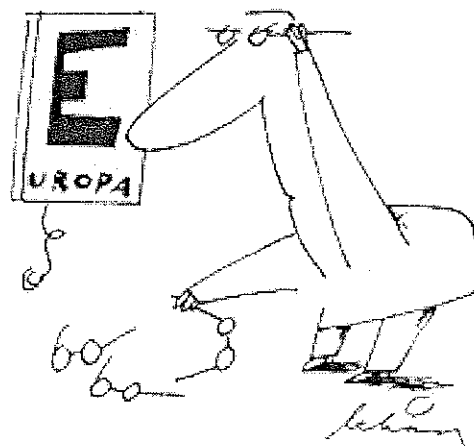


European Master's Degree in Human Rights and Democratisation

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ADDRESSING THE DEMOCRATIC DEFICIT IN THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE



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Abstract

The aim of this thesis is to address the democratic deficit of the European Union in the Treaty Establishing a Constitution for Europe. The thesis looks at democracy in the European Union from two different angles: from a structural/institutional point of view, but also from a more general and theoretical viewpoint. The main thread of argumentation is that as the Union is an entity *sui generis*, situated somewhere between government on one hand, and governance on the other, also the problem of democratic deficit needs to be tackled and discussed in this light.

The thesis begins by explaining what the democratic deficit in the context of the European Union means and where it can be found. As the origins for the problem are various, this account is seen as necessary. Second, the thesis looks at the background process of drafting the Constitution, after which it analyses carefully the main changes introduced by the Constitution. In the final part, the normative implications of creating a Constitution and the inevitable difficulties involved in applying democracy on a non-statal entity are discussed. Particular emphasis is given to the question of developing a true European *demos*.

Being a legal-political analysis of a topical problem, it is hoped that the thesis serves the purpose of bringing the overall discussion of EU's democratic deficit up to date.

Addressing the Democratic Deficit in the Treaty Establishing a Constitution for Europe

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1. INTRODUCTION¹

The European Union is not a simple matter. When trying to write an uncomplicated introduction of what the EU is one quickly realises that it is a mix of intergovernmental, supranational and transnational elements. It is a construction that is demanding both in descriptive and normative terms, as on one hand, it is a complex network of institutions for regulating common affairs, but on the other, it is not completely unitary and self-contained as a political unit. As one commentator has put it, "l'Union est un système institutionnel hybride"². In trying to categorise the Union we see that it lies somewhere between politics and diplomacy, between domestic and international, and between government and governance. Although the European Union has many characteristics in common with traditional intergovernmental organisations, for example, the decision-making so far being characterised by negotiations between Member States trying to find a "lowest common denominator",³ it is however true that Member States have pooled their sovereignty on certain matters far beyond for the Union to remain an intergovernmental organisation only. Some emphasise the supranational aspects of the EU. Many have even pointed out that with its own currency, flag, anthem and

¹ The author would like to thank Florence Benoît-Rohmer, Patrick Dollat, John Morijn and Anne Weber for their valuable comments and suggestions regarding the text. Needless to say, all shortcomings are the author's own responsibility.

² Magnette, Paul, *Contrôler l'Europe, pouvoirs et responsabilité dans l'Union européenne*, 2e édition, Editions de l'Université de Bruxelles, Institut d'Etudes Européennes, Bruxelles, 2003, p.24.

³ Jönsson, Christer, Tägil, Sven and Törnqvist, Gunnar, *Organising European Space*, Sage Publications, London, 2000, p.123.

Constitution⁴ the EU does not differ remarkably from a traditional nation-state. Nonetheless, the European Union is neither of these. It has developed from an interstate treaty to a complex system of governance. In its present form, it can be said to represent a truly pioneering phenomenon as an “attempt to provide a political form for a globalised world”.⁵ It seems that the traditional models of politics do not seem to fit this new, unprecedented phenomenon, and for this reasons, many academics have called the Union *sui generis*, an entity of its own kind, an organisation that cannot be categorised together with anything else.

The history of the European Union shows us that it has been one of the most successful experiments in international organisations ever created. Being created after the Second World War, it has brought its members a degree of economic prosperity and security that few could have imagined. However, as it was originally set up and developed by economic arguments, a process which has largely seen its completion by the single market and the single currency⁶, it has become clear that the EU has developed from an economic project into a political union, without necessarily having received an explicit mandate by the people to do so. While being granted more powers and having extended its scope of action with the introduction of several treaties over the years so that the Union today has influence over almost every aspect of our everyday lives, many citizens have been left out from this integration process, in the sense that their opinions have not always been sufficiently heard. Yet, this riskier and more far-reaching project of political integration is not as easily accepted as economic integration and therefore the project necessarily requires the legitimation and support of the citizens.

As a result of moving from functional economic integration to a more all-exhaustive integration (economic, political, societal, legal) there has been a constant tension in recent years between the economic power of the EU, its expanding size and

⁴ Throughout the thesis, we will use the term ‘Constitution’ or ‘European Constitution’ while acknowledging that formally the new text holds the name “Treaty Establishing a Constitution for Europe” – and as such remains an interstate treaty in the strict legal sense. As a treaty does not hold an identical meaning with a constitution the somewhat ambiguous title will be discussed in more detail later in the thesis.

⁵ Jönsson, Christer *et al.*, *Op.Cit.*, p.123.

⁶ Habermas, Jürgen, “Why Europe Needs a Constitution?” in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, p.21.

status as an international player and the responsibilities and expectations which that generates, on the one hand, and the internal and constitutional forces of restraint and democratic guarantees on the other. This can be seen in the repeated calls for clearer limits to the powers and competences of the EU starting with the Maastricht Treaty and continuing up to today with the recently concluded project of writing a constitution for Europe.⁷

The political unease and uncertainty about the EU, which is manifested on the fresh debate on whether, and if so, what form, of a constitution the Union should adopt reflects the fact that, despite its growing power and strengthening identity as a political as well as an economic organisation, the European Union remains an ambiguous entity which eludes satisfactory definition, whether in conceptual, legal or constitutional terms. If we are to make any sense of the EU, the starting point for analysis is to ask what its function or purpose is, what its powers are and what does it seek to achieve. If, like this thesis seeks to purport, it is conceived of as a constitutional polity, the assumption is that its function is a more general one of political ordering and government. However, as the EU is not an alternative to the sovereign state, it is clear that it still lies somewhere between these two paradigms, of governance and government, of international organisation and independent state, and this explains something of the complexity and uncertainty of its powers and functions.⁸

Despite of its *sui generis* character, this thesis will support the view that as the European Union has crossed the threshold from being an economic organisation into a political union, it cannot, as such, no longer do without the support of the citizens of its member states. This somewhat 'eternal question' of democratic deficit, tackled already in numerous academic writings concerning the EU is still of utmost importance as the problem has not been solved. The Union has developed institutional features that reach beyond its original design, and certainly beyond the original purpose of managing economic interdependence. While it was originally conceived as an international organisation facilitating economic cooperation, its current political quality has significantly changed. As it now stands, it has come to include shared norms, commonly

⁷ De Búrca, Gráinne, "Human Rights: The Charter and Beyond", Jean Monnet Working Paper No.10/01, <http://www.jeanmonnetprogram.org/papers/01/013601.rtf>.

⁸ *Ibid.*

accepted rules and decision-making procedures.⁹ Today, almost all areas of traditional domestic reach have a European dimension. The EU impinges more and more on core attributes of statehood: money, borders and security. As a result, the growing visibility and political importance of the Union raises the question of public opinion and the level of support for the EU and its policies.¹⁰

The aim of this thesis is to address the democratic deficit of the European Union in the light of the Treaty Establishing a Constitution for Europe. Firstly, it will be outlined what the so-called democratic deficit really means and where exactly it can be found. This is important, because the democratic deficit does not stem from a single origin but is a result of several characteristics of the EU. Therefore, to be able to address the question of democratic deficit one must first thoroughly be aware of the extent of the problem. Second, we will examine the Treaty Establishing a Constitution for Europe to see if it helps to solve the problem, as it indeed aims to do. In other words, an underlying question to be found on the subsequent pages is whether the EU needs a Constitution and, if so, what is to be constituted? This question requires attention to fundamental principles, political-legal arrangements and sources of citizens' allegiance. We will examine the institutional and political changes introduced by the Constitution to be able to determine the possible improvements and/or shortcomings of the new text with relation to the question of democratic deficit.

We will also ponder on how the Constitution should and has been created. In this section, we will address the role of the Convention on the Future of Europe in the constitution-making process, in terms of both process and product. This is of significance, because when creating a constitution, a social contract of the people constituted by it, it is of importance to see who were the ones in position to negotiate and conclude this contract. The questions we seek to address are how well did it handle the matters addressed? What was the quality of the processes? Do the deliberation and

⁹ Wiener, Antje: "Finality vs. Enlargement, Constitutive Practices and Opposing Rationales in the Reconstruction of Europe", Jean Monnet Working Paper 8/02, p.17, <http://www.jeanmonnetprogram.org/papers/02/020801.pdf>.

¹⁰ Laffan, Brigid: "Democracy and the European Union" in Cram Laura, Dinan, Desmond and Nugent, Neill (eds.), *Developments in the European Union*, Macmillan, London, 1999, p.334.



negotiation processes comply with the normative criteria for a constitution-making process?¹¹

In the final part, the European Union as a non-state entity is considered in a broader context of democratic theory. What is argued is that the question of Constitution must be considered in light of the type of entity that the EU is. Here, as in overall in this thesis, the view that will be put forward is that the Constitution is indeed, despite its shortcomings, a positive development in the European integration, even if we would like to emphasise that one should remain cautious in the evaluation. As different Member States have different preferences, the Constitution in many points can be seen as a compromise. As such, we should be realistic in our assessment and understand that the EU is still far from anything ideal. However, we are safe to say that the Constitution designates the core principles of any given polity and as such it does serve to reduce the democratic deficit.

This contribution is, of course, but one of many. Numerous books and articles have already been written on the topic of democratic deficit of the Union. Accordingly, on various points no claim is made to any special originality, although the overall account and approach is hoped to differ from other contributions in various ways. The aim of this thesis is to look at democracy in the European Union from two different angles: from a structural/institutional point of view, but also from a more general and theoretical viewpoint. As we will concentrate our analysis on the newly agreed Treaty Establishing a Constitution for Europe¹² it is hoped that the thesis serves the purpose of bringing the overall discussion of EU's democratic deficit up to date.

¹¹ Eriksen, EO, Fossum, JE and Menéndez, AJ, "A Constitution in the Making?" in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, p.3.

¹² Which formally still remains a draft. The text will be signed in Rome on 29 October 2004, after which the national ratification process will start.

2. DEMOCRATIC DEFICIT IN THE EUROPEAN UNION

2.1. What is the *Democratic Deficit*?

In this Part, we will outline the roots of the current problem of democratic deficit within the European Union. It seems to be commonplace to note that the European Union suffers from a lack of democracy. These deficits of democracy and of legitimacy stem from a feeling that the EU is not fully taking account the opinion of its citizens. The democratic deficit has political and institutional dimensions and in general, it can be broken into separated aspects concerning the Union. Brigid Laffan, for one, has identified six different aspects of the democratic deficit. We will use her classification as a basis for discussion¹³, though we will divide the origins of democratic deficit under four broad sub-headings. The democratic deficit can be said to stem from (1) the institutional design of the Union, (2) the dominance of technical experts in the decision-making process, (3) the structural features of the EU, and (4) lack of a European *demos*. In the following, each category will be discussed separately.

2.1.1. EU's Institutional Design

By saying that the institutional design of the European Union is one cause of the democratic deficit we mean that the functions of the main legislative and executive institutions do not conform to the traditional separation of powers between the legislative, executive and judicial branches of government. The Union is not a traditional hierarchy with a clearly defined centre of political authority, such as a government. Rather, decisions evolve from intense bargaining within and across the policy-making institutions, which operate within a delicate institutional balance. Giandomenico Majone for example argues that the institutional arrangements within the EU resemble "the mixed polities of the pre-modern era" rather than contemporary parliamentary or separation of powers systems. He concludes that one of the EU's characteristic features is the impossibility of mapping functions onto specific institutions.¹⁴ As a result, the legitimacy of each institution has in the last decade been questioned. We shall now briefly consider the causes of the democratic deficit in EU's

¹³ See Laffan, Brigid, *Op.Cit.*, pp.330-48.

¹⁴ Quoted in Sbragia, Alberta, M, "The Dilemma of Governance with Government", Jean Monnet Working Paper 3/02, p.3, <http://www.jeanmonnetprogram.org/papers/02/020301.pdf>.

main institutions, the Commission, the Council of Ministers, and the European Parliament.

2.1.1.1. European Commission

Firstly, serving as the guardian of the Treaties and upholding the Community interest, the European Commission has no direct democratic mandate. It retains a rather high institutional autonomy vis-à-vis both the Council and the European Parliament. Yet, it is not clear where it derives the necessary democratic legitimacy from. The Commissioners are appointed by the Member States in conjunction with the European Parliament. They are to serve the interest of the Union and not their respective Member States. The Commission has three separate functions. The first is to initiate proposals for legislation. The second is the broad one of managing the vast range of EU activities, including also the conducting of international trade relations on behalf of the Member States. The third main area of responsibility is to ensure the proper application of EU law within the Member States. As we can see therefore, the Commission is an extremely important body, employing more than 24,000 people.

However, it has been criticised of not being clear whether the Commission is a political institution or an administrative and technical body. It fits uneasily in the classical institutional theory. The place of the Commission in the overall institutional balance of the EU is uncertain. Contrary to the Council and the European Parliament, it does not represent a particular constituency but rather, it is a body of state-appointed civil servants that are called to act in the 'general interest of the community'.¹⁵ The Commission gives the Union administrative capacity without, however, being constituted as a traditional executive headed by an elected government. In some respects it enjoys more powers than national governments (monopoly on initiative ensures it a significant influence in the legislative process) and on others less (cf. the traditional executive function). Nor is it subject to classical mechanisms of political control as national governments are.

Moreover, the allegations of fraud and corruption culminating in the resignation of the Commissioners in March 1999 have undermined the legitimacy of the

¹⁵ Verhoeven, Amaryllis, *The European Union in Search of a Democratic and Constitutional Theory*, European Monographs, Kluwer Law International, The Hague, London, New York, 2002, p.228.

Commission.¹⁶ Concurrently, it has not been clear how its day-to-day accountability vis-à-vis the European public can be secured. Its members are supposed to be independent, but the media has however perceived them regularly as representatives of national governments.¹⁷ As in the recent constitutional debate all Member States appeared extremely keen on keeping their own Commissioner, it does not seem completely convincing to argue that the Commissioners represent the interests of the EU only.

2.1.1.2. Council of Ministers

Secondly, the Council of Ministers, as the main law making body, has increasingly been regarded as lacking accountability as a collective entity. There is a persistent confusion between the executive and legislative powers within the Council. Within pillars II (common foreign and security policy) and III (justice and home affairs) the Council enjoys near exclusive executive competence. Within pillar I (European Communities) it acts as the co-legislator with the European Parliament. The Council decides some things by unanimity and some by qualified majority vote. Euro-sceptics have repeatedly claimed that the increased use of qualified majority vote has meant that the Member States have had to transpose and enforce laws which they do not agree with, this however being often necessary for the effective functioning of the Union. With unanimity there is always the danger that one country can block a decision that other Member States would want to adopt.

The Council of Ministers brings together national ministers, diplomatic representatives, and administrative officials from the Member States, who often deliberate and reach conclusions in secret. While indirectly accountable to voters through national governments, the link is very weak and the mode of interaction too diplomatic or technocratic to satisfy many observers, although there are also those who

¹⁶ Note however that a Belgian court has dropped fraud charges against the former Commissioner Edith Cresson for lack of evidence on 30 June 2004. The charges related to business trip costs between 1995 and 1999. The embezzlement allegations lead to a scandal that finally brought down the entire European Commission in 1999. See Stroobants, Jean-Pierre, "La justice belge prononce un non-lieu au bénéfice d'Edith Cresson", *Le Monde* 01/07/2004.

