



# ***Democratic constitution-making Reflections on the European experiment***

*John Erik Fossum<sup>1</sup> and Agustín José Menéndez<sup>2</sup>*

*Working Paper*

*No.18, May 2005*

*This paper may be downloaded from*

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

---

<sup>1</sup> ARENA, University of Oslo and University of Bergen

<sup>2</sup> Universidad de León and CIDEL-fellow at ARENA, University of Oslo

## **Abstract**

Laeken has ushered in the first continent-wide debate, on the issue of a European constitution. An important question is whether this amounts to Europe's constitutional moment in a *critical normative* sense. To address this we first distil out five core lessons from the Laeken experience. This serves to clarify which normative standards are relevant through reconstruction of those that actually informed the process. We find that the standards from normative theory are adequate, but that the complex European setting and experience throw up several thorny issues pertaining to how such a process can be organised, so as to comply with democratic norms, and whether it at all can be deemed to be representative. Our concern here is to shed light on how the tension between the idea of a constitutional moment and the notion of democratic representation can be resolved. To this end we develop a normative model of deliberative constitution making.

## I. Introduction

Europeans are well-versed in constitutional grammar. The citizens of the old continent can regard themselves as the authors of their national (and, when applicable, regional) constitutions. Further, it is also quite some time since European Community law first began to be read and constructed in a constitutional key. This implies of course that Europeans are also subjected to (and allegedly, authors of) *European constitutional norms*.

But knowledge of a grammar does not necessarily mean proper grasp of a language. Alleged but unconfirmed authorship can be experienced as stark subjection. Many analysts have asserted that the present process of reform of the constitutional basis of the European Union is, to stay within the metaphor, not so much a critical test of Europeans' constitutional language proficiency but a test of the very prospects for a European *democratic* constitution.

To the sceptics, national constitutional grammars do not - and cannot - add up to a European constitutional language. The EU's uniqueness (which to some is also seen as its main merits) prevents it from entering the constitutional terrain proper. To the optimists a European constitution is not only entirely possible, but also within reach. Many analysts have depicted Laeken as Europe's constitutional moment. By implication, they have not only borrowed the terminology and the normative standards

from the national constitutional settings, but also claim that the EU is actively involved in transposing these into its own constitutional structure.

How to navigate within this set of contradictory positions? One take is to consider the Laeken process more closely, and to keep in mind that what is at stake is ultimately what it means to write a Constitution for the Union. In clear contrast to previous instances of constitution making, which failed to spark a constitutional moment,<sup>1</sup> Laeken has ushered in the first continent-wide debate, on the issue of a European constitution; the question then is whether this could be said to amount to Europe's constitutional moment in a *critical normative* sense. To address this we first seek to distil out the core lessons we can derive from the Laeken experience. This serves to clarify which normative standards are relevant through reconstruction of those that actually informed the process. We find that the standards from normative theory are adequate, but that the complex European setting and experience throw up several thorny issues here: how can such a process be organised, so as to comply with democratic norms? Can it at all be representative?

More precisely, our concern here is to shed light on how the tension between the idea of a constitutional moment and the notion of democratic representation can be resolved. A demanding normative conception of the constitution characterises it as the set of fundamental norms of a given legal order which have been deliberated and decided by all the members of the political community; in short, by *We the People*. This might seem, at first glance, to exclude representative mechanisms from constitutional

deliberation and decision-making; or, at least, to downplay their importance, as they would seem marginal in comparison to the intervention of *We the People*. In this article, we claim that this is overly simplistic, as it is evocative of a romantic (and misleading) characterisation of constitutional moments as decisionistic instances, in which a pre-existing people (perhaps even pre-politically forged) enacts the fundamental law *in one stroke*. This is not only at odds with the present (and lengthy) European-wide process of constitution-making, but with any accurate reconstruction of *national* constitutional moments. When bereft of the romantic framing, these also emerge as more complex and multi-faceted than what has tended to be assumed.

On such a basis, we claim that constitution-making should be conceived of in *procedural terms*, as a procedure through which democratic legitimacy is ensured by means of a series of demanding and repeated tests, such set up as to ensure the existence of a collective will in support of new or amended fundamental norms. It is the demanding character of such a procedure, and the intervention of both strong<sup>2</sup> and general publics, and the complex interactions between them, that enables such procedures to decide upon the fundamental norms of the political community.<sup>3</sup>

The remainder of the chapter is divided into three parts. First, we examine in some detail what the recent process of European constitution-making has contributed to our normative understanding of constitution-making. This results in five core lessons. Building on these, in the next part we put forth *our normative model of deliberative constitution-making*, which portrays constitution-making as a procedure which is long,

but not eternal, and always circumscribed to a given number of months, and through which the existence of a *constitutional common will* is tested through actions and interactions between institutional and general publics. The third section holds the conclusion.

The resultant normative model can serve as the key yardstick against which to assess both *whether* the EU can be said to have embarked on a constitutional moment, as well as it also serves as a set of critical tests to establish *the democratic quality* of such a process, whether we end up deeming the present one a constitutional moment or not.<sup>4</sup>

## II. European Constitutional Lessons

The Constitutional Treaty (shorthand for the Treaty establishing a Constitution for Europe) was signed, and opened to ratification, on 29 October 2004. Its four parts and more than four hundred articles have the vocation of becoming the fundamental law of the EU. But we are far from there *yet*. At the time of writing, Europeans have just embarked on a complex and convoluted process of *national ratification* of the Constitutional Treaty. It is uncertain whether the Constitutional Treaty will be ratified by all the Member States. If not what happens next is shrouded in uncertainty, and so is the fallout: whether rejection would lead to abandonment of the constitutional project; whether it will enter into force only in the Member States that have ratified it; or whether it will open up a new constitutional process.

