precisely, the heteronomic character of the European legal order (cf. §14). But no matter how democratic a Constitution, democracy is not merely a matter of constitution-making, in the same way that autonomy is not just a matter of fundamental rights protection. In democratic theory, the Constitution is best understood as 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. The higher democratic dignity of a truly democratic constitution should come hand in hand with the central role of ordinary statutes as the articulation of the common will. A non-democratic constitution is a straitjacket on democratic will formation, but a democratic constitution which exhausts the political space is an equally asphyxiating straitjacket. The very normative reasons that require a bifurcation of the principle of legality into “constitutional law” and “ordinary statutes” require the avoidance of the over-constitutionalisation of the European legal order.

## **VI. Conclusion**

In this article, we have reconstructed and assessed the different processes through which the material constitution of the Union has been written and amended. We did so by reconstructing the main features of the IGC and Laeken processes, including the Convention on the future of the European Union and the 2003-4 Intergovernmental Conference, against the requirements of a normative model of constitution-making. This model operationalised the basic procedural requirements of deliberative democratic theory.

In this article, we have come to three basic conclusions. First, that the most recent IGCs (from the Single European Act to the Nice Treaty) share a sufficient number of features, as to make up an IGC model, which distinguishes itself from earlier

IGCs in that it has become increasingly *constitutionalised*. This evolution was clearly related to the *constitutionalisation* of the Union's substantive constitutional law. Second, that the Laeken process must be seen as a further step in the transformation of the way in which Union primary law is written. The Laeken process, in contrast to the previous IGCs, was explicitly presented as a matter of constitution-making. But of greater importance is that the Laeken process carried further the democratization of constitution-making, through its heightened degree of inclusivity and transparency.

Third, a simplified and streamlined written document which reflects the substantive constitution of the Union in a readable way could thus be considered as *a prior step* to a full constitutionalisation of the Union in a democratic sense. Moreover, the formalisation of the constitution could render more visible the fact that Europeans share a European legal order, which constitutes a community of risks among them. As such, it could enhance the predisposition of European citizens to acknowledge each other as citizens of Europe.

When the Laeken process is assessed against the normative model of deliberative democratic constitution-making, it is also clear that there are noticeable shortcomings. The degree of interconnection of strong and general publics is low, while inclusivity and transparency are insufficient to characterise the process as a properly constitutional one, from a deliberative democratic perspective. Democrats would be well advised to remember that their first command is not to take the name of the constitution in vain. These procedural shortcomings are amplified by the substantive limitations of the Draft. Thus, acknowledging the Laeken Constitutional Treaty the *full dignity* of a democratic constitution would be confusing and inadequate from a deliberative-democratic standpoint. Moreover, it could lead courts - European and national - into trouble. The Constitutional Treaty can however lay the foundations for *We the European people to speak*. This is however far more than most had imagined when the Convention started its work.

## Appendix

TABLE 4

National Procedures of Ratification of the Draft Constitution

Countries	Referendum	Parliamentary Vote
Austria	Possibly a referendum	Ratification by parliamentary vote
Belgium		Ratification by parliamentary vote
Cyprus	Possibly a referendum	Ratification by parliamentary vote
Czech Republic	Ratification by referendum, probably 2005	
Denmark	Ratification by referendum, 27 September 2005	
Estonia		Ratification by parliamentary vote
Finland	Possibly a consultative referendum	Ratification by parliamentary vote
France	Ratification by referendum 29 May 2005	
Germany		Ratification by parliamentary vote, probably June 2005
Greece		Ratification by parliamentary vote
Hungary		<b>Ratified by parliamentary vote on 20 December 2004 (as second MS)</b>
Ireland	Ratification by referendum, probably October 2005	

Italy		Ratification by parliamentary vote (approved by lower chamber 25 January 2005, awaiting vote in Senate)
Latvia		Ratification by parliamentary vote, early 2005
Lithuania		<b>Ratified as the first MS, by an overwhelming majority in the parliament on 11 November 2004 (Seimas)</b>
Luxembourg	Ratification by referendum 10 July 2005	
Malta		Ratification by parliamentary vote (probably July 2005)
Netherlands	Consultative referendum 1 June 2005	Ratification by parliamentary vote
Poland	Referendum, probably late 2005	Ratification by parliamentary vote
Portugal	Ratification by referendum, probably 2005	
Slovakia		Ratification by parliamentary vote
Slovenia		<b>Ratified by parliamentary vote on 1 February 2005 (as third MS)</b>
Spain	Approved in consultative referendum on 20 February 2005 (by 77% of votes)	Ratification by parliamentary vote
Sweden		Ratification by

		parliamentary vote, possibly December 2005
United Kingdom	Consultative referendum in 2006	Ratification by parliamentary vote

Sources: Convention Watch, Embassies, Ministries of Foreign Affairs

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