¹⁷ Sidjanski, Dusan, *The Federal Future of Europe – From the European Community to the European Union*, The University of Michigan Press, Michigan, 4th edition, 2003, p.413.

would argue in the opposite¹⁸. However, even if ministers are (usually) democratically elected, the fact that their work is prepared by the COREPER¹⁹ indicates that the diplomatic and the democratic policy-making procedures are at least intertwined.²⁰ In fact, the adoption of legislation has, in the past, been compared with secret diplomatic negotiations, from which the European and national parliaments are completely excluded. Meeting behind closed doors, ministers and civil servants have been able to later provide their national media with a selective version of events. Although the Council rules of procedure were amended in December 1993, ostensibly with a view to guaranteeing greater transparency, only debates on the Presidency's six-month work programme are open to public scrutiny.²¹

2.1.1.3. *European Parliament*

Thirdly, the European Parliament, directly elected since 1979, has over the years used its democratic credentials to press for more power in the system. The Single European Act and the Maastricht Treaty extended the Parliament's powers, giving it powers of 'cooperation' with the Council and the Commission and 'co-decision' with the Council. But despite its gradual increase in power, the European Parliament still suffers from certain shortcomings in capabilities. For one, it has no right to initiate legislation, this right being exclusively granted to the Commission. Another weakness is that the

¹⁸ Andrew Moravcsik, denying the existence of a democratic deficit in the EU argues that in the Council of Ministers, which imposes the most important binding constraint on everyday EU legislation, permanent representatives, ministerial officials and the ministers themselves from each country act under constant instruction from national executives, just as they would at home, and therefore the bonds of accountability are tight in the Council. See Moravcsik, Andrew, "In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", Center for European Studies Working Paper No. 92, p.8, http://www.ces.fas.harvard.edu/working_papers/Moravcsik92.pdf.

¹⁹ The Committee of Permanent Representatives (COREPER) is made up of the head or deputy head of mission from the EU member states in Brussels. Its defined role is to prepare the agenda for the Council meetings. It may also take some procedural decisions. It oversees and coordinates the work of some 250 committees and working parties made up of civil servants who work on issues at the technical level to be discussed later by COREPER and the Council. It is chaired by the country holding the presidency of the Council of Ministers. There are two committees, COREPER I is made up of deputy heads of mission and deals largely with social and economic issues, and COREPER II is made up of heads of mission and deals largely with political, financial and foreign policy issues.

²⁰ Sbragia, Alberta, M, "The Dilemma of Governance with Government", Jean Monnet Working Paper 3/02, p.8, <http://www.jeanmonnetprogram.org/papers/02/020301.pdf>.

²¹ Bradley, Kieran: "The Union and its Institutions" in Laffan, Brigid (ed.), *Constitution-Building in the European Union*, Studies in the European Union, Institute of European Affairs, Dublin, Ireland, 1996, pp.105-6.

Parliament's decisions in the complicated co-decision procedure have to be taken by an absolute majority of members, a qualification that is difficult to be met in the normal course of events due to the present fragmented state of the parliament. In short, the powers of the European Parliament have been described as mainly reactive.²²

Moreover, the low turnout in the European Parliament elections has served to undermine its assertion of legitimacy. In national context the European Parliament elections are not seen as important, only little discussion on European affairs takes place before the elections. As a result, the voters are not aware of the importance and powers of the European Parliament. They think of it as a remote institution, having much less power on their every-day life than their national parliaments do. Many countries have also witnessed a large number of celebrities standing as candidates in the European Parliament elections. As voters are generally not interested in voting in the elections, many parties try to tempt voters to the polls by having widely-known celebrities as candidates, regardless of how much they know or are interested about European politics and law-making in general. However, this can serve to further undermine the legitimacy of the European Parliament as citizens feel that the issues at stake are not important as celebrities and socialites, ranging from former athletes to famous actors and TV-presenters, are aiming for the job.

Furthermore, the problem with the European Parliament elections is also the absence of coherent European parties. Because there are no disciplined European parties the European Parliament fails to provide a clear European program for election campaigns which would reflect opinions held in a European public and give orientation for the voter. Instead, the influence of national parties is much stronger. The national parties present clear political profiles but primarily reflect the interests and topics of their respective national debates more than European concerns.²³

As the European elections do not result in a certain composition of the executive, Philipp Dann has argued that there is no direct and clear connection between the citizen's right to vote and the governing personnel. Instead, every vote given is manifold counterbalanced and dispersed by other elections, at other times and in other

²² Abromeit, Heidrun, *Democracy in Europe – Legitimising Politics in a Non-State Polity*, Berghahn Books, New York, Oxford, 1998, p.31.

²³ Dann, Philipp: "Looking Through the Federal Lens: The Semi-Parliamentary Democracy of the EU", Jean Monnet Working Paper 5/02, p.43, <http://www.jeanmonnetprogram.org/papers/02/020501.pdf>.

places. Hence, Dann maintains it to be a vote without consequences.²⁴ As the European Parliament seems distant to the voter it is no wonder that there exists a certain tension between the European Parliament and national parliaments. According to Andrew Moravcsik, a more important channel in the democratic accountability thus lies in the democratically elected governments of the Member States, which dominate the still largely territorial and intergovernmental structure of the EU.²⁵

2.1.2. Dominance of Technical Experts

A further source of the democratic deficit lies in the dominance of technical experts and growth of committees and working groups attached to the Commission services and in the Council, known also as comitology.²⁶ It has been argued that the system privileges administrative, technical and expert knowledge over political power and represents a system of government by technocrats. Many national administrators and Commission officials play a crucial role in agenda-setting, in framing the terms of debate on precise regulations, and in taking decisions before the final 'political' decisions are taken at ministerial level. Also, the segmented, technocratic nature of policy making in the Council and Commission impairs the capacity of these institutions to establish priorities for action.

As the EU seems to be dominated by technical experts, the problem of leadership does not come as a surprise. There are at present four separate channels of leadership in the European Union. First, formal leadership of the EU is of course in the hands of the Presidency, which rotates on a six-months basis between all Member States. This system has been criticised as being ineffective and lacking of strategic continuity as every half-year the priorities in the agenda may change depending on which state holds the Presidency. Second, the European Council exercises also an important leadership function as the conclusions of the Council are important political documents signalling the future direction of the Union. Third, the Commission can also

²⁴ *Ibid.*, pp.27-8.

²⁵ Moravcsik, Andrew, *Op.Cit.*, p.8.

²⁶ The committees under the comitology system are forums for discussion, which consist of representatives from Member States and are chaired by the Commission. They enable the Commission to establish a dialogue with national administrations before adopting or implementing measures. The Commission is to ensure that they reflect as far as possible the situation in each country in question.

been seen as a leader in the European integration as the power to initiate legislation lays solely within this institution. Lastly, as if confirming the earlier point regarding confusion in the Union's institutions, it is possible to argue that the ultimate strategic leadership does not lay anywhere within the EU institutions but rather seems to be in the hands of large Member States, notably France and Germany, as up until present days all major political initiatives have been promoted and endorsed by these two countries. Having thus pointed out the dominance of technocrats in decision-making on the one hand, and various paths of leadership on the other, it seems to come as no surprise that the EU is claimed to lack democratic transparency and legitimacy.

2.1.3. Structural Features

Democratic deficit can also refer to the decision-making mechanisms and to their control and accountability,²⁷ especially as the Community law holds supremacy²⁸ over national legislation. The supremacy is considered absolute²⁹. Currently, decisions in the European Union are taken by a complex and varying set of actors, comprising institutions with legislative and executive powers, institutions of symbolic value and/or with 'advisory' powers, and policy networks combining the Commission and various collective actors such as governments, regional authorities, and different lobbyists. Procedures and rules of decision-making in and between these institutions and arrangements vary widely: there is simple majority (in the Parliament), qualified majority (in the Council and in the Parliament whenever it disagrees with the Council), and unanimity (in the Council).³⁰ In general, the qualified majority system privileges

²⁷ The European Court of Justice has formulated three fundamental principles: (1) direct effect – meaning that the Community laws directly create situations appropriate to citizens or legal persons, and do not need to be complemented by the national legislation of each country, (2) the supremacy of Community law over national legislation of any kind, and (3) autonomy, insofar as it is created and applied by the Community institutions.

²⁸ Some textbooks talk about the primacy of Community law. The two terms have an identical meaning. The term 'primacy' seems to derive from the French *primauté*, whereas the English language usually uses 'supremacy'.

²⁹ The judgment in *Simmenthal* renders clear that 'even the most minor piece of Community legislation ranks above the most cherished constitutional norm' (Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629).

³⁰ Abromeit, Heidrun, *Op.Cit.*, p.95.

larger states. It was imposed in order to safeguard their ability to block decisions in an enlarged Union.³¹

The law-making in the Union is a rather complicated, sometimes cumbersome, and often a long bargaining process. Both the Parliament and the Council have two readings of the Commission's proposal, who also acts as a negotiator between both. The whole process is therefore a triangular game, which is facilitated and actually characterised by a wide range of informal meetings between the institutions, using package deals and other tactics to actually reach compromises. Blocking, amending or checking are normal tactics.³²

What is more, some have pointed out that the problem of democratic deficit will not be solved for as long as national parliaments remain rather weak in the decision-making system. It is often argued that as long as the European Parliament remains distant to the citizens of Europe and as it does not even consist of coherent European-wide political parties the solution in the democratic deficit would therefore be in the strengthening of powers and capabilities of national parliaments, and not necessarily the European one.

2.1.4. No European *Demos*

The fourth, and as this thesis supports, arguably most significant cause to the democratic deficit lies in the often-heard claims of 'no European *demos*'. According to this view, it is possible to have democracy only if it is based on a collective entity with a collective identity. Because the EU is composed of different nations and cultures, no public opinion can emerge.³³ In the *Brunner*³⁴ judgment, the Court held that peoplehood required by democracy must be understood in a strictly national way, as a group that is

³¹ Eriksen, Erik Oddvar, "The EU and the Right to Self-Government" in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, p.37.

³² Dann, Philipp: "Looking Through the Federal Lens: The Semi-Parliamentary Democracy of the EU", Jean Monnet Working Paper 5/02, p.37, <http://www.jeanmonnetprogram.org/papers/02/020501.pdf>.

³³ It is possible to identify another source of the democratic deficit, which is also closely linked to the 'no demos' thesis, this being namely that as there is no single people, no real public opinion; the EU suffers also from a deficit of common goals, or purpose. Clearly the EU has evolved past its original economic purpose, but as to its current function, there exists no consensus, and therefore we can identify a deficit also in this respect. See e.g. JHH Weiler.

³⁴ *Manfred Brunner v European Union Treaty* Oct 12, 1993, [1994] CMLRep, 57.

“spiritually, socially and politically”³⁵ homogenous and to that extent different from others. This decision has been later criticised. One could question this view as being simplified and neglecting the fact that an individual can at the same time hold multiple identities. A person can at the same time identify itself as being for example Swedish, Scandinavian, and European, depending on the context and issue in question. Moreover, together with the establishment of common currency and the free movement of people it is possible to argue that a true ‘European citizenship’ has been emerging in recent years. Quite clearly therefore, the EU cannot rest on nation-building as understood by the *Brunner* judgment. Since the EU aims at establishing ‘an ever closer union among the peoples of Europe’, the *demos* is to be interpreted in a non-national, non-ethnic manner.

Nevertheless, even if citizens may feel as ‘Europeans’ there often exists a gap between the views of political elites and their electorates, as exemplified by the Danish ‘no’ to the Treaty of Maastricht or the more recent Irish ‘no’ to the Treaty of Nice. The EU institutions suffer from a distinct remoteness from Europe’s peoples. As result, the citizens have a difficulty in identifying who governs in the Union as they cannot exercise their own prerogative to dismiss them at elections, like they can do in national democracies. Besides, the lack of strong European political parties and a Europe-wide media hinders the development of a European common identity.

There is a debate about the desirability and feasibility of a European identity which may be necessary if the EU is to enhance its identity and become a genuine political realm. Because of the challenge of scale, democracy and solidarity in the contemporary world may need to be redefined in a larger political space than the nation state.³⁶ In many ways, the question of a European *demos* can be seen as the most relevant when discussing democracy, and as such a more careful consideration of this issue will be undertaken in Part IV of the thesis when we discuss the application of democratic theory into an entity other than a sovereign state.

2.2. Denying the Democratic Deficit

Of course the existence of the democratic deficit has also been questioned. Nicholas Moussis, for one, criticises that the “rhetoric about the so-called democratic deficit” is

³⁵ *Ibid.*, paragraph 44.

³⁶ See Held, David, *Models of Democracy*, Second edition, Polity Press, Cambridge and Oxford, 1998.

not correct anymore. He argues that the democratic deficit claims neglect the fact that as most modern democratic systems are representative democracies, so is also the case with the European Union. The European citizens have practically the same influence on the shaping of European law as they have on the shaping of national law. They indirectly influence it through the choice of the political parties, which make up the national governments and which are consequently involved in any European decision adopted by the Council of Ministers. In addition, citizens have a direct say in the elections of the European Parliament. According to Moussis, in the European Union, where most decisions are taken jointly by the Council, representing the democratically elected governments of the Union, and by the European Parliament, representing directly the citizens of the Union, it is not appropriate to talk about a democratic deficit.³⁷ Also Andrew Moravcsik argues that there is no democratic deficit in the Union. He maintains that constitutional checks and balances, indirect democratic control via national governments, and the increasing powers of the European Parliament are sufficient to assure that the EU policy-making is, in nearly all cases, clean, transparent, effective, and politically responsive to the demands of European citizens.³⁸

However, based on the previous discussion it seems to be largely insufficient to claim that there exists no democratic deficit. Even if the citizens indirectly influence the developments in the EU by selecting politicians at the national level, this indirect power is not enough as the citizens cannot directly see how to influence the decision-making in the European Union more specifically. There is no denying that the institutional design of the Union is complex, favouring expert knowledge over politicians, that the structural features are often too complicated and that the decision-making lacks transparency. As a response to those who deny the existence of democratic deficit largely on the basis that democracy on a national level suffices, we can point out that as the EU's decisions have an impact on more people at the same time, they should be controlled perhaps even more stringently than decisions taken at national level. Or at any rate, the Union should have a similar level of scrutiny than at national level. Moreover, since democratic control needs to enter the EU on different levels, there is a need for increased coordination amongst these levels, which

³⁷ Moussis, Nicholas, *Access to European Union – Law, Economics, Politics*, 12th edition, European Study Service, Rixensart, Belgium, 2003, p.169.

³⁸ Moravcsik, Andrew, *Op.Cit.*, p.3.

(on the realisation that such coordination always comes at the cost of efficiency) requires each level to start out with a level of control that would seem higher than normally applied in national contexts; absolutely not lower, as those denying the democratic deficit would suggest. As we have now established that the democratic deficit indeed exists and as it can be said to have various origins we will now move on to discuss how to actually address it.

2.3. How to Address the Democratic Deficit?

According to Brigid Laffan, democracy in the European Union cannot be seen as distinct from democracy in the Member States. If the Union is to transform itself from a system of democratic states into a democratic system of governance, it must first crucially remain a system of democratic states. This seems clear. For governments, individuals and interest groups, democratic participation, channels of influence, identity and rights may begin within their national polities but they do not end there; there is now a wider European arena. Concrete remedies for the democratic deficit include institutional and procedural reform, embedding fundamental values, identity-building, as well as constitutionalism. We shall now discuss more in detail the positive values of constitutionalism.

The advantages of creating a constitution for EU are multiple. A written constitution will contribute to transparency, establishment of common values and identity-building. It will establish a clear framework for the Union. The Constitution, once in force, will replace all existing treaties and include all relevant provisions in one single document. Currently, over 700 articles form a complex and to an extent disjointed whole, including both fundamental principles and institutional and more technical provisions. The European Commission has stated that this construction is “not understandable to the European citizens”.³⁹ The Constitution is a much shorter document than the existing treaties (although it still reaches well over 200 pages!) and hence it is hoped to have the merit of being more accessible to the citizens of EU. In other words, the Constitution will set out the institutions and procedures of the Union in

³⁹ Commission of the European Communities, “A Basic Treaty for the European Union”, COM(2000) 434 final, July 12, 2000, 2-3, cited in Devuyst, Youri, *The European Union at the Crossroads, The EU's Institutional Evolution from the Schuman Plan to the European Convention*, Second edition, PIE Peter Lang, Brussels, 2003, p.32.

a clear and transparent manner. In the Constitution, rights will be specified with regard to the explicit duties of the power-wielding bodies, i.e. legislative, adjudicative and executive power bodies. In addition, the Constitution will include and hence legalise the Charter of Fundamental Rights. As such, it will contribute to the identity-building and embedding of fundamental values in the Union. As the Constitution will have to receive the formal consent of the electorate it will consequently enhance the legitimacy of the Union.