Despite such profound uncertainties, there is no doubt that the process through which the Constitutional Treaty was forged, hereafter referred to as the Laeken process, is a worthy object of study unto itself. It can, and in our view, is best seen, as a *major constitutional experiment, whether or not it bears constitutional fruit*. Europeans have, after all, not only engaged in a *substantive constitutional debate* about the contents of the EU's material constitutional norms, but they have also entered into a *meta-constitutional debate* on the very idea of Constitution: what it is and how it can be written. In this section, we will aim at distilling out five of the most important lessons that can be learned from the reconstruction of the Laeken constitution-making process. They concern (a) the relationship between constitution and democracy; (b) the limits of the *constituent power*; (c) the necessarily procedural character of constitution-making; (d) the plural character of constitutional publics; and (e) the theoretical instruments that enable us to capture the complex character of democratic constitution-making.

### **A) Constitutionalism and democratic legitimacy**

'Constitution' is one of the key concepts of our political vocabulary, and as such, there is no scarcity of *conceptions* of the constitution. These are tuned to (a) different tasks assigned to the Constitution (political, legal, historical); (b) different institutional foundations (where the issue of state-based foundation is the most important); and (c) the different normative conceptions that the constitution can be associated with (among others, liberal, communitarian, discursive).<sup>5</sup> Having said that, it seems to us that there is an *especially close* connection between the idea of a constitution and (a) the *critical*

*normative legitimacy* of the procedure through which it is elaborated, and (b) the *democratic framing of the* substantive norms which are included in the fundamental law. That the constitution should be democratic is an intrinsic part of Europeans' constitutional grammar (from their national constitutions). Laeken was the most explicit and symbolically visible case thus far of the infusion of this grammar into the EU's constitutional language. The first lesson we can draw from the Laeken experience is that the close association between constitutionalism and democratic legitimacy also has to apply to the European level.

At first glance, the constitutionalisation of the EU appears as among the *least favourable* instances to forge such a special connection between constitutionalism and democratic legitimacy. After all, the EU has emerged as a *polity* with a set of material constitutional norms *which have been distilled* from the national constitutional traditions. The process was far from democratic. It combined an inter-governmental, diplomatic-style negotiation of international treaties, with the elucidation of the commonality of constitutional traditions and interpretation of the Treaties through judicial rulings (this was mainly undertaken by the European Court of Justice). In brief, the EU seems to provide ammunition to the advocates of the *normative and functional* superiority of *evolutionary vis-à-vis overt* constitutionalism. If the EU *already* has a constitution despite the fact that such a constitution is more properly said to *have evolved* than to *have been established*, how can we claim that the Laeken process (which after all, is quite likely to fail) *proves* the special connection between the idea of a constitution and of a *democratically legitimate* process of constitution-making?

The reason does not refer to the result, that is, whether the Laeken process bears constitutional fruit or not. Rather, the *signalling* of a constitutional moment in Europe reveals the limits of evolutionary constitutionalism, and the *political mobilising power* of the *normative* conception of the constitution.

First, the fact that even in the EU a *constitutional moment* is found to be *normatively* and *functionally* necessary in the first place clearly proves the limits in reducing the constitution to the set of *norms* which design institutions, devise decision-making procedures, and vindicate fundamental rights. The EU is a political community with a *high* density of constitutional norms, perhaps with the highest constitutional density in the world. Of notable importance is further that the EU has been grounded on the basis of what was common to the national constitutional traditions of the Member States. As already suggested, such norms were partially spelled out in the founding Treaties of the European Communities, although then only in a fragmentary and unsystematic manner. This created the conditions under which courts, and very especially the European Court of Justice, were implicitly assigned with the task of clarifying the normative implications of such common constitutional traditions in the concrete political and economic context of the process of European integration. Several rounds of Treaty amendment further contributed to the specification of national constitutional traditions. However, the more the material constitutional norms of the EU were concretised, the more they framed the process of European integration, and consequently also affected national constitutional norms, the more problematic it was to establish the *democratic*

*legitimacy* of such norms, because the appeal that could be made to the democratic legitimacy of each national constitutional tradition as grounding *European material constitutional norms* was increasingly reduced. This reverse legitimacy relation, combined with the sustained expansion of the breadth and depth of the powers of the EU, is at the root of the democratic legitimacy problems of the EU, generally referred to as the *democratic deficit of the EU*. Such a concern has emerged as *the major impetus* towards the writing of a European Constitution *through a normatively sound constitution-making process*.<sup>6</sup> Much of the democratic impetus for this process emanated from the reliance on the constitutional grammar that Europeans were so familiar with.