Some have pointed out that the EU can already be understood as having a constitution. Even if not in a formal meaning, the European Communities have a Constitution in a legal sense⁴⁰; however, this is not recognised by the Member States and the Treaties are not formulated as such. Further, it has been suggested that even before starting of the Laeken process the EU already had a material constitution⁴¹, while it lacked a constitution in the formal and democratic sense.

The EU has however been in need of a proper constitution. This is because of its actual power and the actual effects it has on the European people, the goals and competences of the Union on the one hand, but also the rights and duties of the citizens on the other hand, need to be spelled out through a basic binding text. Constitutionalisation is commonly depicted as “a process whereby the European treaties evolved from a set of legal arrangements binding on sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons, public and private, within EC territory”.⁴² It has been portrayed as a process of radical transformation of Europe, affecting the very nature and structure of the integration process. In reading the EC treaty as the Community’s ‘constitutional

⁴⁰ The EU is a political entity with far reaching effects on interests and identities, and in a sense it already has a constitution. The Treaties are the constituting elements of the Union, extended for handling deeper and wider integration whenever necessary. The Treaties of Rome of 1957, the Single European Act of 1986, the Treaty on the European Union (the Treaty of Maastricht) of 1991, the Treaty of Amsterdam of 1997, the Treaty of Nice of 2000 and the Charter of Fundamental Rights of the EU solemnly proclaimed at the Nice IGC meeting, may be seen as the constituting parts of the EU. See, for example, Menéndez, Agustín José, “Three Conceptions of the European Constitution” in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, pp.116-7. See also Verhoeven, Amaryllis, *Op.Cit.*

⁴¹ A material constitution refers to those social practices that are actually regarded as the basic norms of a given society. See e.g. Habermas, Menendez, Möllers.

⁴² Stone Sweet, A., “Constitutional Dialogues in the European Community”, in Slaughter A-M, Stone Sweet A, and Weiler JHH, *The European Courts and National Courts. Doctrine and Jurisprudence*, Hart Publishing, Oxford, 1997, p.306.

charter⁴³ the Court could have caused a rupture between European law and its international law origins, steering into the direction of a federal state. However, today it is hoped that a proper Constitution will specify the responsibilities between the vertical and horizontal institutions and levels, between the decision-making bodies of the EU as well as between the Member States and the Union.⁴⁴

In short, European integration is a political project, based on democracy. A Constitution will not only affirm this orientation, its existence will allow European citizens to practice their democratic rights.⁴⁵ If the European Union is to remain legitimate in the eyes of its citizens, legitimacy for policy-making rules derives from collective reflection, deliberation and evaluation with reference to some valid norms. These norms can be best made explicit in a form of a written constitution. As Pier Virgilio Dastoli writes, a democratic constitution is above all the founding act that sets down the principles and values according to which its citizens tend to associate, live together and constitute a society. It is the translation into legal terms of a social contract: as a written act, the constitution makes public the values that it embodies and the organisational rules that it determines, and offers citizens the instruments with which to compare the acts of public authorities with these values and rules and, when necessary, demand their respect. Hence, a constitution is the “manifestation, set down in a legal text, of the democratic quality of a society, of every human society”.⁴⁶



⁴³ Case 294/83, *Les Verts v Parliament* [1986], ECR, 1339, para 23.

⁴⁴ Eriksen, Erik Oddvar, “Democratic or Technocratic Governance?”, Jean Monnet Working Paper No. 6/01, A Critical Appraisal of the Commission White Paper on Governance, <http://www.jeanmonnetprogram.org/papers/01/011201.rtf>.

⁴⁵ Collignon, Stefan, *The European Republic, Reflections on the Political Economy of a Future Constitution*, The Federal Trust, London, 2003, p.30.

⁴⁶ Dastoli, Pier Virgilio, “An EU Constitution and Federalism after Nice: a New Chance or Requiem for a Myth?” in *The International Spectator*, vol 36, no 1, January-March 2001.

3. CONSTITUTION: PROCESS AND OUTCOME

3.1. Preparatory phase: *Convention on the Future of Europe*

The above-outlined problems with regard democracy in the European Union and the hoped solution that a constitution could bring where the main reasons why the European Council in Laeken in 2001 convened the European Convention on the Future of Europe. The Convention was to consider the key issues arising for EU's future development. These included the delimitation of powers within the Union including the formal institutional changes and procedures, the principle of subsidiarity, and the status of the Charter of Fundamental Rights.⁴⁷ The key objective of the Convention was to produce a simplified constitutional treaty, which should help to render the EU more understandable for its citizens, and to establish more clearly the responsibilities of those involved in the decision-making process. Currently, the European Union is governed by several treaties that have been revised over the years of its existence.⁴⁸ The Constitution for Europe, once adopted, will mean the abandonment of the earlier Treaties and the attribution of legal personality to the Union.

The Treaty Establishing a Constitution for Europe has three parts. Part I contains the definition and the objectives of the European Union, the fundamental rights and citizenship, competences, institutions, finances, EU's relations with the neighbours and its membership, as well as provisions on the democratic life of the Union. Part II consists of the Charter of Fundamental Rights. Part III defines the policies and functioning of the Union, including clauses of general application, non-discrimination, internal policies and action, external relations and action, functioning of the Union, and some common provisions.

The novel form of Convention method was inspired by the successful experience with the drafting of the EU Charter of Fundamental Rights in 2001, which had been prepared by a Convention. It was hoped that the Convention method would make the process more democratic and transparent, as it would involve a wide range of

⁴⁷ Wiener, Antje, *Op.Cit.*, pp.25-6.

⁴⁸ The three original Treaties founding the European Communities were the Treaty establishing the European Community, the Treaty establishing the Atomic Energy Community and the Treaty establishing the European Coal and Steel Community. They were followed by the Single European Act, the Treaty on European Union (Treaty of Maastricht), the Treaty of Amsterdam and the Treaty of Nice, which entered into force on 1 February 2003.

actors and interest groups and encourage deliberation and consensus seeking. However, the Convention was not to replace the traditional Inter-Governmental Conference (IGC) as the IGC was to convene after the work of the Convention for final approval of the draft text.

In the following, we will analyse the composition and work of the Convention to determine whether the drafting process of the Constitution itself was indeed democratic. Here, we can find two theories to be of relevance and of interest: contract theory of democracy on the one hand, and discourse theory of democracy, on the other. Contract theory is the very theoretical basis of democracy. One of the difficulties of democratic theory is how to draw the proper boundaries, and who is to decide upon the matter. A contract theory may give valuable hints at alternative ways of democratising political systems, especially, as alternatives to parliamentarisation.⁴⁹

3.1.1. Composition

It is important to take a look at the composition of the Convention on the future of Europe to see who were the ones in a position to conclude a contract. After all, if the Treaty Establishing a Constitution for Europe is a pact among all future citizens, then all future citizens should be represented at the constitutional convention.

The Convention, which started its work in February 2002, was composed of a representative of the Heads of State or Government of each Member State, two representatives of national parliaments of each Member State, 16 members of the European Parliament and two members of the European Commission. The ten accession countries (who joined EU on 1 May 2004) were represented in a similar way to the Member States. In addition, the Convention was observed by three members from the Economic and Social Committee, two representatives from the European social partners, six representatives from the Committee of the Regions and the European Ombudsman. The Convention was chaired by former French President Valéry Giscard d'Estaing together with two vice-chairmen.

With regards the representation of states, a basic principle of equality was followed, both regarding the state's relative territorial size and population. Also the ten

⁴⁹ Eriksen, Erik Oddvar. "The EU and the Right to Self-Government" in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, p.45.

accession countries were included. They were able to take part in the proceedings without however being able to prevent any consensus that might emerge among the Member States. The states were represented through representatives from both their government and parliament. This composition reflects the compromise between those who originally wanted a purely parliamentary body (France) and those who wanted the inclusion of national governments (Germany and the United Kingdom).⁵⁰

In overall, the composition of the Convention followed the innovative example set by the Convention set up to draft the EU Charter of Fundamental Rights⁵¹. It was a body composed of both legislative and executive representatives, at both national and European level. The involvement of national parliaments in the process is of particular importance in view of their repeated calls for a greater role in the EU's legislative process. The Convention opened new ways of participation of national parliaments in the Union, and so helped to overcome the democratic deficit to an extent. From a citizen's point of view, their participation in the drafting of the Constitution increased the legitimacy of the text.

What is perhaps worth noting is that despite the equal representation of states, the Convention was poorly represented in terms of minorities or women. Of the 104 members, only 17 were women. Virtually no minorities were present. Jo Shaw⁵² has marked that these absences contradict the very constitutional objective of protecting minorities against the tyranny of the majority and ensuring that vulnerable groups receive enforceable protection.⁵³ As no minorities were present, it was uncertain that their needs and views were sufficiently taken into account.

⁵⁰ Closa, Carlos, "The Convention Method and the Transformation of EU Constitutional Politics" in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, p.189.

⁵¹ The Convention, which was set up by the Cologne European Council to draw up the draft Charter of Fundamental Rights, was made up of 15 representatives of the Heads of State or Government, 30 representatives of the national parliaments, 16 representatives of the European Parliament, and one representative of the Commission.

⁵² For a thorough analysis of the working of the Convention see Shaw, Jo, "What's in a Convention? Process and Substance in the Project of European Constitution-Building" in Shaw, Jo, Magnette, Paul, Hoffmann, Lars, Vergés Bausili, Anna (eds), *The Convention on the Future of Europe, Working towards an EU Constitution*, The Federal Trust Series, Future of European Parliamentary Democracy 6, London, 2003.

⁵³ Miguel Poiáres Maduro talks about "the fear of the few and the fear of the many" when discussing on how to find a balance between the democratic will of the majority and the rights of the minority in the context of constitutionalism. See Maduro, MP, "Europe and the Constitution: What if this is

In contrast to the previous treaty reforms, the European Parliament was very well represented in the Convention. However, representatives of states outweighed representation of EU institutions by four to one. The large number of national representatives was to safeguard national interest in the negotiations. Yet, the EU institutions were said to benefit for the kind of 'community skills' required for operating within the Community setting. Representatives from the EU know each other, and they are used to working within an environment resembling the Convention. According to Carlos Closa, the representatives of EU institutions were generally more skilful to impose EU interest over a tight style of defence of national interests.⁵⁴ The European Parliament and the Commission held internal meetings of the issues tackled in the Convention, which of course produced their representatives strong arguments and documents to be used in the negotiations.⁵⁵ In this sense, we see that both national and Union interest were in a position to successfully defend their stances.

With regard the Praesidium of the Convention, it has been criticised of sometimes holding a too decisive role. The strongest critique was directed at the Chairman. President Valéry Giscard d'Estaing had tried to present himself as a neutral actor. He had refused to give his personal opinions on the issues discussed by the members, arguing that he did not want to prevent them from making up their own minds. Nonetheless, in summarising the workings and conclusions of the sessions he could privilege certain issues and hence orient the subsequent debates. This is the reason why his role as a Chairman was often criticised. The critics feared that the Chairman was manipulating the Convention, acting in the interests of the European Council that had nominated him, and particularly France and other larger states. In short, the autonomy of the Convention from external pressures was feared to be violated.⁵⁶

as good as it gets?" in Weiler, JHH, and Wind, Marlene (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press, Cambridge, 2003, pp.74-102.

⁵⁴ Closa, Carlos, "The Convention Method and the Transformation of EU Constitutional Politics" in Eriksen, EO *et al. Op.Cit.*, p.191.

⁵⁵ *Ibid.*

⁵⁶ Magnette, Paul, "Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe" in Eriksen, EO, Fossum, JE and Menéndez, AJ (eds.) *Developing a Constitution for Europe*, Routledge Studies on Democratizing Europe, Routledge, London, 2004, p.215.

3.1.2. Working Methods

The deliberative, procedural or discourse theory of democracy sees democracy essentially as a process of institutionalised public deliberation on matters of common concern. According to this theory, a common action norm is legitimate only when it has been accepted in a free, open, inclusive and rational debate, that is, where all affected parties can be effectively heard⁵⁷. Public discourse and deliberation are generally considered essential for rational and reasonable decision-making. From a normative point of view, deliberative democracy is thought of being superior to bargaining. Rational and sensible decisions are not to be arrived at in bargaining processes between interested parties but only in public debate between open-minded individuals capable of yielding to the force of the better argument.

In deliberative democracy participation is based on equality and symmetry. All are given equal chances to speak, question and interrogate. Everyone has the right to question the assigned topics of conversation, as well the very rules of the discourse procedure and the way in which they are applied and carried out. Accordingly, in discourse theory, the validity of norms draws from the assurance that, if the discourse rules are followed, everyone can decide freely and equally about what she/he is willing to accept.

In deliberative democracy, in theory at least, all actors should be satisfied with the end result, because those who lost at least have the satisfaction of being heard, and they also know why in the end they did not win⁵⁸. In other words, decisions are not to be seen as the product of numerical co-incidence of votes among equal citizens, but of a process of will-formation geared towards the formulation of common good producing, ideally, a change of minds which ensures an internal acceptance of norms. So the end-goal of deliberation, like Amaryllis Verhoeven writes, is "not just to find the most rational norms but to have those solutions accepted by anyone called to abide by them".⁵⁹ However in reality, ideal situations of deliberation, where equal actors debate freely and objectively to conclude with a rationally motivated consensus, are rare, if not impossible to attain. In practice popular votes are decided by interested parties, and

⁵⁷ Eriksen, Erik Oddvar, "The EU and the Right to Self-Government" in Eriksen *et al. Op.Cit.*, p.45.

⁵⁸ Magnette, Paul, "Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe" in Eriksen *et al. Op.Cit.*, p.208.

⁵⁹ Verhoeven, Amaryllis, *Op.Cit.*, p.42.

secondly, they are reproached for lacking the decisive deliberative element as in general, people only decide for or against something, yes or no.⁶⁰

Yet, some features of the Convention have been noted to favour a deliberative approach. Paul Maignette suggests that the creation of the Convention itself, and the way its members have defined the rules governing their work, can be understood in deliberative terms. According to him, most members wanted to promote deliberative styles of negotiation in order to overcome the classic means of bargaining.⁶¹ They adopted attitudes that did not violate the principles of rationality and impartiality. They avoided strategic and passionate language. Threats were not used openly; rather, they were combined as warnings and empiricist arguments.

One reason for a more deliberative approach can be the absence of stable and rigid groups in the Convention. In fact, the members were torn between three sets of interests: they represented their national states, the institution by which they were nominated (national or European parliament, government, Commission), and they also shared the views of the political parties they came from, although some representatives included also allegedly non-political actors, such as academics. Thus the Convention did not witness the formulation of very strong groups. The Chairman also pleaded that a rigid forming of identities should be avoided. Instead, members were invited to come across with also their personal views. This is what Giscard called the true "Convention spirit".

Perhaps the deliberative method was more likely to succeed since the members did not forget that they were just a preparatory body, and that the governments in the next Inter-Governmental Conference would anyways renegotiate their compromises. As a result the Convention lacked very strong threats and bargaining-making. Contrary to the IGC, the Convention took place in a more relaxed context, and as such it was protected from the pressure of force and passionate opinions which make rational argumentation difficult, or even impossible. The debates were more open and fluid than those of an Inter-Governmental Conference. Also, the existence of more discrete forums (Presidium, working groups, components, *ad hoc* meeting) provided opportunities for compromise, though it should be noted that also the Inter-

⁶⁰ Abromeit, Heidrun, *Op.Cit.*, p.141.

⁶¹ Maignette, Paul, "Deliberation or Bargaining? Coping with Constitutional Conflicts in the Convention on the Future of Europe" in Eriksen *et al. Op.Cit.*, p.208.

Governmental Conference uses many informal means of communication. But as Paul Magnette has written, we agree that a deliberative approach was possible in the Convention, if not certain.⁶²

Despite the very open form in which the Convention was presented to the larger public (for example, all *travaux préparatoires* being available for consultation on the official Convention website⁶³, there are also several shortcomings in the process, especially as the context of long-standing consolidated democracies in Europe impose automatically very high standards. Firstly, the Convention lacked a direct mandate and was thus backed up by indirect or derived legitimacy. This point can hardly be underestimated as in the end it implies that it was states, not citizens, who decided to begin the process of constitution writing. Secondly, the preparatory function of the Convention for the upcoming Inter-Governmental Conference means that ultimately, the Convention could not get around the decisive power of the IGC. Third point refers to the already noted lack of representation in terms of minorities. Fourth, there are also many procedural inadequacies in the Convention. It did not nominate its main organs, the President and Vice-President, rather, these were appointed by the European Council. Further, the fact that the internal proceedings of the Praesidium were held in secret has been subject to criticism. Also some of the proceedings of the Working Groups were not conducted publicly.