It is important to notice that such an impetus has been basically *contrary* to the will of many of the representatives of national governments, which in most cases have aimed at countering, delaying or constraining such an impetus. This *democratising pressure* has been expressed in rather unarticulated albeit sustained form, and can be seen at work in the growing resistance to *Treaty amendments* since Maastricht. However, its persistence does explain why, despite their reluctance and despite major electoral risks, national governments have embarked on the Laeken process, and why such a process, despite all its shortcomings, has resulted in a wider democratisation of the Treaty writing process than was originally envisaged (certainly further than envisaged in the Laeken Declaration). What the Laeken process demonstrates is that even with regard to a set of material constitutional norms evolved through a process whereby the EU distilled these from the commonalities of national constitutional traditions, a process which indirectly could draw on the legitimacy of national constitutional norms, the normative

legitimacy of EU norms would not be sustainable, in the long run, without an overt process of constitution-making through which citizens could *re-appropriate such norms*. It is not obvious that a *democratically written* European constitution would *radically* depart in substantive terms from the present set of material constitutional norms. However, in democratic legitimacy terms, there would be a major difference, precisely because of the different procedures of elaboration. This shows that evolutionary constitutionalism, particularly in a constitutionally saturated context is bound to reach its integrative limits. Sooner or later, the democratic writing of the fundamental norms of the political community will forge its way.

Second, the Laeken process further proves that the political mobilising power of the term ‘constitution’ depends on its close association with the normative conception of a *democratically written* constitution. It was such an association that the Laeken Convention relied on to *appropriate* and *alter* the mandate established in the Laeken Declaration, and it was on such a basis that the *conventionnels* who were in favour of producing one single proposal which would not only consolidate but also innovate the existing material constitutional norms managed to win the high ground in the Convention. And it is on the basis of such an association that the partisans of ratification actually fight the national battles of ratification.<sup>7</sup>

In conclusion, what the Laeken process is a clear indicator of (and here is the first constitutional lesson we would like to draw) is of the fact that any constitution-making

process, even if relying on the democratic legitimacy of national constitutions, cannot proceed according to an exclusive logic of evolutionary constitutionalism.

## **B) The sovereign character of the *pouvoir constituant***

One of the most vexing questions in constitutional theory is whether there are limits to the *pouvoir constituant*. The Laeken constitution-making process demonstrates that the sovereignty and radical originality of processes of constitution-making should not be equated with an unlimited, unbridled power.

On the one hand, the very idea of drafting the fundamental law which constitutes a community of already constitutionalised nation-states implies that the constitution-making exercise should not be characterized as something radically new and unlimited, but instead as an exercise aimed at a further concretization of the normative principles which underpin the common constitutional traditions. Not that each national constitutional tradition could trump, on its own, any potential substantive character to be included in the European constitution, but that the constitutional traditions, as what is common to them, should be seen as establishing constitutional mandates to the European constitution.

On the other hand the Laeken process has made apparent, the degree to which, national constitutions have become Europeanised. National constituent powers are now also bounded by the basic normative principles enshrined in European law, and made

to correspond with common national constitutional traditions. This does not impinge upon their sovereignty, because of the way they have become bounded: in the exercise of the *common national* constitutional traditions. But it is simply ludicrous to depict such power as *radically unlimited*. Moreover, we can see patterns of synchronisation and constitutional cross-fertilisation, outstanding among which is the decision to subject constitutional reform to the constitutional decision of other Member States. In conclusion, *the very limits to the constituent power are the ones which turn into constituent*.<sup>8</sup>

### **C) The procedural character of constitution-making**

The third main lesson which can be drawn from the writing of a European Constitution is that constitution-making is a procedural affair, which does not fit with one of the components of the widely held association between constitution and nation-state, namely that the constitution is to be regarded as the most perfect expression of a pre-existing collective will, whose mouthpiece will be people's representatives, and which should be subject afterwards to the plebiscitarian endorsement by *We the People* (a people which pre-dates the Constitution itself). The Laeken process proves this conception to be misleading, both when applied to the national and to the supra-national constitutions.

On what regards the latter, the constitutionalisation of a community made up of constitutionalised political communities cannot but be depicted in procedural terms. The no-demos thesis is wrong in its implications, but not in its description of the in-

existence of a pre-constituted constitutional will among Europeans. Such a will can only emerge if forged through a process in which multiple national and supra-national publics are active, and intervene accordingly. What the *no-demos* thesis is wrong in is in not realising that the constitution-making process can be the catalyst of a common identity, which is the product, not the precondition, of the exercise of constitution-making power.

On what concerns nation-states, the Laeken process has contributed to falsify the romantic conception, and add credence to the notion that it was *never* correct. The very process of European constitution-making has obliged Europeans to revisit their own national constitutional trajectories, and to realize that all instances of national constitution-making have been procedural affairs. The same applies, perhaps even more strongly, to the future, to the convenience of *further proceduralising* national constitutional reform processes. The very ratification of the Constitutional Treaty has pushed Europeans into rather uncharted constitutional territory, that is, of having to conceive of proper national constitutional provisions regarding the relationships between European and national constitutional law, and of having to subject the *effectiveness* of their constituent power to the effective exercise of the respective constituent power of other Member States.

#### **D) Multiple European Constitutional Publics**

The fourth lesson to be distilled from the process of European constitution-making concerns the soundness of a key component in the association between constitution and

nation-state, namely the characterisation of constitution-making as something *momentous*, its identification with a decision adopted at a specific point in time. This is misleading. European constitution-making involves multiple constitutional publics, and it cannot be reduced to the image of the constitutional moment in which the will of a pre-constituted *people* is enshrined in one stroke into the law. There is one point at which things get decided, but it must be preceded by a rich and complex process.