Taking into account the listed weaknesses of the Convention, how are we to evaluate the whole process of drafting a Constitution for Europe then? It seems that in general, the Convention tried to act as openly as possible. The civil society was invited to come forward with their views throughout the process. The fact that the Convention proceedings were available for anyone to consult on the Convention website added immensely to its transparent and accountable character. Therefore we can shortly conclude that despite its vague original mandate, the Convention itself did work in a democratic manner, this of course being crucial if it is to produce a document aimed at increasing the democratic accountability of the Union.

⁶² *Ibid.*, p.11.

⁶³ The official website of the Convention on the Future of Europe is <http://european-convention.eu.int>. The EU has set up also another website, in which the most latest developments regarding the Constitution can be found. The address is <http://europa.eu.int/futurum>.

Having now examined the preparatory phase of writing the Constitution, we shall now move on to analyse the actual text itself.

3.2. Treaty Establishing a Constitution for Europe

The main objectives of the Constitution are to define the EU's fundamental aims, functions and principles. It establishes the division of powers, responsibilities, and competencies among the national authorities and the European institutions. Moreover, the inclusion of fundamental rights provides constitutional legitimacy and normative commitment to human rights values. As such, the existence of a Constitution is hoped to improve the transparency and comprehensibility of the functioning of the European Union. It is hoped that this simplification and reorganisation of Treaties, decision-making procedures and role of institutions all contribute to the enhanced legitimacy of the Union.

How does the proposed Constitution then compare to current treaties, practice and case law? In this section we will examine how the Constitution ameliorates the realisation of democracy in the EU. We will discuss the role of the Charter of Fundamental Rights in the Constitution. We will examine whether the text clarifies the function of each institution, namely the European Parliament, the Commission, the Council of Ministers, and the European Council. We will also consider whether the decision-making procedures have been 'democratised' and see which role is given to the national parliaments and judiciary in the new constitutive order. In overall, we seek to determine how successfully the text addresses the problem of the democratic deficit.

3.2.1. Democratic Values?

A constitution can be thought of as a "social contract joining the citizens of the state and defining the state itself".⁶⁴ Although the European Union is not a state, the Constitution specifies the relationship between its citizens and institutions by reading out the rights and duties of the parties. In essence, a constitution is a set of ground rules for policy-making. According to Dusan Sidjanski, a constitution is written according to the basic principles of democracy and civil liberty. They form the foundation for a social model

⁶⁴ Mueller, Dennis, C, *Constitutional Democracy*, Oxford University Press, Oxford, 1996, p.61.

that rests on a broad consensus and gives substance to the European identity.⁶⁵ The rules set out by a Constitution must be practical and legitimate. As signing a contract, in this case a social contract, is a voluntary act, it must have the acceptance of all affected parties, meaning that it must be accepted by unanimity. In short, the Constitution, once adopted, is hoped to provide the European polity with the democratic legitimacy and accountability that has so far been lacking. The European Constitution seeks to do this expressly by including the Charter of Fundamental Rights as well as whole new section, titled "The Democratic Life of the Union" in the document.

3.2.1.1. The Charter of Fundamental Rights of the Union

The Charter of Fundamental Rights of the Union is included in Part II of the Constitution. In a way it can be seen to represent a classical constitutional model of a bill of rights situated at the heart of a written constitution. The protection of fundamental rights is one of the most well-known characteristics of Western liberal democracy,⁶⁶ something that the EU cannot easily afford to disregard. Consequently, it has been argued that if the Union is to comply with standards of democracy, it first of all has to institutionalise the political rights of the citizens.⁶⁷ As the EU wants to profile itself as a global defender of human rights, it is very difficult to do so if it itself lacks a fully-fledged human rights policy. The purpose of the Charter, which was drafted before the Constitution⁶⁸, is to remedy this deficiency. As stated by the Cologne European Council in 1999, the "protection of fundamental rights is a founding principle of the Union and an indispensable requisite for her legitimacy".

The Charter holds (1) legal, (2) political and (3) symbolic significance. First, it enhances the legal certainty of European citizens as everybody can claim protection for the same interests and concerns. It strengthens consistent rights

⁶⁵ Sidjanski, Dusan, *The Federal Future of Europe – From the European Community to the European Union*, The University of Michigan Press, Michigan, 4th edition, 2003, p.411.

⁶⁶ For example, Article 16 Déclaration des Droits de l'homme et du citoyen du 26 août 1789 states: "Toute Société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution".

⁶⁷ Eriksen, Erik Oddvar, "Democratic or Technocratic Governance?", Jean Monnet Working Paper No.6/01, A Critical Appraisal of the Commission White Paper on Governance, <http://www.jeanmonnetprogram.org/papers/01/011201.rtf>.

⁶⁸ The Charter is included in the Constitution in its original form. The Convention on the Future of Europe updated the explanations to the Charter, which are now binding (by a new reference in the horizontal clauses of the Charter).

enforcement in the Union, which before has been variable in terms of implementation and levels of enforcement between Member States.⁶⁹ Many articles correspond exactly to those of the European Convention of Human Rights, and in some areas, the Charter offers wider protection. The scope of the Charter is determined by Article II-51 which states that the text applies to the “institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity”. Regarding the Member States, as has been established by the case law of the of the European Court of Justice⁷⁰, the requirement to respect fundamental rights defined in a Union context is only binding on the them when they are implementing Union law. In overall therefore, the Charter should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

However, as the Charter contains also provisions that are rather vague in wording, the meaning of the Charter is also, and perhaps first and foremost, highly political. When deciding to draw up the text in June 1999 the conclusions of the Cologne European Council stated: “There appears to be a need, at the present stage of the Union’s development, to establish a Charter of Fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens”. In the broadest political sense, the drafting and proclamation of the Charter both proclaims and concretises a shift in the normative underpinning of the EU as a polity. Although it can be seen that Articles 6⁷¹ and 7⁷² of the Treaty on European Union after the Maastricht

⁶⁹ Moreover, Article I-7 of the Constitution states that the EU will seek accession to the European Convention of Human Rights, which will further strengthen protection of human rights in the Union.

⁷⁰ In *Solange I* (in 1974) the German *Bundesverfassungsgericht* called upon the German courts to review whether Community action met the human rights standards set forth in the German constitution. It deemed such review necessary ‘as long as the integration process of the Community has not advanced to the point that Community law also contains a valid and formulated catalogue of basic rights ... equivalent to the catalogue of basic rights of the Basic Law’. (*BverfGE* 37, 271 (1971)). In *Solange II*, it withdrew the threat of review arguing that, in light of the Court of Justice’s case law in *Simmenthal*, the protection of fundamental rights at the European level had achieved a degree comparable to the standards set forth by the German Constitution (*BverfGE* 1986, CML Rep 225 (1987)).

⁷¹ Article 6(1) TEU states that the EU “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. These values can be considered foundational in the sense that they are the foundation on which the other principles and objectives of the Union rest. Article 6(2) continues: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

and Amsterdam Treaties already suggested such a change, the drafting and adoption of the Charter arguably represents a qualitative leap forward in this respect.⁷³

Third, the Charter carries also an important symbolic meaning. Gráinne de Búrca argues that the potential symbolic significance of the Charter in articulating and crystallising a new normative basis and a new ethic for the EU is relevant on a number of levels. On the wider symbolic level, it can be seen to herald a reorientation of the historic mission of the Community, so that the creation of the single market is no longer the dominant constitutional core of the EU but stands alongside a commitment to a range of fundamental values which go beyond economic goals. As Florence Benoît-Rohmer suggests, the Charter reinforces the legitimacy of the Union and contributes to the construction of a European identity founded on the fundamental community values.⁷⁴ The broad symbolic power of the Charter in marking a reorientation of the Community ethic is enhanced by the formal constitutionalisation of the Charter through its integration in the Constitution. In effect, the Charter can therefore be read as one of the most explicit statements on the EU's commitment to direct legitimacy. The institutions and the rights provided to the citizens by the Union shall, in themselves, provide the necessary basis for legitimate governance.⁷⁵ Some have even proclaimed that it documents to the fact that the EU is a full-blown and grown polity.

But the Charter is not without its critics. The distinction between 'rights' and 'principles' has been questioned on the basis that principles are too vague to be included in the Charter in the first place, and also that the EU does not have competence on all areas. Furthermore, some have even doubted whether the Charter really is necessary since Europeans already have rights entrenched and protected at the national and supranational levels.

To respond to these claims, Article II-52 outlines the difference between rights and principles, according to which "principles may be implemented by legislative

⁷² Article 7 TEU allows the European Council to determine the existence of a serious and persistent violation of fundamental rights by a Member State. On that basis, it may suspend some of the rights of that Member State (for example, its voting rights within the Council). The Treaty of Nice supplements this procedure with a prevention mechanism.

⁷³ De Búrca, Gráinne, *Op.Cit.*

⁷⁴ For a discussion on the Charter of Fundamental Rights of the Union, see Benoît-Rohmer, Florence, "La Charte des droits fondamentaux de l'Union européenne" in *Le Dalloz*, No 19, 2001, pp.1483-1992.

⁷⁵ *Ibid.*

and executive acts taken by institutions and bodies of the Union and by acts of Member States when they are implementing Union law". Accordingly, the explanation to this Article reads that they become significant for the courts only when such acts are interpreted or reviewed. Nevertheless they do not give rise to direct claims for positive action by the Union's institutions or Member State authorities. Moreover, to defend the purpose of the Charter, the significance of it to precisely the European Union is of utmost importance. With it, the judicial enforcement of fundamental rights in the Union is given a more stable foundation. The Charter also increases the visibility of human rights protection and underscores the political dimension of the European integration process.⁷⁶ Moreover, and on a more general note, it is not inconsistent for a (national or supranational) legal order to have its own bill of rights while simultaneously adhering to an international protection standard such as the European Convention on Human Rights⁷⁷.

3.2.1.2. *The Democratic Life of the Union*

Apart from the Charter of Fundamental Rights, which in its preamble states that the Union "is based on the principles of democracy and the rule of law", the Constitution includes in Part I also a separate section under title "The Democratic Life of the Union". Under this heading, the text has four new articles that cannot be found from the current existing treaties. These articles tackle the principles of democratic equality (Article I-44), of representative and participatory democracy (Articles I-45 and I-46) and "social partners and autonomous social dialogue" (Article I-47). These Articles can be seen as welcomed as they confirm democracy as a principle by which the EU is founded, although it is clear that Article 6 TEU has already been used by the Court of Justice to determine the scope of the rights and obligations under EU law.⁷⁸ As many have raised concerns about the executive being left somehow uncontrolled in the EU, article I-45 brings 'democratic reassurance' by stating the general principles of democratic control

⁷⁶ Lenaerts, Koen and De Smijter, Eddy, "A 'Bill of Rights' for the European Union", *Common Market Law Review*, (2001), p.279.

⁷⁷ *Ibid.*, p.292.

⁷⁸ In *Roquette*, the Court referred for the first time to 'the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'. See Case 138/79, *Roquette Frères v Council* [1980] ECR 3333, paragraph 33 and Case 139/79 *Maizena v Council* [1980] ECR 3393, paragraph 34.

of executive action by European institutions. Article I-46 is in effect at the heart of the Laeken mandate aiming to find measures to increase democracy, transparency and efficiency of the Union.⁷⁹ Article I-47 remains ambiguous as it not clear what is meant by “it shall facilitate dialogue between the social partners, respecting their autonomy”.

3.2.2. Democratic Institutions?

In general, the Constitution can be said to democratise the European institutions as it lays down more clearly the competences and limits of each institutions. However, it does not radically alter the power relations between the institutions by granting any institution significant new powers. The main changes include the creation of a European Council President and the Union Foreign Minister. Also the composition of Commission and the Parliament have been altered to accommodate the 10 new Member States within the Union.

3.2.2.1. European Parliament

As was outlined in Part I, the powers of the European Parliament have been seen as mainly reactive, although it has over the years gradually increased its powers. The European Parliament has been in favour of creating a Constitution for Europe⁸⁰ but as such, the Constitution does not grant any significant new powers to it.

According to Article I-19, “the European Parliament shall elect the President of the European Commission”. When tracing the origins for the democratic deficit earlier in this thesis, we wrote that one factor contributing to the democratic deficit is what Philipp Dann calls “a vote without consequences”, this referring to the fact that the European elections do not result in a certain composition of the executive. However, this argument no longer holds completely true. The largest political group in the European Parliament has now claimed the right to have the Commission President

⁷⁹ “Making It Our Own – A trans-European proposal on amending the draft Constitutional Treaty for the European Union” is an independent initiative created by a group of academics and researches on the EU. Their proposal is available at <http://www.pceu.org/forum/index.php?lang=uk>, see comments on Articles I-45 and I-46.

⁸⁰ In the past, the European Parliament has made efforts to come up with a written constitution, but these efforts failed and have been of a marginal influence only. One will recall, in particular, the Draft Treaty on European Union, approved on 14 February 1984 by a vast majority of the European Parliament ([1984] OJ C 77/33-52) and the 1994 Draft Constitution, adopted by the Parliament by a way of resolution on 10 February 1994 ([1994] OJ C 61/156).

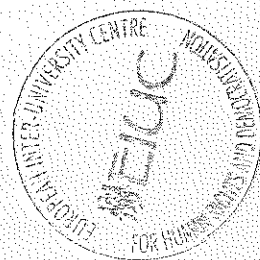
coming from their same political colour, and therefore at least to an extent it is possible to argue that things have started to evolve in this regard.

Although⁸¹ not a new measure, it is worth noting that the European Parliament holds the power to censure the activities of the Commission. Article III-243 of the Constitution reads that "if the motion of censure is carried by a two-thirds majority of the votes cast ... the Commission shall resign". In comparison with the position of national parliaments vis-à-vis national governments, the European Parliament is therefore a more independent institution. In most Member States, the parliament's ability to remove the government from power is counterbalanced by the executive's power to dissolve the assembly. Thus, by dismissing the government the parliamentarians might provoke early parliamentary elections, therefore jeopardising their own seats. As Youri Devuyst has pointed out, this constitutional balance remains absent in the EU, giving the members of the European Parliament freedom to criticise the Commission without fear for any personal consequences.⁸¹

Taking into account the future enlargements of the Union, the size of the European Parliament shall not exceed 750 members (Article I-19(2)). Representation of European citizens shall be degressively proportional, with a minimum threshold of six seats per Member State and a maximum of 96 seats. Acting on the initiative of the Parliament, the European Council shall adopt by unanimity a European decision establishing the composition of the European Parliament.

On the whole, we see that the Constitution does not significantly alter the function or the institutional structure of the Parliament. What perhaps remains as one of the biggest legitimacy problems with regard to the Parliament is that the Constitution does not allow for the creation of European-wide political parties, even if Article I-45(4) recognises that "political parties at European level contribute to forming European political awareness and to expressing the will of the citizens". Nevertheless, we shall emphasise that as more decisions will be taken under the co-decision procedure, the European Parliament will be more involved in the Union's decision-making.

⁸¹ Devuyst, Youri, *The European Union at the Crossroads, The EU's Institutional Evolution from the Schuman Plan to the European Convention*, Second edition, PIE Peter Lang, Brussels, 2003, p.77.



3.2.2.2. *European Council*

The Constitution establishes the European Council as an institution, distinct from the Council of Ministers. The European Council does not exercise legislative functions, but it defines the Union's general political directions and priorities. It consists of the Heads of State or Government of the Member States. The Council will meet four times in a year, and the Union Minister for Foreign Affairs will take part in its work.

Article I-21 of the Constitution provides for the creation of a President of the European Council. The President will chair the European Council. He/she will be appointed for a period of two and a half years. The appointment can be renewed once. The system of a six months rotation period among the Member States of the presidency of the different Council formations (with the exception of the External Relations Council) will be maintained, although within a "team presidency" of three countries. This system will be able to evolve in the future since it can be altered by the European Council acting by qualified majority.

Although the President will in practice have rather limited powers only, it is hoped that the creation of the President of the European Council will help to settle the question of leadership, (as tackled in the earlier Part II of this thesis) of "who can one call in Europe in case of emergency" – a often quoted question once posed by Henry Kissinger, the former US Secretary of State. The President may not hold a national mandate, and he/she shall try to facilitate cohesion and consensus within the European Council. It is meant that the President will be a high-profile figurehead which will enhance EU's global standing.

Many big countries – notably Britain, France, Spain and Italy – promoted the idea of a permanent president of the Council, claiming that the current system of rotating presidencies is inefficient. Smaller countries have, however, suspected them of wanting to use the new post to turn the European Commission into a civil service and to run the EU as a *directoire* of big governments. The small Member States believed that a long-term president chosen from among former EU leaders would be dominated by larger states and would also weaken the Commission. Reluctantly, the small countries accepted the idea of a president of the Council. But they have managed to crimp efforts to give him or her a big staff and have defined the job fairly tightly. The end-result, as in many other issues, seems to be a compromise between the two camps.

Even if the appointment of a President would give the EU seemingly more transparency, there is a fear that by strengthening the power of the European Council the institutional balance can be undermined and the intergovernmental practices be increased. Stronger European Council would not help to tackle the problem of a democratic deficit because a considerable amount of the decision-making powers would be offered to a small group. As the Heads of States are not similarly democratically accountable as the Heads of Governments, this can pose a further problem to the guarantee of democratic decision-making. Moreover, the European Council is not accountable to the European Parliament. Even if the European Council has a duty to present a report to the European Parliament after each of its meetings (Article I-21(2)(d)), and the President of the European Parliament may be invited to be heard by it (Article III-244(2)), the position by the Parliament is not binding upon the Council.

3.2.2.3. European Commission

Article I-25(1) of the Constitution recognises the different missions of the Commission. The importance of the Commission can hardly be overestimated as we note its various functions. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Constitution and measures adopted by the Institutions under the Constitution. It shall oversee the application of Union law under the control of the Court of Justice of the European Union, execute the budget and manage programmes as well as exercise coordinating executive and management functions. With the exception of the common foreign and security policy, it shall ensure the Union's external representation.

The Commission will retain the exclusive right to propose legislation. According to Youri Devuyst, the Commission's right to initiate legislation serves two purposes. First, it ensures that the starting point for any legislative proposals is the interest of the Union, not that of individual Member States. Second, it helps to protect the smaller Member States against the dominance of the larger Member States, as they are not able to dominate the agenda, which is often the case for inter-governmental decision-making. However, as Youri Devuyst outlines, the Commission's position as the sole legislative initiator is affected by three developments: the creation of the co-

decision procedure by the Treaty of Maastricht, the expansion of the comitology process, and the establishment of specialised agencies outside the Commission.⁸²

The Constitution introduces many new measures in the Commission. From 2014 onward, the Commission shall consist of its President, the Minister for Foreign Affairs (who serves also as a Vice-President for the Commission) and a number of Commissioners corresponding to two thirds of the number of Member States. The members of the Commission will be chosen according to a system based on equal rotation among the Member States, which will reflect satisfactorily the demographic and geographical range of all Member States, and which had been already decided by the Nice Treaty. Until 2014, every Member State will have one Commissioner.

The composition of the Commission was one of the major issues of debate during the Inter-Governmental Conference. Smaller countries, such as Belgium and the Netherlands, lobbied for a strong Commission as the supranational executive, while the larger states, the UK, France, Spain and Italy, preferred that power should remain with national governments in an efficient and representative Council of Ministers. Although the Commission shall be completely independent in carrying out its responsibilities, and the Commissioners' "independence shall be beyond doubt"⁸³, so that all countries undertake to "respect their independence and shall not seek to influence them in the performance of their tasks"⁸⁴ Member States tend to attach great symbolic significance in having a national Commissioner. The smaller states insisted persistently that it would be essential for each Member State to have voice in the Commission, in order for the Commission to enjoy wide acceptance throughout the Union. These claims were largely rejected on grounds of efficiency. It was argued that a Commission of 25 Commissioners cannot necessarily reach decisions easily and thus the desirability of all Member States having their own Commissioner was questioned. However, the "Trans-European proposal on amending the draft Constitutional Treaty for the European Union" has noted that it could be questioned whether the efficiency of the work of the Commission is dependent on its size. Instead, keeping a Commissioner per each country but at the same time reforming the internal organisation of the Commission could have

⁸² *Ibid.*, pp.50-1.

⁸³ Article I-25(4) of the Constitution.

⁸⁴ Article III-251 of the Constitution.

been a better solution when wanting to safeguard the cohesion and efficiency of the institution. The presence of all Union nationalities would bring the Commission local knowledge and most importantly, legitimacy to its work.⁸⁵

One of the main institutional innovations is the creation of the post of Union Minister for Foreign Affairs. The Minister will be appointed by the European Council with the agreement of the President of the Commission. He/she shall be responsible for conducting the Union's common foreign and security policy. This function will merge the present tasks of the High Representative for the Common Foreign and Security Policy with those of the Commissioner for external relations. The Minister of Foreign Affairs will thus be mandated by the Council for common foreign and security policy, while being a full member of the Commission and as such in charge of the Commission's responsibilities in the field of external relations as well as of the coordination of the other aspects of the Union's external action; in addition, he will chair the External Relations Council.

It is hoped that together with the President, the Minister for Foreign Affairs will solve the problem of leadership and also accountability as he/she will be answerable to Member States. A Union Minister for Foreign Affairs could also help the Union in trying to formulate a coherent foreign policy. The Foreign Minister will lead Union's external relations, but only on policies which have been approved by all Member States. Therefore, his or her power can in the end be seen as rather limited.⁸⁶ However, the Union's newly acquired single legal personality will nonetheless enable it to play a more visible role in world affairs.

3.2.2.4. *Council of Ministers*

The main change introduced with regard the Council of Ministers (which is now simply called "Council") is that its proceedings, when exercising legislative functions, are to be open to the public. This can definitely be taken as a positive development but otherwise the Constitution presents no major changes, although Article I-23 on the configurations of the Council of Ministers is new. According to Article I-22 the Council of Ministers shall, jointly with the European Parliament, exercise legislative and budgetary

⁸⁵ "Making It Our Own", *Op.Cit.*

⁸⁶ Reynolds, Paul, "Constitution a Hard-Won Compromise", BBC News Online 18 June 2004, www.bbcnews.com.

functions. The decisions of the Council of Ministers shall generally be taken by qualified majority.

On the whole, we can see that the Constitution does not alter the current situation with regards the functioning of the Council in a major way, with the exception of abandoning the current complicated pillar structure of the EU, this also having an effect on the working of the Council (as discussed earlier in Part II).

3.2.3. Democratic Decision-Making?

One of the often-stated aims of the Constitution is to increase the effectiveness of decision-making. The decision-making, whether it is done by unanimity, simple majority, or double majority, differs within institutions. There are also different decision-making procedures. Over the years, the European Union has witnessed an increase in the use of qualified majority voting. The number of Treaty provisions where unanimity is required has been declining steadily. Following the Single European Act, and the Treaty of the European Union, 80 per cent of the Community legislation adopted in 1996 was on a legal base subject to qualified majority voting. The following year, the Treaty of Amsterdam extended the qualified majority vote to 14 additional areas.⁸⁷ And under the new Constitution, unanimity vote will be further pruned from 42 matters. The national veto will be preserved in a few politically sensitive areas, such as taxation, defence⁸⁸ and foreign policy⁸⁹, but most decisions will be taken by a majority vote. The Constitution lays down that where a qualified majority vote shall apply, decisions will be taken by double majority, representing at least 55 per cent of the Member States, comprising at least 15 of them, and 65 per cent of the Union's total population (Article I-24(1)).

⁸⁷ Kaila, Heidi, "Qualified Majority Voting: The Key to Efficient Decision-Making in an Enlarged European Union" in Best, Edward, Gray, Mark, and Stubb, Alexander (eds.), *Rethinking the European Union, IGC 2000 and Beyond*, European Institute of Public Administration, Maastricht, 2000, p.132.

⁸⁸ The EU aims to develop a common defence policy. The decision to adopt a common defence will be taken by a unanimous decision by the European Council, after which the Member States will be recommended to adopt such a decision in accordance with their respective constitutional requirements. See Article I-40(2).

⁸⁹ Article I-39(7) states that "decisions relating to common foreign and security policy shall be adopted by the European Council and the Council unanimously". Furthermore, Article III-282 notes that the Court shall have no jurisdiction over matters of common foreign and security policy.

3.2.3.1. *Qualified Majority Vote*

The extension of qualified majority vote (QMV) has been seen as necessary if the EU is to be able to function effectively as a Union of 25 states. When unanimity is required, decision-making can be very difficult if not even impossible. It has also been argued that the Commission may be less innovative when preparing proposals to be adopted by unanimity, as they think they need to propose something that can be acceptable to every Member State. Unanimity may also expose the EU to blackmail by Member States threatening to invoke their veto. QMV on the other hand facilitates decision-making and paves the way for deliberative politics as Member States have a strong incentive to participate and create coalitions.

However, the increase of qualified majority voting has raised concerns about the sovereignty of Member States. Some Member States, notably the United Kingdom, have been reluctant to give up the unanimity rule because they want to safeguard particular national interests, or maintain control over issues that have traditionally been linked to national sovereignty, such as taxation, social policy, and asylum and immigration policies. Yet, as Heidi Kaila reminds us, as long as unanimity remains the rule for constitutional or quasi-constitutional matters, the principle of sovereignty will not be incompatible with the qualified majority vote.⁹⁰

Nonetheless, we may ask whether an increased use of qualified majority vote will lead to problems of legitimacy as it according to Brigid Laffan means the reduction of national parliamentary control of European issues. Some governments fear an adverse reaction of public opinion if their national position is over-ruled. Especially large Member States have emphasised that the extension of QMV can only increase the efficiency and legitimacy of the EU if the decisions adopted are supported by a significant majority of the Union's citizens. Those opposing this view stress that the smaller Member States do not act as a block and practically there is no risk that these states would outvote those Member States representing the majority of the Union's citizens.⁹¹ Nevertheless, the idea of linking QMV with legitimacy was supported and for these reasons a double majority rule has been suggested.

⁹⁰ Kaila, Heidi, *Op.Cit.*, p.134.

⁹¹ *Ibid.*, p.135.



3.2.3.2. Double Majority

To increase the legitimacy of qualified majority voting a double majority rule has been introduced. It is argued that qualified majority as agreed in Nice in 2000 reduces the capacity of the Union to take decisions as larger states can use this procedure as a blocking power to prevent decisions that they do not agree to from going through.⁹² In Nice it was agreed that 62 per cent of the Union's population would be needed to take a decision. In reverse this means that 38 per cent is able to block a decision from being made. By a rule of thumb, the more Member States and citizens are needed for the decisions, the more difficult and inefficient the decision-making will be⁹³. In the final version of the Constitution, the percentage is raised to a requirement of 65 per cent.

The definition of qualified majority for decision-making in the Council was probably the most difficult question the Inter-Governmental Conference had to tackle. As proposed by the Convention, the Council will henceforth decide on the basis of the double majority of the Member States and of the people, which constitutes an expression of the Union's double legitimacy. The IGC finally decided that a qualified majority will require the support of 55 per cent of the Member States representing 65 per cent of the population. This definition is accompanied by two further elements. First, in order to avoid the situation where, in an extreme case, only three (large) Member States would be able block a Council decision due to an increase in the population threshold, a blocking minority needs to comprise at least four Member States. Moreover, a number of Council members representing at least 75 per cent of a blocking minority, whether at the level of Member States or the level of population, can demand that a vote is postponed and that discussions continue for a reasonable time in order to reach a broader basis of consensus within the Council.

The final decision on double majority favours most relatively the most populated states. Throughout the negotiations smaller states in particular argued that the decision-making would be more effective if only 50 per cent of the population was needed for a decision. It is true that the 50 per cent rule would improve the balance between the two principles of representation (Member States and population) in the Council. What is more, the rule would be easier to understand for Union's citizens,

⁹² Lane, Jan-Erik, "Democracy in the European Union: What is the Democratic Deficit?", <http://www.fas.nus.edu.sg/ppp/docs/wp/wp20.pdf>.

⁹³ Tuohinen, Petter, "Malli 50-60 ja itikoiden kirus", *Helsingin Sanomat*, 19 May 2004.

because it would respect the democratic principle as it is commonly known (i.e. the rule of simple majority). Moreover, it has been pointed out by the contributors to the "Trans-European proposal on amending the draft Constitutional Treaty for the European Union"⁹⁴, that upholding the population criterion at even 60 per cent, as the Convention had proposed, is arbitrary. Their comment to Article I-24 states: "It is as if population criterion was brought in the EU for purely instrumental purposes, that is only to the extent necessary to exclude the veto power of some states but not others (i.e. the four bigger Member States)." The 60 per cent requirement could prevent a proposal endorsed by 22 Member States representing 56-57% of the Union's population, from being created into a legal regulation. This, the group states, is "incompatible with the democratic principle and impossible to justify to the European citizen". Also, the requirement of 60 per cent of population gives a greater weight to population than states, which could be seen as violating the principle of a union of equal sovereign states. The fear that larger states could create a group whose relative veto power could in fact offer these states permanent control over legislation is not groundless.

From the point of transparency and clarity, it is at least doubtful whether the double majority rule in practice makes sense to the citizens. Richard North declares that that "to say that the procedure is mind-bogglingly complex is something of an understatement"⁹⁵. It is true that the conditions of two separate percentages with also the listed checks to ensure a reasonable broad consensus are difficult to understand in practical consequential terms.

3.2.3.3. *Weighting of Votes*

Institutional arrangements are not only essential for providing a framework for policy deliberation, but also for political legitimacy and justice. The principle of political equality is one of the founding norms of modern democracies. As a consequence, it comes perhaps as no surprise that the re-weighting of the votes of each member of the Council, in order to take better account of the relative importance of the Member States, and more particularly of their populations, was another very difficult point when

⁹⁴ "Making It Our Own – A trans-European proposal on amending the draft Constitutional Treaty for the European Union" *Op.Cit.*

⁹⁵ North, Richard, "The Brussels Agreement on the Treaty Establishing a Constitution for Europe: A 'User-Friendly' Analysis", available at the website of the London-based Bruges Group, www.brugesgroup.co.uk.

drafting the Constitution. It is true that the EU formally speaking has bias in favour of small Member States. Malta and Luxembourg with less than half a million people have over ten times as much voting power in the Council and over eight times the representation in the European Parliament than they deserve for the population share. Germany with roughly 17 per cent of the population has only half the weight in the Council and only 13.5 per cent representation in the Parliament. However, even if small states are over-represented in relation to their size, we need to keep in mind that the larger states are still more powerful as the small states cannot easily block the decisions of the largest states. It is very difficult to find a number of votes to small states that would still guarantee a degree of significance in the decision-making. Therefore, the question of voting weights is a very delicate one and not easy to solve as it is immensely difficult to find a compromise that would safeguard all states' interests.

The new Constitution gives more power to the largest Member States in the Council. The combined overall power of the six largest states in the Union will be increased considerable when compared to both the current situation as well as the Treaty of Nice. The power of large Member States is nevertheless not taken at the expense of the smallest states. When compared to the Treaty of Nice, the Constitution increases also the power of the 11 smallest states. In relation to the current situation the standing of the smallest states is however slightly weakened. But most clearly, the Constitution reduces the power of the eight middle-sized states, these being countries of the size between the Netherlands and Austria. These calculations are based on the researches made by Mika Widgren and Richard Baldwin.⁹⁶

Despite these changes, many researchers believe that there are only few issues of which the largest states Germany, France, Spain, Italy, Poland and the United Kingdom would agree on as opposed to the smallest states. The divisive factors between Member States are not necessarily created by size but can more often be for example whether the Member States support a welfare system of market liberalism, whether they are net payers or recipients of the Union budget, or whether they come from Southern or Northern Europe. It should also be noted that as the EU now has 25 members, France and Germany alone cannot continue to take decisions on behalf of others in the same

⁹⁶ The calculations are presented in a newspaper article by Nalbantoglu, Minna, "Perustuslaki kasvattaa suurten ja pienimpien maiden valtaa, tutkijat eivät usko pienten ja isojen valtataisteluun" in *Helsingin Sanomat*, 22 June 2004.

way as in the past. As such, small states should not see the voting of weights as a threat to their capability to influence developments and decision-making. In fact, what could perhaps been seen as greater challenge to small states is not the voting weights but rather that the Constitution gives more power to the European Council. When the leaders of the Member States get together they often end up bargaining and in this horse trading small states have often been forced to agree by the conditions dictated by larger states.⁹⁷

3.2.3.4. *Role of National Parliaments*

A former Permanent Representative of Germany to the European Community once wrote that "the democratic deficit is essentially the incapacity of national parliaments to control their governments in EC matters"⁹⁸. Indeed, one of the means often suggested to ameliorate the democratic deficit is the strengthening of links between national parliaments and the institutions of the EU. As a consequence of the ratification process by the Treaty of Maastricht and the popular disillusionment revealed by it, many national parliaments have sought and obtained a stronger supervisory role over the form and content of EU legislation.