The concrete constitutional will which is finally implemented never exists prior to the constitution-making process. Citizens might have quite concrete constitutional complaints and criticisms, and also hold highly concrete and strongly held constitutional preferences. More often however these will be unarticulated or relate to quite general constitutional principles. Further articulation and specification takes place when confronted with the complaints, preferences and arguments of fellow citizens, through facing the particular constitutional wills of other citizens. Note that within a setting of multiple constitutional publics, when a constitution making process is sparked in motion it is likely to *multiply* the number of questions and to *increase uncertainty*. A deliberately designed constitution making process will then help to *contract* the range of views, foster common understandings and framing of issues, and bring the parties closer together – at times to full agreement.<sup>9</sup> When functioning as deliberative a process of constitution-making produces *deliberatively filtered* preferences.

The challenge for such a system of multiple constitutional publics, then, is to develop the best possible combination of representative and direct deliberative and decision-

making logics. If successful, such a polity may ensure a better testing of democratic legitimacy, as more opinions and viewpoints are vindicated, and more arguments are aired. Such an optimal combination has to balance the need for proper public sanction of the end result, with the need to maximize learning and reflexivity throughout the process.

Focusing on the European process, multiplicity has been enhanced by the addition to strong and general publics of the further layer of differentiation between European and national publics. Such complexity is often held up as a challenge to democracy. This would clearly be the case if we consider the process in relation to the classical approach to representation, or what Jane Mansbridge calls ‘promissory representation’.<sup>10</sup> However, such representation is simply inadequate at the European level. This agent-structure notion of representation presupposes a clear mandate which can steer the process and which the voters can assess the result up against. As could be expected from a process steeped within the context of multiple constitutional publics, the Laeken mandate was very large and inchoate and only indirectly reflected the constitutional will of European citizens. As such it was also unable to offer citizens a clear and definitive set of criteria by which to assess the result. Through the Convention, which saw itself more as a Constitutional Assembly than as a preparatory body for the Intergovernmental Conference (albeit formally only designed as a preparatory body), the Laeken mandate was *further democratised* – even against the will of *resistant* national governments. Thus, part of the fourth lesson is that the representative model that we can discern from Laeken – insofar as Laeken can be labelled representative in the first

place – did not rest foremost on a promissory conception of representation but more on an anticipatory - deliberative - mode of representation. This model is such designed as to foster mutual learning and reflexivity throughout the process. Accountability is ensured through an ongoing interaction between strong and general publics throughout the entire process. Anticipatory representation sees representatives as catalysts and facilitators, and where representatives seek to anticipate voters' preferences. One of the main shortcomings of Laeken is that the process was such set up as to compel Convention representatives to focus so much of their energies on anticipating the *governments'* responses over those of the citizens. Representatives of national governments were influential *conventionnels*, and the Intergovernmental Conference *mediated* between the Convention and the ratification stage.

On the importance of anticipatory representation Laeken is hardly atypical. National democratic constitution making is also set up to tap the deliberative merits of representation. Looking back to national constitutional making from the standpoint of Laeken, one can realise the extent to which this was also part of such national processes. There was also there a vital interplay between the public sphere based in civil society and institutionalised will-formation, with both of these components essential to popular sovereignty.<sup>11</sup>

## **E) Designing proper theoretical instruments to properly caption constitution-making**

The fifth lesson which can be drawn from the Laeken process corresponds to the delineation of the specific procedures through which a common constitutional will is forged and tested, or to put it differently, of the specific procedures through which multiple publics forge a common constitutional will.

To the phases of drafting and ratification, which are usually mapped by constitutional theory, we have to add signalling, and two deliberative phases, which precede and follow the drafting by strong publics of a constitutional proposal. In more concrete terms, this means that the process has to be set up with several distinct stages. It has to test whether there exists a general democratic will to forge a constitution; it has to authorise a strong public to act on this, within a given mandate; this strong public must be well and closely connected to the general public throughout the process of constitution-making; and the latter should have the last word either in focused general elections or through a referendum. Such a process-based approach seeks to balance systems of representation so that accountability rests not merely on a dyadic relation between representative and voter but even more so, on the overall deliberative quality of the process.

These five distinct phases allow us to capture in theoretical terms the multifaceted character of constitution-making, the third and fourth lessons just referred to, which generally escape the lens of constitutional theory.

### **III. A normative model of deliberative democratic constitution-making**

In the previous section we have reconstructed the Laeken process and drawn constitutional lessons from it. These are relevant and enduring lessons whether the Constitutional Treaty will finally be ratified or whether it will end up as raw material for historians specialised in European integration. In this section, we put forth a model of constitution-making which draws on such lessons and incorporates them into a *normative model*.

#### **A) The constitution as the norm grounding the democratic legitimacy of the legal order**

The guiding premise of such a normative model is that *constitutions* as the set of fundamental norms of a given legal order play a key role in grounding the democratic legitimacy of *the whole* legal order. The democratic legitimacy of the *constitution-making process* and of *substantive constitutional norms* render possible for citizens, to see themselves as authors, not only subjects, of the laws. This is so because *democratic constitutional norms* irradiate *democratic legitimacy* to the whole legal order, thanks to the combination of their hierarchical superiority (stemming from the very differentiation between constitution

and ordinary statutes and their *normative credentials*. This can be said to be the more abstract and theoretical formulation of the *first lesson* we derived from the Laeken process.