The Constitution acknowledges the role of national parliaments by having included a "Protocol on the role of national parliaments in the EU" as an annex. The protocol provides for a number of important elements. Also a separate protocol on subsidiarity⁹⁹ states that the Commission has to show how all its proposals are consistent with the principle of subsidiarity and must substantiate this with "qualitative and wherever possible quantitative indicators". National parliaments are given six weeks during which to object to any proposal on subsidiarity grounds. If one-third of national parliaments object, the Commission is forced to review – but not necessarily withdraw or even amend – its proposals. Member States can, however, on behalf of their national parliaments, ask the Court of Justice to adjudicate if they think that the

⁹⁷ Nalbantoglu, Minna, "Perustuslaki kasvattaa suurten ja pienimpien maiden valtaa, tutkijat eivät usko pienten ja isojen valtataisteluun" in *Helsingin Sanomat*, 22 June 2004.

⁹⁸ Ungerer, Werner, "Institutional Consequences of Broadening and Deepening the Community: the Consequences for the Decision-Making Process", *Common Market Law Review* (1993), p.76.

⁹⁹ The principle of subsidiarity is commonly understood to mean that policy-making functions should always be exercised at the lowest possible level, and only 'if necessary' should they be delegated to a higher level. The ambiguity of what is necessary results from the fact that the policy functions are not specified clearly. See Collignon, Stefan, *Op.Cit.*, p.85.

subsidiarity principle has been breached. However, as the national parliaments are not allowed to refer the matter to the Court of Justice on their own, the right of national parliaments to independent recourse to the Court is effectively removed, as parliaments would have to request their governments to act as their conduit.

Although the important role of national parliaments has been recognised, and the Constitution proposes subsidiarity as one of the “fundamental principles” in Article I-9, some have criticised that it would be important that national parliaments are able to express their views before decisions are being made. There should be no “preliminary agreements” for the basis of adoption of legislation in the Council. The national parliaments should also be granted adequate time specifications at the various legislative stages to allow for national scrutiny purposes. These measures are not written in the Constitution. Furthermore, the Constitution provides a weak basis for the Commission to take into account the arguments put forward by national parliaments. As such, we can conclude that the Constitution does not ameliorate the role of national parliaments in the decision-making process in a sufficient way.

3.2.4. Rule of Law

Since Montesquieu (1689-1755) it has been accepted that an independent and impartial judiciary is a *conditio sine qua non* for a functioning democracy.¹⁰⁰ The Constitution lays down that the Court of Justice of the European Union comprises the European Court of Justice, the High Court (which at present is called the Court of First Instance) and specialised courts. Article I-5(a) sets out the relationship between the Constitution and other Community laws with national laws. It states the primacy of EC law. Although this is the first time that the supremacy of EC law is given an explicit legal and constitutional basis, the concept is not new. The principle has been established in the early case-law of the European Court of Justice¹⁰¹, and it has later also been enshrined in some Member States’ constitutions.

¹⁰⁰ Montesquieu distinguished between the executive, the legislature, and the judiciary. He argued that under modern conditions liberty can only be based on the careful creation of an institutionalised separation of powers and the rule of law. See Montesquieu, *L'Esprit des lois*, livre XI, chapitre 6 (1748).

¹⁰¹ Notably in *Costa v ENEL* (1964) and confirmed later in *Simmenthal* (1978), *Factortame* (1990), and *Francovich* (1991).

The Court of Justice is responsible for ensuring respect for the Community law. It has jurisdiction in disputes between Member States, between the Union and its Member States, between institutions and between private individuals and the Union. It can also answer questions about the interpretation of Community law raised by national courts in the course of a dispute being heard in such courts. This power to issue preliminary rulings is essential to ensure a uniform interpretation of Community law throughout the Union. A very recent judgement concerning the excessive deficit procedure under the Stability and Growth Pact¹⁰² confirms that the Court has an important function in ensuring that political bargaining and compromises do not step over the actual formal rules. The media has widely praised the ruling as a brave decision. It seems to confirm that a rules-based system is the best guarantee for commitments to be enforced and for all Member States to be treated equally. Moreover, we see that the Court can have a positive impact on the transparency as this ruling will make budget observations more transparent and predictable in the future.¹⁰³

What has been changed in the new Constitution is that the Constitution should allow the public to take action more easily against the Union regulations on which sanctions are based, even if they do not affect them individually (as imposed in the Treaties today). In addition, the Constitution will enable the Court in certain cases, at the request of the Commission, to punish infringements by Member States more swiftly. The Court can more easily impose penalties and fines in respect of non-transposal of the Union's law or non-implementation of its judgments.

¹⁰² In Case C-27/04, *Commission v Council*, 13 July 2004, the Court clarified the powers of the Commission and the Council relating to the excessive deficit procedure under the Stability and Growth Pact. The Court ruled against the actions of national finance ministers in deciding that the Council cannot depart from the rules laid down by the EC Treaty (Article 104) or those which it set for itself in Regulation No 1467/97.

¹⁰³ The Constitution includes also specific clauses which are to enhance the transparency of the Union. In general, openness in government contributes to democratic governance, since it enhances control and efficiency of, and public participation in, the decision-making process. Advocate-General Tesauro wrote in his opinion in *The NL v Council* (Case C-58/94, *The Netherlands v. Council*, [1996] European Court Reports E.C.R. II-313, paragraphs 53-4): "Openness of the public authorities' action is closely linked with the democratic nature of the institutions in as much as it tends to secure better knowledge on the part of citizens of the acts and measures – even in the phase when they are being drawn up – adopted by those who have government functions". For this reason, the Constitution includes a new Article III-304 which specifically states that "in carrying out their missions, the Institutions, bodies and agencies of the Union shall have the support of an open, efficient and independent European administration". See also Article I-49 of the Constitution.

3.2.5. Overall Clarity

As a concise wrapping up, this Part has sought to examine in detail the new Constitution, as well as the Convention leading to the creation of the text, to see which concrete measures the Constitution introduces in order to make the Union more democratic. As a single text, although not always written in a very clear language, the Constitution aims to clarify the Union law, as everything can now be found in a single major Treaty. Yet, as it is over 200 pages long, it is arguably too long to actually simplify the current Treaties from a citizen's point of view. Although the Constitution introduces certain welcomed clarifications, such as 'European framework laws' to replace the term 'directives', the text remains complicated and unclear at places, both in terms of actual content¹⁰⁴ as well as structure and readability. With regards new developments in the Union, the Constitution does introduce some changes in the main institutions, in order to make the Union not only more democratic, but also more efficient, as it has recently enlarged to include 25 members in total. The unanimity vote is further reduced, and a new qualified majority rule has been adjusted. What is perhaps most significant with regards addressing the democracy problem is that the Constitution includes and hence legalises the Charter of Fundamental Rights. The Charter does not only grant more protection to the citizen in the Union, it also carries great symbolic importance within it.

In the following Part, we shall move on to discuss in more detail the symbolic and normative meaning and implications of the Constitution.

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From a citizen's point of view, the actual content of several articles remains unclear. Take for example Article I-14 which reads "The Union may take initiatives to ensure coordination of Member States' social policies". Perhaps it has been a deliberate choice of the drafters, but nonetheless it remains vague what is exactly is meant by 'initiatives to ensure coordination'.

4. NORMATIVE IMPLICATIONS OF THE EUROPEAN CONSTITUTION

The European Union challenges the territorial and subjective borders of the state and by doing so, it is developing new, non-statal ways of societal living together. The Constitution is partly created as to offer a sound theoretical base in which democracy and constitutionalism on a non-state entity can be grounded. As the European Union is not a traditional nation-state, the extent to which we can measure democracy and legitimacy within it will be considered. There are two important dimensions to the problems of democratic legitimacy in the Union, namely, institutional structures and the problem of political community. As the problem of institutional accountability has been largely tackled in the previous part, in this one we will concentrate on the more philosophical and normative implications on creating a Constitution for Europe. We will ponder on the function of a constitution in a non-state entity, and in particular, we will concentrate in large part on the symbolic value that the Constitution can bring in identity building on a European level. Lastly, we shall also consider whether the Member States should hold a referendum on the adoption of the Constitution. To begin however, we shall briefly discuss the theoretical meaning of constitutionalism, referring especially to the European level.

4.1. Between Treaty and Constitution

When convening the Convention on the Future of Europe in February 2002, the stated key objective was to produce a simplified constitutional treaty. To “avoid any disagreement over semantics” between different interest groups, Convention President Valéry Giscard d’Estaing proposed in his introductory speech to the Convention to work towards a “Constitutional Treaty for Europe”. However, the decision whether to call a text a ‘constitution’ or a ‘treaty’ is not necessarily a simple semantic choice, but a constitution differs from a treaty in several aspects. A treaty is a binding agreement under international law, concluded under the principle of *pacta sunt servanda*, by subjects of international law, namely states and international organisations. A constitution, in its most common usage, can be defined as a single, written, fundamental law that defines how a state (can be other entity as well) is governed, legislation is passed, power and authority are distributed, and how they are limited. In a sense, it is thus the most basic law from which all the other laws and rules are hierarchically

derived. In democratic systems, the constitution is considered a fundamental social contract among citizens where government receives its powers from the people, and is bound by fundamental rights.¹⁰⁵ In short, 'treaty' refers to governance whereas a 'constitution' points to a government. A treaty is a convention between state parties, but a constitution is a binding contract of the people, as it is written by, and for, them.

In this thesis, we have deliberately chosen to call the text a Constitution. As the document is most often referred to as a Constitution in the media and by the politicians alike, this decision does not come as original but practical. That being said, we have also chosen to call it a Constitution, and not for example a 'Constitutional Treaty' for more theoretical reasons. As we see a solution to the democratic deficit largely in the development in a European *demos*, the symbolic importance of having and supporting a real Constitution cannot be underestimated. Constitutions, if they are to function successfully, need to be founded on some set of shared values and to express commitment to some form of collective identity. Constitutional law is believed to be the reflection of, and promote, the creation of the political community governed by it.¹⁰⁶ In this sense, the European Constitution is a very particular one as the EU is not a fixed entity but rather a process towards an 'ever closer union'.¹⁰⁷ As argued by Amaryllis Verhoeven, the European Constitution is to guide that process, and at the same time, it is formed by it. Integration can thus be seen as the result of gradual development and creation of several treaties paving the way to a formal, written constitution. The dynamic nature of the European constitution highlights the importance of the *acquis communautaire*. The *acquis communautaire* can be seen to present a base upon which the new written constitution has been built on.¹⁰⁸

The European Constitution per se carries within it a specific normative content which cannot be ignored. Constitutions are never value-neutral. All constitutive rules have normative content insofar as they define how the contractors need to behave

¹⁰⁵ Rousseau writes in *Du contrat social*, livre I, chapitre VI (1762): "Cette difficulté ramenée à mon sujet peut s'énoncer en ces termes: Trouver une forme d'association qui défende et protège de toute la force commune la personne et les biens de chaque associé, et par laquelle chacun s'unissant à tous n'obéisse pourtant qu'à lui-même et reste aussi libre qu'auparavant. Tel est le problème fondamental dont le contrat social donne la solution."

¹⁰⁶ Verhoeven, Amaryllis, *Op.Cit.*, p15.

¹⁰⁷ The preamble of the Treaty Establishing a Constitution for Europe states: "The peoples of Europe ... united ever more closely [are determined to] forge a common destiny".

¹⁰⁸ Verhoeven, Amaryllis, *Op.Cit.*, p.362.

in order to obey the rules set out by the contract. By assigning a specific status to objects or actions, they provide the logical foundation and normative contents of institutions. Therefore we do also acknowledge the current political realities when writing this thesis. If the EU was to have a proper, formal Constitution, then the development of the Union would be likely to lead to federalism. Yet, as there are many doubting the necessity, or even desirableness of such development, preferring the Union to stay as a confederation of states, it does not come as a surprise that in the legal sense, the text remains a Treaty.

Being formally a Treaty, and as treaties are not necessarily permanently binding upon the signatory parties¹⁰⁹, the Member States are given the possibility to resign from it, even if it is not clear what the actual economic and political consequences of such a withdrawal in the end would be to the state(s) in question. As the EU wants to be more legitimate, it needs to have the consent of its Member States, and hence a new Article I-59 providing for the voluntary withdrawal from the Union has been included, though it is widely believed that Member States have the right to withdraw from the EU even in the absence of an express provision. A formal withdrawal clause has been welcomed but there are also those who express concerns that such a provision could become a bargaining weapon that could be used by larger states to get their will through. It is evident that national constitutions cannot contain such a clause, even if they almost always contain a clause for amendment. Therefore this clause reflects once again the peculiar nature of EU, standing somewhere between a state and an international organisation as the Constitution contains elements belonging to both of these entities.

4.2. Between Governance and Government

Today, few would doubt the value of democracy. Democracy is both a set of ideals about the exercise of political authority and a set of institutions and processes to organise a government. It has largely been accepted as the most desired form of governance outweighing all other alternatives. The basic principles of democracy are that people have a right to a controlling influence over public decisions and decision-

¹⁰⁹ Although many treaties expressly forbid withdrawal. Human rights treaties, for example, are generally interpreted to exclude the possibility of withdrawal, because of the importance and permanence of the obligations.

makers affecting them, and that they should be treated with equal respect and as of equal worth in the context of such situations. At best, democracy offers a decision-making system that grants equal worth and rights to its citizens, that listens to their opinions and interests, that prefers open deliberation and compromise, that guarantees civil and political rights, and that allows for societal and political renewal without massive upheaval.¹¹⁰ Moreover, the normative value of democracy is important because it does not just present one value among many, such as liberty, justice or equality, but democracy can actually help to mediate among competing prescriptive concerns. According to David Held, democracy does not presume agreement on different values but it rather offers a means of relating and negotiating between the values so that deliberation and resolution can be found in open public process.¹¹¹

However, as we are measuring democracy in the context of a European Union, we note that the concept is inevitably modified, as the ambiguous nature of the EU, standing somewhere between governance and government, has not been solved. Effectively, the European Constitution describes and sets out a *Rechtsstaat* by securing the protection of fundamental rights and the separation of powers. But yet, its members remain sovereign states. As we shall see therefore, democracy in the EU is affected and being characterised by the opposing forces of globalisation and state sovereignty. Moreover, democracy cannot be discussed without also giving some thought to efficiency and representation in the decision-making process.

4.2.1. Globalisation versus Sovereignty

Traditionally, core principles of our democratic thinking such as sovereignty, democracy, community and citizenship have all been subjected to the territorial logic of state. As democratic institutions and practices originally evolved within the sovereign nation state, one of our hard-rooted political and legal beliefs is the idea that the state is the one and only frame of reference in which the democratic ideal can be implemented. The idea that democracy can only fully be realised within a state still remains an important tenet of our democratic thinking. This view is further enhanced by seeing a state's constitution as a kind of a social contract through which the people establish a

¹¹⁰ Beetham, David, *Democracy and Human Rights*, Polity Press, Cambridge, 1999, p.169.

¹¹¹ Held, David, *Op.Cit.*, p.298.

legitimate government in the form of an impersonal, statal apparatus endowed with sovereignty. The main idea behind social contract thinking is that government power must be granted by and rest on the consent and acceptance of the ruled.¹¹²

Nonetheless, the emergence of the European Union, in which its Member States have come together and voluntarily agreed to pool their sovereignty to an extent, poses a challenge of how we conceptualise democracy, authority, and legitimacy in contemporary politics.¹¹³ In many ways the EU can be seen as present-day response to the new challenges brought about by globalisation and multiculturalism. Globalisation¹¹⁴ can be defined as the “intensification of world-wide social relationships which link distant localities in such a way that local happenings are shaped by distant events and, in turn, distant events are shaped by local happenings”. It is a process which has led to the “reduction of geographical, spatial, and temporal factors as constraints to the development of society. It has resulted in an increased perception of the world as a whole, and a readjustment of societal thought and action away from national, and towards international and global spheres”.¹¹⁵ Globalisation accounts for the growing interdependence of independent actors, and as such, it affects state sovereignty.