First, when constitutional norms trump ordinary norms *on account of the latter being in conflict with the former*, hierarchical superiority is not only infusing coherence, but also democratic legitimacy, into the whole legal order. The conflict is, simultaneously, one between a superior and an inferior norm, and also one between a norm decided by *We the People*, and one decided by *the ordinary law-making process*, which can only be legitimate if proceeding within the framework of what citizens, as constitutional authors, have decided.

Second, the democratic legitimacy of constitutional norms *establishes a prima facie case* for a general obligation to obey the whole set of legal norms, which is hard to ground in the absence of democratic constitutional norms. Indeed, the key question here is precisely the *split* between constitutional norms and ordinary statutes. The democratic legitimacy of a *non-constitutionalised* legal order hinges on the democratic legitimacy of each and every legal norm; but if this is so, then the demands on the public autonomy of citizens will overtax their private autonomy. On the contrary, a proper differentiation between constitution and ordinary statutes allows us to reconcile the *democratic imperative* with *the normative properties* of a proper division of labour between citizens and their democratic representatives. Such division is operationalised by means

of combining the hierarchical superiority of the Constitution with the assignment to the fundamental law of the legitimacy burden of the whole legal order.

Consequently, any normative model of constitution-making portrays a process of *overt* and *intentional* constitutionalisation, which is designed so as to equip the constitution with the necessary democratic legitimacy, which can then be irradiated to the *whole legal order*, on account of the hierarchical superiority of constitutional norms.

### **B) The limits of the constituent power**

In that sense, the model stands in 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>12</sup> This does not mean that *the constituent power* should not be inspired, and even draw lessons, from the previous process of *evolutionary constitutionalism*. To the extent that such a process has been infused with the logic of progressive *democratisation* of constitutional norms, the *constituent power* is bound to *reconstitute* the legal order, more than to *constitute it anew*.

### **C) The process of constitution-making: the operational implications of multiple publics**

At any rate, constitution-making must be conceived of as a *process* that must extend over a certain, yet circumscribed, period of time in order to actually forge and test the

common constitutional will. This is so not only because deliberative democracy is based on a procedural conception of democracy, but also because the formation of a democratic constitution requires several steps and tests, through which a collective constitutional will is ascertained. Indeed, constitutional norms enjoy what may be termed *reinforced democratic legitimacy* because they have been developed through particularly arduous procedures. It is only by means of a proper process of clarification, filtering and testing differences that the conclusion can be drawn that a *constitutional will* actually exists.

Any political act, and obviously also the writing or amending of the constitution, is an intentional act, but whether the initiators' intentions correspond to the general constitutional will is something that can only be ascertained if assessed and tested through procedures that require considerable time; even more if such intentions reflect, as is always the case, a vision whose spelling out requires the exchange of arguments and the testing of preferences. *Democratic constitution-making* cannot be reduced to an isolated or unique moment in time, a conception proper to decisionistic, populist and authoritarian conceptions of the constitution.<sup>13</sup> But it can also not be portrayed as an unending process, something, which would refer back to the *evolutionary conception* of the constitution just referred to.

Our designation of democratic constitution-making in process terms is democratically founded. First, we have already argued that constitutional norms can be said to prevail over ordinary statutes if they can exhibit stronger democratic credentials; we will like to

add that such credentials can only be established if the political will behind such norms is not only a reflection of a broad social majority, but also of a consistent majority over (constitution-making) time. Second, the fact that the Constitution typically enshrines a set of universalistic principles and only the political community's most basic ethical choices, reinforces the need for constitution-making to take place through an ongoing process, and not through a mere (one-shot) decision. It is particularly important to test that constitutional norms are supported also by what in a normal political process are minority positions. After all, the obligation of all citizens to obey ordinary statutes could only be established by statutes that are in compliance with the *constitutional framework*, which all citizens have accepted, and therefore, turned into their own.

The main operational implication of such premises is that the democratic process of constitution-making can be reconstructed around five main phases, which are critical to the proper testing of preferences, and to the *emergence* of a strong constitutional will. The different phases can be construed as a set of increasingly demanding tests, designed to foster a common will in favour of constitution-making or reform, both in terms of consistency (support must converge around a *single constitutional proposal*) and in terms of intensity (support must be as large as possible, verging on supermajorities).

All this entails that the democratic process of forging a legitimate Constitution must adhere 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. These two logics play into the process in different ways, so as to forge both opening and closing of it. The ideal process will have to oscillate between these two logics. Similarly, an adequate interplay between strong and general publics is essential for the legitimacy credentials of the constitution-making process to come to fruition.

*a) Phase 1: The signaling phase*

The *signalling phase* basically corresponds to the initiative to launch the constitution-making process. Some individual, group or faction must articulate latent social claims in terms of a request to change constitutional norms. This phase is necessary in any process of *conscious, overt constitution-making*. Otherwise, the process is implicit, not explicit, and does not qualify as a genuine constitutional moment.

The signalling has something of an *enunciative* 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. The notion of signalling itself has a certain, 'top down', logic. But this is not unconstrained or unauthorised leadership because those signalling have to provide reasons and justifications for the claim to be speaking in the name of *We the People*. Nevertheless, the individual or group signalling the constitutional moment only has a claim to articulate a diffuse social feeling, whereas this claim has then to be redeemed by means of eliciting wide public support as early as possible in the process. The process is such designed as to ensure this.

Those claiming that the people wants to make a new constitution or amend the present one must come up with answers to three basic questions: (1) *Why* forge or amend the constitution?; (2) *Why* do it *now*?; and (3) *How* to do it?

***b) Phase 2: The initial deliberative phase***

The second, *initial deliberative, phase*, is where the arguments put forth in favour of constitutional change are tested and transformed into platforms for constitutional reform. This phase is justified for the obvious reason that to raise the claim that the people want a new Constitution is very different from redeeming such a claim. The initial deliberative phase is precisely where (a) the claim raised by those launching the constitution-making process is put to the test of public opinion, and (b) where an agenda for constitutional reform starts to take shape.

The process is actually put in motion, if or insofar as, the emerging platform receives general public endorsement. This phase is needed in order to ensure that the signalling initiative is properly debated not only in strong, but also in general publics, and after this a common will starts to be formed.

At the end of phase two, either the process *fails*, and thus comes to an end, or it results in a decision to proceed with the debate on the concrete contents of the constitutional reform. How to ensure that there is such a widespread social demand?

- a) A standard case is that of a landslide electoral victory for the party or the parties that stand for constitutional change. This is the direct political or ideological approach
- b) Another option is what we may label ‘top-down solicitation of support’. This can emanate from the claims that strong publics set forth for constitutional reform. This is an indirect approach, in which strong publics take on to serve as proxies for the population.
- c) A third option is top-down solicitation of support through for instance public opinion polls.

Bruce Ackerman, in his leading study on the constitutionalism of the United States, highlights the first option. This majoritarian model is clearly the most robust means of obtaining popular support. It is also the option that most explicitly draws on promissory representation. Its majoritarian and potentially highly ideological character (think for example of the major reforms of the American social and economic tissue in the early 1980s) can however also be a limitation, as there is no assurance that it will be a consensually based mandate (Ackerman, 1991 and 1998). When this option is chosen, the subsequent stages must be devised in such a way as to foster such a consensus. Hence this option also has a strong deliberative component.

The second option is based on a weaker mode of popular consultation, but a potentially less conflictive one. The option’s main weakness is its inability to offer adequate proof

that the popular assembly *actually* speaks for the people. If this option is chosen, the model logic requires that the subsequent stages ensure that such consultation is properly ensured. Here more extensive deliberation akin to that of anticipatory representation is presupposed.

The third option is incompatible with the model as opinion polls are ephemeral and unreliable in ensuring adequate information on people's constitutional desires.

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, despite the absence of an adequate *signal* that there is a popular will to reform the constitution, such a will still exists and could become visible from Phase Three onwards. The democratic validity of such a claim is then critically dependent on the *representativeness* of the relevant strong public(s) involved.

### *c) Phase 3: The drafting phase*

The third is a *drafting phase*, in which a specific form of strong publics (typically an assembly or convention) develops and agrees on a draft of the new or amended constitution. The purpose of this phase is to establish a constitutional proposal, to move

from the strong but unstructured common constitutional will of the second phase, to the formation of a *common will* around a precise constitutional proposal.

On the character of the strong public, three main options at least can be identified. The first is a specially convened “Constitutional Assembly” or “Constitutional Convention” made up of *popularly elected* representatives, and mandated to draft a constitutional proposal. The key defining feature of such a body is that its members have been elected by citizens on the basis of their constitutional platforms, which reflects a clear element of promissory representation. The second option is an *already existing body*, such as a chamber of Parliament, or a mixed formation of the two chambers of Parliament, with a resolve to draft a constitutional proposal. In the absence of a popular mandate, their legitimacy could be grounded on a landslide victory for a party or parties favouring constitutional reform; organisationally speaking, the key issue is that their constitutional labours would be given priority, if not exclusive attention, allowing them to detach themselves from *concrete ordinary questions* to have the time and energy to reflect on constitutional issues. This formation relies on an initial element of promissory representation (through the electoral channel) but where this is subsequently interspersed with a stronger component of anticipatory representation – and which also presupposes that the body establish very strong links with the public. The third is to form an *ad hoc* body whose composition would reflect, fully or partially, the will of popular representatives (i.e., Members of Parliament).

Such an assembly must see itself as having 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 the fundamental law. In its strongest version this implies that the Convention's composition be determined through a direct, polity-wide election (see first and perhaps also the second option). A weaker version would entail election by strong publics (could be used in the second and third options). Certainly, in case of low popular mobilisation, and absent an adequate signal, direct polity-wide election would be very much needed to redeem the claim that *the people* wants to write or amend the Constitution. The general principle could be stated as follows: *the weaker the signal, the greater the need*, to obtain direct popular support at this critical stage of the process.

Further, the assembly must have a clear understanding that the mandate is to write 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 people) be focused on candidates' ideas and views on the concrete exercise and drafting of the constitution.

The activities of the 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.

The process must be such devised as to find a balance between forging a coherent common will and openness to general publics. This can only be ensured through proper transparency. The strong public has to be closely attentive to the proposals and reactions of general publics – which serve as critical tests of the emerging constitutional proposal.

The work of the assembly/convention ends when a draft constitution is put forth. But contrary to what is the case in ordinary political processes, the existence of a coherent will on the side of the strong publics is not enough to turn the proposal into constitutional norms: further tests of the *common constitutional will* are to be conducted in phases four and five. The aspect of decision-making within this strong public is confined to the *making of a proposal*, and does not include the *turning of the proposal into constitutional norms* proper.