It is largely because of globalisation that the EU has evolved from market integration into a political union. The single market has not been created in a vacuum. Economic integration and the globalisation of markets inevitably create political consequences for nation states. Oliver Letwin, for one, argues that it will not be sustainable to run the euro zone without handing over power of the taxation and spending policies of the individual Member States to the EU.¹¹⁶ What is more, if the European states want to defend their traditional welfare systems they are better off in creating common policies of how to fight the undesired social consequences of globalisation by complementary social and infrastructural policies. A small state is not

¹¹² Most well-known classical theorists on social contract thinking include Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-1778), although all authors differed on the reasons and conditions leading to people to step out of the so-called state of nature and to sign a social contract.

¹¹³ Laffan, Brigid, *Op.Cit.*, p.330.

¹¹⁴ For a general account of the effects on globalisation on democracy, see Held, David, *Democracy and the Global Order*, Stanford University Press, Berkeley, 1995.

¹¹⁵ As defined by Anthony Giddens in a public lecture “Globalisation: Where Next?” at the London School of Economics, 8 October 2001 (unpublished).

¹¹⁶ Letwin, Olivier, “Will the EU's Constitution Rescue its Currency?”, www.brugesgroup.co.uk.

capable to defend itself alone against the market forces in today's interconnected world. National governments are increasingly entangled in transnational networks, and thereby become even more dependent on other states and negotiations concluded between them. Whatever social policies they choose, they must adapt to constraints imposed by deregulated markets. Thus, we can see that trying to diminish the need for a political union is not possible in today's interdependent world. Precisely since we have a political union, we are also concerned about democracy in the system. And precisely because of globalisation, democracy must be transformed from a simple national level to an inter-state level, even if the solutions on how to do this are not easily determined. When decisions are taken to a larger scale, questions of efficiency and democratic representation cannot be avoided, which we shall consider in the following.

4.2.2. Efficiency versus Representation

When discussing democracy and democratic decision-making we come to realise that what can be agreed upon within a traditional nation-state, does not necessarily hold true within the European Union, consisting of 25 Member States, all different in their own national identities and history. As such, it seems clear that the benchmarks used to evaluate democracy in a traditional sovereign state do not necessarily hold true in a Union *sui generis*, which represents a truly novel form of existence in the modern world. In no other region of the world have independent countries pooled their sovereignty to this extent and in so many areas of crucial importance to their citizens.

The European Union is built on concrete achievements. In many cases, it is true that had the EU been more democratic in the past, these developments would never have taken place so rapidly and the Union would not have evolved as quickly as it has had the democratic principles always been respected. Therefore, we can note here that the democratic deficit of the Union is an often debated and contested feature of a political system that is totally different from national democracies and yet has received powers from its Member States that have a deep impact on national sovereignty.

This debate circles around a number of different elements, which all point to a central dilemma of governance: for the form of governance of a modern political system, can efficiency replace democratic legitimisation? Is it possible to render a

system both efficient and democratic?¹¹⁷ Quite clearly, the so-called “Monnet method” of integration described by Pascal Lamy, Delors’ Chef de Cabinet in the following terms: “the people weren’t ready to agree to integration, so you had to get on without telling them too much about what was happening”, is no longer sufficient.¹¹⁸ And yet, the question of democracy cannot be considered without giving thought to efficiency. In large-scale political systems it is more difficult to allow for the effective participation of citizens and to ensure that the political process is responsive to the preferences of the people.

To an extent, in the history of the EU we can identify a certain trade-off between effectiveness and participation. Alternatively, we could also say that the Union rests on dual legitimacy logic: of consent (democracy), and of efficiency. In this respect, the EU is “characteristic of, and indeed forerunner to, a more global reorganisation of societies under conditions of increasing interdependence”.¹¹⁹ The voting weights in the Council of Ministers are a good example of this. While wanting to be democratic, the decision-making procedures will also have to be efficient; otherwise the risk of slowing down or even hindering completely the integration process can be too great.

Further, it has been noted that increased parliamentary participation slows down the decision-making process. Empirical data collected and analysed by König and Schultz (1996) show that in general the time-lag between initial proposal and final decision is usually remarkably short in EU decision-making. This can partly be explained by the comparatively great number of regulations and comparable decisions of a ‘technical’ kind which do not require a lengthy legislative process. The decision-making has however slowed down since the early 1990s. We can thus see that both the participation of additional actors and the extension of democratic control obviously have the effect of slowing down the decision-making. This is inevitable because whenever widespread consensus about an issue is lacking, any proposal can run the risk of being blocked. Thus the dilemma between democracy and efficiency is not an easy one to overcome.

¹¹⁷ Michalowitz, Irina: “Lowering the Democratic Deficit: Legitimacy via Knowledge via Transparency”, p.2, <http://www.shef.ac.uk/~perc/mlgc/papers/michalowitz.pdf>.

¹¹⁸ Quoted in Laffan, Brigid (ed.), *Constitution-Building in the European Union*, Studies in the European Union, Institute of European Affairs, Dublin, 1996, p.198.

¹¹⁹ Verhoeven, Amaryllis, *Op.Cit.*, p.155.



4.3. Towards a European Demos

In this section, we shall ponder on the relationship between a European Constitution and a European *demos*. As discussed earlier, the lack of a European people is one of the most profound problems in relation to democracy in the Union as in general, a basic prerequisite for the proper functioning of democracy is the existence of a *demos*, that is, a polity or public sphere in which a meaningful democratic discourse can take place. When discussing democracy, people and identity remain the necessary presuppositions for democratic principles, because without these, the concept of representation loses sense. Hence, it is argued, to be democratic, the Union needs a collective singular people capable of defining itself as a democratic nation. Since there is no coherent European *demos* as such, all attempts to address the democratic deficit by creating a constitution are at least questionable.

This thesis however, while recognising that democracy, to be genuine, cannot exist without at least a minimum form of a *demos*, maintains that European identity and European Constitution are, to an extent, mutually dependent. In this regard, we realise that the whole discussion about European identity and European Constitution almost resembles a chicken-and-egg problem: Which comes first, identity or constitution? It seems that the two are reciprocally dependent on each other. On the one hand, a people is needed to give legitimacy to the whole project of Constitution building but on the other hand, a European Constitution has been created precisely to facilitate the emergence of a European public space, something that would exist alongside national (and local) identities. As such, it is argued that the EU citizenship is constructive and transformative. We should not forget that as the entity to which democracy is applied is different from a traditional sovereign state, so too the European *demos* differs from a national, or statal *demos* in distinctive ways.¹²⁰

We shall first consider the opposing argument, namely that as there exist no European people it is impossible to have a legitimate constitution, and hence the Constitution cannot solve the problem of the democratic deficit. Those who see the democratic deficit largely as a result of the non-existence of a true European *demos* argue that only where a people exists as a pre-political fact can constitutional

¹²⁰ Verhoeven, Amaryllis, *Op.Cit.*, p.362.

democracy start operating. Moreover, as democracy depends on pre-given and fixed boundaries, it cannot function outside the context of a state. Offe, supporting this line of thought, argues that a state must already be in place before a democracy can start operating. This is so because the essential features of a state (peoplehood, territory, sovereignty) cannot be established by democratic means.¹²¹ Hence, if a constitutional democracy is to be meaningful, a sufficient degree of homogeneity between the population, enabling mutual trust and solidarity between citizens, must be pre-existent. Peoplehood justifies boundaries (territorial and personal) by drawing a distinction between 'us' and 'them'.

However, this view seems to ignore the fact that in many sovereign states the people does not consist of a single nation. As there can be opposing groups it seems that the only way to secure representative and democratic decision-making is precisely by creating a constitution which establishes principles such as the rule of law and democratic representation. *Demos* must not pre-date democracy as a culturally homogenous group, instead it is, to a large extent, created by the democratic process. The European Constitution has its value in precisely creating a European *demos*, a people, which is bound together by commonly accepted norms. In terms of Habermas, the Constitution can have a catalytic effect as the making and final acceptance of such a constitution represents in itself a unique opportunity of transnational communication, with the potential for a "self-fulfilling prophecy"¹²².

Furthermore, time can be an important factor in identity forming. If we allow us to make a comparison with the constitution of the United States, which is the oldest constitution still in effect today, we note that it begins by elevated words "we, the people". However, at the time of the creation of the Philadelphia convention in 1787 this reflected arguably more wishful thinking or political manipulation than a social fact. The American people, or nation, as we know it today, did not exist. As such, it is possible that the whole emergence of a particular 'people' or 'nation' is, among other factors affecting it, a question of time. Even in the most favourable circumstances, it seems clear that it will take time to develop a collective identity based on 'post-national' or 'supranational' citizenship, understood in civil and political rather than traditional

¹²¹ Offe's argument is outlined in Verhoeven, Amaryllis, *Op.Cit.*, p.161.

¹²² Habermas, Jürgen, "Why Europe Needs a Constitution?" *Op.Cit.*, p.28.

ethno-cultural terms.¹²³ However, as the United States is a sovereign singular country, but the EU a union of 25 independent states, it is perhaps not even reasonable to make straightforward comparisons between the two. The United States calls itself as "one nation under God" whereas the preamble of the Constitution states clearly "the peoples of Europe"¹²⁴. Nevertheless, regardless of differences of the two, identity can be seen as the end-product of integration, rather as a pre-requisite.¹²⁵

There exists also a certain difference between citizenship as a legal category on the one hand and European identity on the other.¹²⁶ The constitution not only enhances the legal one, but it also seeks to build the identity behind it, in the hope that the whole integration project will become more legitimate. This is understandable since it is possible to argue that as long as shared perceptions of belonging and identity remain weak, however strong the formal rights granted by citizenship, citizens will tend to feel unfairly treated, because the representative body does not in their view represent them. And yet, perceptions of common interest and even identity can obviously only grow if people are brought together in and by common institutions more closely than they would have been otherwise. That is one of the reasons that the Constitution, clarifying the role of the European institutions, has been developed.

The European identity, as well as citizenship, is complementary to national one. Article I-8(1) of the Constitution writes: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it"¹²⁷. A person can comfortably hold several

¹²³ Best, Edward, "The Debate over the Weighting of Votes: The Mis-Presentation of Representation?" in Best, Edward, Gray, Mark, and Stubb, Alexander (eds.), *Rethinking the European Union, IGC 2000 and Beyond*, European Institute of Public Administration, Maastricht, 2000, p.118.

¹²⁴ Underlining added by the author of this thesis.

¹²⁵ In general, there is a line of argument in studies of ethnicity and nationhood that groups of people who are governed by the same centre of power over a period of time gradually acquire a shared set of responses to that power and recognise others in a similar position as having something in common with them. If the period of time is long enough, i.e. goes beyond individual memory, the pattern can come to be seen as "natural", as an aspect of culture that the collectivity will defend as a part of its identity. See Schöpflin, George, "European Identity: Patterns of Construction, Contest and Reproduction" in Audéoud, Olivier, Mouton, Jean-Denis et Pierré-Caps Stéphanie (eds.), *L'état multinational et l'Europe*, Centre d'Etudes et de Recherches sur le Droit International et la Paix, Université de Nancy II, Presses Universitaires de Nancy, 1998, p.205.

¹²⁶ Verhoeven, Amaryllis, *Op.Cit.*, p.160.

¹²⁷ In addition, Article I-5 of the Constitution affirms the importance of national identity alongside a European one as it states that "the Union shall respect the equality of Member States ... as well as their national identities...".

identities simultaneously, depending on the context and issue at stake. Rather than consisting of one clear identity, the European citizenship builds on and takes into account multiple identities and allegiances of which the EU and its citizens are composed.

Yet, many studies on the topic indicate that a pro-European mentality change has not really taken place. Cultural and political allegiances still remain heavily tied to and determined by the traditional frame of the nation-state. As the success of democracy is dependent on a common political culture shared by citizens that genuinely interact with each other on the public arena, some critics of the EU have precisely pointed to the fact as there is no real European-wide public arena (as there exists no European-wide media, no European political parties, no common language) it is no wonder that the European identity still remains very weak.

The results of the June 2004 European Parliament elections prove this point very well. The statistics of turnout of voters show that across the EU people are far more likely to vote in national elections than in European elections. This "Euro-gap", according to *The Economist*, now stands at an average of 22% in the 15 old EU Member States and at 29% in the ten new countries.¹²⁸ The average voter turnout 49% – notably with chronic abstentionism in most of the new Member States (26%) – underlines what is argued here: people do not relate to the Union. In the election campaign this was itself widely realised. Instead of trying to raise a debate on genuine European issues, many political parties concentrated on national or personality matters. Moreover, in most states the elections served as an opportunity for the citizens to express their disapproval of national government policies. In 23 of the 25 EU Member States, the largest party in the national government saw its share of the vote slump, many times spectacularly.¹²⁹ As the European Parliament President Pat Cox bitterly noted after the election results, "Europe was, to a large extent, the missing ingredient in the European elections"¹³⁰.

¹²⁸ "The Voters Take Their Revenge", *The Economist*, 17 June 2004, available at www.economist.com.

¹²⁹ The only two governing parties to escape the trend were those in Spain and Greece. This can be interpreted that as they both won general elections only some months between the European elections, they were still enjoying their honeymoons with the electorate.

¹³⁰ Address by Pat Cox to the European Council, 13 June 2004, <http://www.europarl.eu.int>.

Having said this, the project of “identity-building” with the creation of a Constitution can be understood as immensely important in not only rendering the Union more democratic, but in particular, more legitimate. As “Europe is too absent from European elections in East and West”¹³¹, the legitimacy of the politics and policies of the Union is questioned. The European Union can only gain citizen support if it visibly manages to sort out and communicate the goals and ideals it stands for, and more importantly, if it visibly manages to bring these ideals into practice. The European Constitution, especially with its Charter of Fundamental Rights, is created to precisely do this. It is hoped that as the citizens would start to feel more ‘European’, they would also become more interested on European-wide issues and developments. Instead of conceiving the EU as something remote and distant, they would realise that decisions taken on a EU level have a real impact on their lives, and as such, they would pay more attention in its activities. If the turnout of votes to the European Parliament could be increased to anywhere near the figures corresponding to national general elections, the European Parliament would enjoy a far greater degree of legitimacy among the European citizens.

Furthermore, as pointed out by Verhoeven, since we are building precisely a *European* union, and not for example a world-wide one, there must be something more substantive to European identity than a loose reference to democratic values, of which the EU itself stresses the universal nature.¹³² It is largely for these reasons that the European Constitution seeks to establish and consolidate also some European symbols. In the following, we shall discuss the purpose and function of symbols in democratising the European Union and developing a sense of we-feeling required for the construction of a European *demos*.

4.3.1. European Symbols

As the Union’s governance lacks a sense of wholeness in terms of a political community, the Constitution serves as political glue as it gives the Union a new constitutional design. One of these ‘glues’ is also the use of symbols on a European

¹³¹ Statement made by European Parliament President Pat Cox after the European Elections on June 13, 2004. Quoted in “Poll Bruising Forces EU Rethink”, BBC News 14/06/2004, <http://news.bbc.co.uk/go/pr/ft/-/2/hi/europe/3806757.stm>.

¹³² *Ibid.*, pp.187-8.

level. The draft Constitution establishes a number of symbols of the European Union. Article I-6a describes how the Union is to have an official flag, anthem, motto, currency and an official 'celebration' day, known as the "Europe day". In addition, and perhaps more importantly, the Constitution itself has a symbolic character. Besides its functional purpose of having a clearer juridical text by clarifying the scope and competences of the EU, it also serves as a symbol for reasserting the unity of the EU, just as constitutions in European history have frequently reasserted national unity and marked the beginning of a new phase in its development¹³³.

The symbols can be seen as important, since they enable Europeans to identify more with Europe. They are also hoped to serve as a unifying factor among the peoples of Europe because, even if the need for common values in the Union can be recognised, it is not necessarily clear-cut what these values are. The European Union has currently 25 Member States, and the future limits to its membership have not yet been determined. Romania and Bulgaria are set to become members in 2007, and in the future Turkey is also set to join, although the question of Turkey's membership has not yet been formally decided. There are also those who envision that one day maybe even Russia or Israel would join in the Union. Regardless of how realistic these envisages are, one cannot ignore the question of whether the members share the same values. For EU's fifth enlargement, the European Council in Copenhagen in 1993 laid down three major criteria that the candidate countries were required to meet before they could join the EU¹³⁴. Yet despite these formal requirements, the introduction of common symbols is equally important as they can offer a simple, common reference point to all countries, regardless of their national peculiarities.

What holds true for national ones is equally valid for European political symbols. Symbols serve different purposes according to the different sorts of meanings that they are designed to convey. Hartmut Kaeble has identified three different

¹³³ Kaelble, Hartmut, "European Symbols, 1945-2000: Concept, Meaning and Historical Change" in Passerini, Luisa (ed.), *Figures d'Europe, Images and Myths of Europe*, PIE Peter Lang, Brussels, 2003, pp.49-50.

¹³⁴ First, the political criterion demanded that the candidate countries must have stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Second, the economic criterion required a functioning market economy. The candidate countries must be able to cope with the competitive pressure and market forces within the Union. Thirdly, the candidates were to adopt the *acquis communautaire*, the entire body of EU law into their domestic legislation.



meanings, these being the identity meaning¹³⁵, citizenships meaning¹³⁶, and critical meaning of symbols¹³⁷. The Constitution seeks to address both the identity and citizenship meanings of symbols. Citizenship is most clearly promoted by the whole project of drafting a Constitution, and before that, the Charter of Fundamental Rights. Also the introduction of a European passport, the Euro currency, and the right of free movement within the Member States contributes to the building of a Union based on defined European citizenship.

However, even if the membership in the Union guarantees European citizenship, the weakness of a true European identity is precisely a reason why European symbols are often considered as meaningless. Still, as was discussed above, the emergence of a European identity should not be underestimated and moreover, to argue that political symbols are meaningless because there exists no European identity, is to an extent to misunderstand the purpose of symbols. As Suzanne Shanahan points out, "the power of a symbol is invariably derived precisely from its abstraction"¹³⁸. Identities are never static, but they are constantly becoming, forming, and changing; and for this reason, symbols have to have the capacity to grow and adapt with the actual development of the identity they signify. Indeed, symbols invariably represent what has not yet come into being in a manner that brings this entity into existence. We can even argue that European identity, as it currently exists, is simply acts of articulated hope and aspiration. As Shanahan puts it: if you enact a European identity eventually it will exist. Thus whether the debate over the European Constitution reflects optimism or pessimism about European identity is almost beside the point. Any discourse that makes Europe its subject makes Europe more real.¹³⁹

¹³⁵ The identity meaning of symbols, which can be used by democracies as well as by dictatorships, is usually given to flags, memorial days, landscapes, places, buildings, music, rituals, myths and mythical figures.

¹³⁶ The citizenships meaning of symbols, which is specific to democracies, is given to symbols such as constitutions, parliamentary buildings, or to persons strongly linked with political values.

¹³⁷ These are symbols, which are used for criticising governments or more general political situations.

¹³⁸ Shanahan, Suzanne, "Currency and Community: European Identity and the Euro" in Passerini, Luisa (ed.), *Figures d'Europe, Images and Myths of Europe*, PIE Peter Lang, Brussels, 2003, p.176.

¹³⁹ *Ibid.*, p.178.

4.4. *Towards a Referendum*

Democratic deficit within the European Union signifies also a crisis of legitimacy. Legitimacy can be defined as the propensity of members of a society to obey rules set by a regulator in the absence of either punishments or rewards for doing so. It consists of two dimensions: normativity and acceptance. The acceptance, or validity, of certain rules depends on the coherence of their normative content with the background of value standards against which they are evaluated. Legitimacy is an important requirement for a political system that can be conceived of as being 'just'. On the one hand, democracy legitimates the authority of those in power and, on the other hand, the effectiveness of political authority must rest on a degree of legitimacy. From a purely formal point of view, we can say that legitimacy of the EU will rest on the ratification on the Constitution by its Member States, just like it currently rests on the agreement about the existing Treaties. However, as has been illustrated in this thesis, the EU has both social and formal legitimacy problems. Whether organising a referendum on the Constitution would tackle both legitimacy problems is debatable. In this section, we will discuss the advantages and disadvantages of organising a referendum on the European Constitution.

The Constitution, before it will become law, will have to be approved in each Member State either by a vote in parliament or by public referendum. It seems likely that approximately half of the Member States will organise a referendum.¹⁴⁰ Many governments have still not taken a decision or are considering the matter. The referendum comes close to a pure form of direct democracy in which the citizens assemble and discuss, after which they vote directly on issues in question. In contrast, in representative democracy the citizens' direct participation means voting for one's preferred candidate. Not surprisingly, the debate whether a referendum is a desired policy option or not often simulates the arguments whether to favour direct or representative democracy.¹⁴¹

On a more general note, the question of referendum can also be seen in the light of whether the European Union is to be categorised as government or governance, and whether the text should be taken as a Treaty or a Constitution, this

¹⁴⁰ Countries that have decided to organise a referendum include the Czech Republic, Denmark, France, Ireland, Luxembourg, Netherlands, Spain, Portugal and the United Kingdom. Germany, Greece, Latvia and Malta will not hold a referendum.

¹⁴¹ Mueller, Dennis, C, *Op.Cit.*, p.177.

dilemma being a recurring theme of the thesis. If the text aims to create a true European form of government, then the citizens should have a direct say on whether to adopt it. If however it is aimed to be an interstate treaty guiding the governance of the Union, then the decision to ratify it can well be taken by the national parliaments.

We can identify several arguments supporting a plebiscite. The most simple and straightforward argument for a referendum is that if the Constitution will be a contract among the citizens (not states), then logically the citizens must cast the final vote for the Constitution. If the Constitution is a contract among all citizens, then all must approve the Constitution before it can take effect. Moreover, as the Constitution is precisely a European one, the referendums should take place at the same time in different Member States. There exists currently a civil movement pressing for simultaneous referendums across Europe. The group's hope is that this would not only definitively legitimise the document. It might also create that most elusive of things: a genuine pan-European political debate.¹⁴²

Second, it is generally believed that referendums on European issues serve a vital democratic purpose. The larger the majority required to ratify the draft Constitution, the more likely it is that it will be viewed as a binding agreement by the citizens. It has also been argued that by organising a plebiscite the politicians would be forced to explain more in detail what the Constitution in practice includes and means to its citizens. As such the text would become more familiar to the people. A further point in favour of a referendum is that decisions made directly by the citizens can also be more accurate reflections of their preferences. Sometimes representatives take decisions which are not accurate reflections of voters' preferences.

Yet, the reason to decide to organise a referendum can also be more pragmatic than any of the above-mentioned. Some states may use it as a strategic choice. For example, in the traditionally Euro-sceptic Britain, the Prime Minister Blair promised even before the Constitution had been accepted by the Inter-Governmental Conference that the United Kingdom will hold a referendum on whether to accept it. By this statement the United Kingdom wanted to make sure that their demands would be

¹⁴² However, the Union foreign ministers on a meeting in 5 July 2004 rejected the idea of organising simultaneous referendums, stating that all states should have the right for their own schedules and ways of how to sell the Constitution to its people. See *Helsingin Sanomat*, 6 July 2004.

taken into account in the negotiations over the Constitution.¹⁴³ This is because if the final text would have come across as very much against the popular will of Britain, the danger that the Constitution could be outvoted could be great. Alternatively, some have complained that the Prime Minister's decision was a tactical one to prevent votes being lost in the June European elections rather than a long-term strategy for Britain's relationship with Europe.¹⁴⁴

There are also those who do not support the idea of organising a referendum. Arguments against the use of referendum are in essence that the referenda can in fact result in weakening the democratic process. Dennis Mueller argues that by taking decisions out of the hands of elected officials and representatives, referenda weaken their authority and thereby weaken the process of representative government. Mueller writes that "to the extent that the health of the democratic process rests on the health of its institutions to *representative* government, a weakening of the authority of representative bodies weakens the democratic process".¹⁴⁵ Even if the plebiscite may increase the transparency in decision-making, in reality the result may be twisted as many times people express their opinions on other things than on the actual referendum issue. The citizens often use the opportunity to express their disappointment to the government at large, and thus the issue in question is always in danger to be outvoted. Moreover, issues in question can often be quite complicated and can presume levels of knowledge that the average voter may not have.

However, the line of argument that citizens are too ignorant to vote on issues directly, but are capable of selecting representatives who will make the "right" decisions for them, does not sound very convincing. If one presses the voter-ignorance attack on the plebiscite very far, it will undermine not only this democratic institution but also the institution of elected representatives and representative government. In the end, all attacks on direct democracy are ultimately attacks on all forms of democracy.¹⁴⁶ Yet, even if we would not doubt the capacity of the average citizen to come to the most rational opinion, it is true that in contrast to an individual, an assembly of

¹⁴³ Leading article of *Helsingin Sanomat*, 10 June 2004.

¹⁴⁴ "Blair confirms EU constitution poll", BBC News Online 20/04/2004, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/politics/3640949.stm.

¹⁴⁵ Mueller, Dennis, C, *Op.Cit.*, p.179.

¹⁴⁶ *Ibid.*, p.189.

representatives can both debate and amend issues. It can thus agree to compromises and safeguard the interests of minorities that are unavailable to the electorate in a referendum vote. In addition, the danger in choosing a majority too high (in the case of the European Constitution, all Member States must accept it) is that in the end no constitution is ratified.

Nevertheless, while commentators and politicians are praising the Constitution as “a fundamental advance for the European Union”¹⁴⁷ but at the same time also saying that a referendum is not needed because in the end the Constitution does not change so much – something grates on one’s ear as being inconsistent. If in the end the Constitution does not alter the current situation of Member States in the Union in a significant way, no referendum is needed. If, however, a “new world order” or something in the like is in the making with the new Constitution, in terms of legitimacy, it might be wise to consult and seek the approval of those that will be bound and affected by it. Once again, we can see that the discussion boils down on how to characterise the text, and in a larger sense, the European Union as a whole. From a technical point of view, as the text strictly speaking remains a treaty it should be sufficient to let the national parliaments decide on the approval of it. However theoretically, as the document is supposed to be the answer to the democratic deficit, the magnet that will draw the Union closer to its people, it is very difficult to do this credibly unless the people are directly consulted on the issue. The problem is of course, if the people would then reject the remedy, the EU would clearly have failed the test it set itself. The matter of organising a referendum is no small gamble therefore.

¹⁴⁷ Bertie Ahern on the occasion of the official announcement on the agreement on the new Constitutional Treaty for Europe on 18 June 2004. Source: <http://www.eu2004.ie/>.

5. CONCLUSION

Democracy is the core requirement and intrinsic part of any set of legitimate constitutional standards. Under modern conditions only a normative, that is, a democratic constitution, based on human rights and the principle of popular sovereignty can be deemed legitimate. In this thesis, this scheme has been applied to the European Union. The thesis has tried to tackle the well-known and often repeated claims of democratic deficit within the EU. In particular, we have taken the new Treaty Establishing a Constitution for Europe as our focal point of analysis. We have approached the new Constitution from two separate angles.

First, we have looked at the text from a more practical and technical point view, to see which concrete new measures it introduces in order to make the system more democratic. The Constitution introduces, or confirms in a fundamental text, an important number of provisions aiming at more democratic, transparent and controllable EU institutions that are closer to the citizen. To note a few examples, the use of qualified majority vote is extended and new rules on double majority have been agreed to ensure better decision-making in the enlarged Union. The proceedings of the Council, when exercising its legislative function, are to be open to the public. The role of the European Parliament has been strengthened. National parliaments are to be informed about all new initiatives from the Commission and, if one third of them consider that a proposal does not comply with the principle of subsidiarity, the Commission must review its proposal. New provisions on participatory democracy and good governance have acquired constitutional status. The Charter of Fundamental Rights will guarantee better protection of citizens' rights.

Second, we have also discussed constitutionalism and democracy from a broader theoretical point of view. As the European Union is not a traditional state as such, the democratic credentials will necessarily have to be somewhat different when compared to a sovereign state. In other words, this thesis has argued that put in negative terms, democracy must be freed from the territorial logic of the state and assumptions of the sovereign. The success of the European integration project in terms of democracy depends on its capacity to revitalise the ideal of popular rule under conditions of pluralism. Much conceptual groundwork and guidance is offered by theories of deliberative democracy. Deliberative democracy allows for decisions "united in

diversity" (like the European motto goes!) through discourse. However, in order for that discourse to be more than a mere exchange of pre-established national interests, basic conditions of constitutionalism on a European level must be met. For instance, the principles of legal basis and institutional balance, clearly established by the new Constitution, can be seen as fostering the deliberative-democratic ideal.

What is more, the Constitution, being understood as a social contract, serves to develop and strengthen the development of a European identity. The Constitution for Europe makes clear that the EU is not merely a free market project, but also a union of citizens built upon shared values and binding universal norms. In general, a constitution containing a bill of rights increases transparency and comprehensibility for ordinary citizens and makes existing law liable to public scrutiny. It enhances the possibility of public reflection and democratic deliberation. Thus it enhances the legal certainty of citizens, clarifies the Union's basis of identity and legitimacy and, consequently, reduces the democratic deficit.

Finally, let us allow here some speculative words about the future of the European Union. Having recently acquired ten new Member States and a new legal text to guide its existence, the EU finds itself at a fundamental crossroads. It is often said that the European Union faces the choice between staying (or rather retreating into) a mere common market, or developing into a fully-fledged political system. With the agreement on the Constitution it seems now that it is choosing the latter. Yet, to this development, we can pose a question of a more fundamental kind: is the ever closer Union just an empty phrase to describe the enlarging Union, or are we really witnessing the emergence of a new community of Europeans – a "United States of Europe", albeit a non-statal one?

Much will depend in this respect on the stance the EU will take as regards the identity question. If a true political community is what we want, it seems inevitable the people must start feeling more European for this project to be successful. This development depends to a large extent on EU's capacity to define and further its own values and goals vis-à-vis the needs and strategies of its Member States. As there currently exists (at least) two different political cultures in Europe, the ultimate form that the Constitution will take is not yet clear. Federalists would like to see the EU to develop into a real government, governing a real European people. Those opposing this view say that the EU is precisely a union, a confederation, which independent states have joined in the hope of growing (individually) stronger. Whether to grow stronger

also collectively is not necessarily desired as this would mean the loss of national decision-making power and capability. Therefore, in today's political discourse the dilemma of governance and government remains, the "Constitutional Treaty" currently fitting in the middle of the two alternatives.

Keeping these possibilities in mind, what then are we to make of the democracy model adopted by the Union that is now supposedly ameliorated by the draft Constitution? Taking into account the peculiar nature of the EU, are the democratic assurances enough? In other words, would it be realistic to demand for even more democracy in the system? In our view, the task of rendering the Union democratic is a tremendously difficult task, not least because of the atypical nature of the EU. Even if the institutions are reformed and will now be more transparent and open, and even if the European Parliament, the only body that is directly elected by the citizens of Europe, is granted more powers, there are still those who doubt the democracy in the system. For example, David Heathcoat-Amory has noted that "simplifying the Treaties is not the same as making them democratic or conferring democratic legitimacy". Therefore, even if the text is managed to put into better and more comprehensible language and even if the powers of the institutions are set out more clearly, that will not in itself cure the democratic deficit.¹⁴⁸ In order to do that, the actual importance of the Union will have to be emphasised, so that people would start feeling more interested about the developments in the European Union. As Peter Hain has pointed out, democracy is not only about how to arrive into a decision, but it is also about the actual outcomes. "Complexity is an issue of course, but most people are not worried about exactly how we make laws nationally or in our regions. What matters to them is whether the resulting laws make sense, whether they deliver, and how they can make their own voice heard".¹⁴⁹ In other words, being democratic is not enough, the system needs to be also legitimate in the eyes of its citizens.

Consequently, we would suggest here that the Constitution does give the Union more clarity, but whether it also enhances unity among its members and therefore contributes to its legitimacy, will have to be seen in the future.

¹⁴⁸ Quoted in Magonette, Paul, "Coping with constitutional incompatibilities, Bargains and Rhetoric in the Convention on the Future of Europe", Jean Monnet Working Paper 14/03, p.22, <http://www.jeanmonnetprogram.org/papers/03/031401.pdf>.

¹⁴⁹ *Ibid.*

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