***d) Phase 4: The agenda-settled deliberative phase***

The fourth is a *central deliberative phase*, in which general publics engage in further deliberation, this time around the concrete agenda provided by the draft constitutional proposal. The pros and cons of the different contents of the new constitutional text are considered, with a view to determine whether the people should or should not endorse the new Constitution. This corresponds once again to the needed interplay between institutionalised deliberative process and informally developed public opinion.<sup>14</sup>

For this to strictly comply with promissory representation there would have had to be full consensus on a constitutional draft at the outset. Since this is unlikely, this phase also presupposes that the strong publics interact closely with civil society, in line with the anticipatory mode of representation. Here, as always when the anticipatory mode is involved it is important to prevent manipulation and top-down orchestration of views and positions. Therefore, whereas strong publics need to be active and help spark debate, they cannot in themselves replace the legitimacy input stemming from actual deliberation in civil society. It goes without saying that there is a difference between fostering debate and co-opting civil society. This process needs to continue long enough to allow the public to assess the constitution in a proper manner. If it is too short, accountability suffers, whereas if it is too long, transparency might suffer.

*e) Phase 5: The endorsement phase*

The fifth and final phase is endorsement or ratification. The draft constitution is subjected to a final vote *by the people*. We can think of four main options, although there are many variants of each:

- a) a polity-wide referendum (where different majorities could be required: super-majority, qualified majority or simple majority, and different formulae applied in each case)

- b) a polity-wide referendum combined with strong public ratification (also with different possible concrete formulations: one is to require a simple majority in the referendum and qualified majority of the members of the relevant representative assembly or assemblies)
- c) referenda in critical constituencies only (referendum *à la carte* in a federal or quasi-federal context), supplemented with the endorsement of representative institutions
- d) exclusive parliamentary ratification, which can assign different roles and weights to different parliaments in a federal or quasi-federal context

The need for a final popular sanction is intrinsic to the social function of law in modern societies, which is to ensure social integration by means of certain social norms apt to solve conflicts and coordinate behaviour in order to achieve social goals.<sup>15</sup>

The procedural model outlined here reflects the notion that the legitimacy of a constitution rests to a large extent on the richness and quality of the debate *prior to voting*,<sup>16</sup> from the reasons that move people to vote. However, for a constitutional initiative to qualify as a democratic constitutional moment the procedure has to include a final test of the common will to adopt the constitution. The choice of procedure also could depend on the magnitude of constitutional change: the more comprehensive, the more the need for referendum.

If the referendum form is chosen, it has to be such set up to ensure that all those partaking, consider themselves to make an unambiguous decision in favour of or against a specific proposal. Special efforts must be taken to avoid the possibility for manipulation. The purpose is to ensure, as far as possible, a common focus and a common attention throughout the process.

## IV. Conclusion

In this article, we have drawn on political and constitutional theory to shed light on the EU's Constitutional Treaty. The Constitutional Treaty has already become the object of a large and rapidly growing number of commentaries in the European studies literature. Most of these tie the Treaty's relevance and importance to its actual ratification. Our analysis has had a somewhat different focus. We see the Laeken process as a major experiment in constitution-making, which holds important lessons. We derived five main lessons from this process, all of which are independent of the Treaty's ratification. These speak to (1) the substantive connection between constitution and democratic legitimacy (*no constitution without democratic legitimacy*); (2) the nature of the sovereign power in the hands of the *constituting power*, or *pouvoir constituant*, i.e. those who have the last word on the enacting of the constitution (*the sovereignty of the pouvoir constituant is not coterminous with fully discretionary political power*); (3) the procedural character of constitution-making, which is clearly at odds with any romantic notion of constitution-making in a *decisionistic* sense (*constitution-making is a complex and multi-step process where the existence of a common constitutional will is tested*); (4) the challenge of

multiple publics and the implications for political representation (*both strong and general publics play key roles in constitution-making, and different conceptions of representation are relevant*); and (5) the design (or the reconstruction) of constitution-making reflects both its procedural character and the multiplicity of publics which intervene. Keeping such lessons in mind, we proceeded to outline a normative model of constitution-making, which seems to us to; (1) offer a rationale for how the principle of legality can properly differentiate between statutes and constitution; (2) assign to the Constitution the main legitimacy burden of the legal order, and by such means, allow us to establish an adequate balance between public and private autonomy; and (3) distinguish five clearly delineated phases in any process of constitution making, necessary in order to properly test the existence of a general constitutional will. This design is set up to strike the best possible balance between constitution and democracy, the two core components of modernity, whose co-terminous existence and in-built tensions are of such vital importance for how we live our lives.

---

1 Something, which was not the case in 1953 (The European Political Community) and 1984 (Spinelli' European Union). These precedents, even if precious and direct forerunners of the present process, either lacked any chance of succeeding or were seen as a distant agreement among elites, not worthy of the constitutional label.

2 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. See Fraser 1992.

3 This chapter, as a good deal of our previous work on European constitutionalism, has been inspired by our reading of the seminal work of Bruce Ackerman (1991, 1997, 1998) on the United States Constitution.

4 We have applied the model in Fossum and Menendez (2005)

5 On the European context, see Menéndez 2004.

6 This is the core message of the debate preceding and immediately following the “fiasco” of the Nice Intergovernmental Conference. See Closa (2002) and Eriksen, Fossum and Menéndez (2004).

7 Occasionally, partisans of ratification might be far from consistent. Thus, the Spanish government submitted the Constitutional Treaty to constitutional screening by the Spanish Constitutional Court following the procedure foreseen for the constitutional review of international treaties, while it presented the Constitutional Treaty to the public as a Constitution. This clearly proves inconsistency, but such inconsistency supports, not undermines, our

---

argument. If they were impelled to be inconsistent is because most citizens feel that the best reason to write a constitution is to ensure the democratic legitimacy of fundamental norms.

8 In that regard, see the French law amending the Constitution, Loi constitutionnelle n° 2005-204 of March 1st, 2005, Journal Officielle n° 51 of 2 March 2005, 3696, especially Article 3 : ‘ A compter de l’entrée en vigueur du traité établissant une Constitution pour l’Europe, le titre XV de la Constitution est ainsi rédigé’. We are tempted to draw a parallelism with human language. The very rules which govern it render possible a creative use of language.

9 There are many different categories of agreement: from a mere compromise to a working agreement and to a rational consensus. See Eriksen 2003.

10 ‘Promissory representation works normatively through the explicit and implicit promises that the elected representative makes to the electorate. It works prudentially through the sanction the voter exercises at the next election (Time 3)’. Mansbridge 2003, 516.

11 The difference with the European process is one of degree, not of scale. At the national level, there is usually a basic agreement on which constitution is to be written, while at Laeken, there was a stark conflict between which national constitutional traditions should be emulated: the constitution as the fundamental laws authored by the people viz. evolutionary constitutionalism.

12 See Ackerman 1999. For a defence of EU evolutionary constitutionalism, see Weiler 2003. The establishment of the democratic credentials of such evolutionary processes is harder, if only because that is cognitively more demanding.

13 Deliberative constitutionalism does not assume pre-given public differences, but it does not conceive of the process of deliberation as one of “manufacturing of consent”, as leading social scientists did in the 1920s and 1930s. On this, see, for example Lasswell (1998); for a critical analysis see Herman and Chomsky (1988).

14 Habermas 1996, 298.

15 Habermas 1996, 139 and 145; Rawls 1971, 268-9; Honoré 1992, 1-17; 2002, 489-95.

16 Habermas 1996, 32.

## References

- Ackerman, Bruce (1991). *We the People*, volume I: *Foundations*, Cambridge.
- Ackerman, Bruce (1997). *We the People*, volume II: *Transformations*, Cambridge.
- Ackerman, Bruce (1999). Revolution on a Human Scale, in: *Yale Law Journal*, 108(8), 2279-2349.
- Ackerman, Bruce/Katyal, Neal Kumar (1995). Our Unconventional Founding, in: *University of Chicago Law Review*, 62 (2), 475-573.
- Brunkhorst, Hauke (2002). Globalising Democracy without a State: Weak Public, Strong Public, *Global Constitutionalism, Millennium*, 31(3), 675-90.
- Closa, Carlos (2002). ‘The Implicit Model of Constitution in the EU Constitutional Project’ in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *Constitution-Making and Democratic Legitimacy*, ARENA Report 8/02, Oslo, 53-74.
- Eriksen, Erik Oddvar, John Erik Fossum and Agustín José Menéndez (eds.) (2004) *Developing a Constitution for Europe*, London
- Fossum, John Erik and Agustín José Menéndez ‘The Constitution’s Gift’, *European Law Journal*, 11 (4): 282-312.

- 
- *Fraser, Nancy* (1992). Rethinking the public sphere. A contribution to the critique of actually existing democracy, in: Craig Calhoun (Ed.) *Habermas and the Public Sphere*, Cambridge, 109-142.
  - *Habermas, Jürgen* (1996). *Between Facts and Norms*, Cambridge/MA: MIT Press.
  - *Habermas, Jürgen* (2001). Constitutional Democracy, A Paradoxical Union of Contradictory Principles?, in *Political Theory*, 29(6), 766-781.
  - *Herman, Edward S./Chomsky, Noam* (1988). *Manufacturing Consent. The Political Economy of the Mass Media*, New York.
  - *Honoré, Tony* (1992). The Dependence of Morality on Law, in: *Oxford Journal of Legal Studies*, 13 (1), 1-17.
  - *Honoré, Tony* (2002). The Necessary Connection between Law and Morality, in: *Oxford Journal of Legal Studies*, 22(3), 489-95.
  - *Lasswell, Harold D.* (1998). Propaganda, in: *Encyclopedia of the Social Sciences*, 520-9.
  - *Mansbridge* (2003) Rethinking Representation, *American Political Science Review*, 97(4):515-528.
  - *Menéndez, Agustín José* (2004). Three Conceptions of the European Constitution, in *Eriksen, Fossum and Menéndez* (2004), 109-128.
  - *Rawls, John* (1971). *A Theory of Justice*, Cambridge.
  - *Rousseau, Jean Jacques* (1964). *Oeuvres complètes, III*. Paris.
  - *Santiago, Carlos* (1993). A Philosophical Reconstruction of Judicial Review, in: *Cardozo Law Review*, 14 (4), 799-846.
  - *Weiler, Joseph* (2003). In defence of the status quo: Europe's constitutional Sonderweg, in: *Joseph Weiler/Marlene Wind, European Constitutionalism beyond the State*, Cambridge, 7-23.