

## Will the Constitutional Treaty Contribute to the Legitimacy of the European Union?

**Heidrun Abromeit and Sebastian Wolf**

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### Keywords

Constitution for Europe, democracy, democratisation, democratic deficit, legitimacy, European Convention, political science

### Abstract

The article explores whether the Constitutional Treaty may provide more legitimacy for governance in the European Union. After presenting a list of normative criteria, relevant parts of the Constitutional Treaty are summarised and evaluated. It is concluded that the Constitutional Treaty's 'added value' is rather small: the document does not make the complicated nature of Union powers and Union decision-making visible and understandable to the public; the vertical and horizontal checks on the use of Union power are suboptimal; the EU's weak 'input legitimacy' is not strengthened. On the other side, the Constitutional Treaty might provide for a better protection of fundamental rights at the supranational level. Hence, as regards enhanced legitimacy, the overall picture, albeit somewhat daunting, is not altogether bleak.

### Kurzfassung

Der Aufsatz widmet sich der Frage, ob der Verfassungsvertrag einen Legitimationsgewinn für das Regieren in der Europäischen Union bedeuten kann. Nach einer Auflistung relevanter normativer Kriterien werden einschlägige Passagen des Verfassungsvertrags kurz erläutert und evaluiert. Die Schlussfolgerung lautet, dass der Verfassungsvertrag kaum einen legitimatorischen Mehrwert mit sich bringt: Das Dokument macht das komplizierte System der EU-Kompetenzen und -entscheidungsverfahren für die Öffentlichkeit nicht sichtbar; die vertikalen und horizontalen Begrenzungen der Unionskompetenzen sind defizitär; die schwache ‚Input Legitimation‘ der Union wird nicht verstärkt. Andererseits könnte der Verfassungsvertrag einen besseren Schutz von Grundrechten auf supranationaler Ebene bedeuten. So fällt das Gesamturteil fällt also eher negativ, aber nicht völlig vernichtend aus.

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## 1. Introduction <sup>↑</sup>

The public expect much of a constitution; more surprisingly, (continental) politicians tend to do the same. The reasons for the high esteem in which constitutions are so generally held differ, though: the public believe that the powers that be are domesticated and held in check by constitutional devices; and politicians seem to think that the sheer existence of an agreed constitutional document will enhance the legitimacy of their actions. National constitutional traditions differ, too. The British, on the one hand, live quite happily without a written constitution and would not dream of deeming their government illegitimate. Diceyan tradition will even have it that a written, i.e. 'rigid' constitution is detrimental to democratic politics as embodied in 'parliamentary sovereignty' (Dicey 1959: 173; 175). The Germans, on the other extreme, think neither power nor authority legitimate which has not firmly and explicitly been vested with the constitutional blessing. German constitutional tradition knows no other sovereign than the constitution itself, nor any other source of legitimacy. Small wonder, then, that in the quest for a European constitution German expectations ran highest. To them, the 'constitutional act' seemed desperately needed to render the supra-national level of governance legitimate and to provide the proper basis for the emergence of a European collective identity (see, for instance, Fischer 2000 and Rau 2001).

How can those different constitutional traditions be reconciled? And how can we explain the wide support the project of ‘constitutionalising Europe’ has found among European politicians even though the constitutional cultures they were reared in vary so much? Was it really their primary aim ‘to institutionalise legitimate democratic government in the EU’, or were they motivated ‘rather by the need to shore up popular support for its political system’? (Hurrelmann 2004: 10). Allegedly, the common denominator of Western democracies is ‘constitutional democracy’: a vague notion embracing the complex whole of modern representative government. The model of ‘constitutional democracy’ is held up against modernising and transition systems; adherence to it has been made the precondition for membership in the EU. High time, then, one should think, that the Union conform itself to the model it propagates; maybe this is why the need for the proper ‘constitutional act’ was so commonly felt. Yet the notion of constitutional democracy is not without ambiguity. It seems to imply that legitimate government is not to be had without a constitutional document; and to turn the argument on its head, it also seems to promise that the passing of such a document *alone* will by necessity enhance the democratic legitimacy of the respective system of government. This does sound a myth – but, apparently, it is a myth believed in some quarters (see also Weiler/Wind 2003: 2)

The major question to be asked in this context is: (1) What – if there is any – is the ‘added value’ of a constitutional document in a Union which, according to many experts, has long since possessed a constitution made up by the Treaties and the rulings of its – quasi-constitutional – Court (see Weiler 1996; Pernice 1999; and below)? Complementary questions are: (2) Which features of constitutionalisation and/or of a constitutional document *generally* contribute to the legitimacy of a system of government? (3) What would be the meaning and relevance of a constitution in a *sui generis* polity like the EU which does not want – or is not allowed – to be a ‘super-state’? (4) Which basic elements ought to mark a constitution of the Union to fit its very specific traits and the heterogeneity of its parts?

We shall deal with these questions by turning first to the functions and benefits of constitutions, generally, and to those features which can be expected to impinge on the legitimacy of the political systems based on them ([section 2](#)). Subsequently we shall discuss the method of European constitutionalisation and dwell extensively on the evaluation of results: on outlining the legitimising qualities of the constitutional document ([section 3](#)). The [concluding](#) section will come back to the questions just listed and summarise the answers.

## 2. The legitimising qualities of constitutions <sup>↑</sup>

### 2.1. Why the need for constitutions?

The following list of criteria does not draw on specific constitutional theories, but undertakes to compile basic principles of liberal constitutionalism derived from common wisdom as well as from a comparative perspective (cf. Loewenstein 1975: 131).

1. Basically, constitutions are ‘rules about rules’ (or ‘norms about norms’): they prescribe the way collective decisions are made within the polity. As such they perform the function of organisational statute or ‘*power map*’ (see Elster 1994: 40/41, Loewenstein 1975: 67/68): which institutional and other actors participate in collective decision-making; how do they interact; how are conflicts between them solved; when does majority rule apply and in which cases other rules; which actors possess veto rights, whose is the right of final decision?

2. The second major task of constitutions is that of delimiting spheres of action and of *allocating competences* to different levels of government (see Zippelius 1999: 311). In federations this is of paramount importance, and this is why no federation can do without a written constitution (Loewenstein 1975: 298). Since the EU must be regarded as some sort of (con-)federation the constitutional problems of federal governance will, by necessity, figure prominently in the course of our argument (cf. Laufer/Fischer 1996).
3. Delimiting spheres of action is the major principle guiding the guarantee of *civil liberties*, as well: they circumscribe the spheres which are safe from government interference (Zippelius 1999: 325, Loewenstein 1975: 333). At the same time, civil liberties or citizens' rights may constitute specific values both government and societal actors are supposed to adhere to.
4. Political, i.e. *participatory rights* of citizens deserve special mentioning since they are of paramount importance in democracies of whichever type (see Zippelius 1999: 113/114).
5. Constitutions do not only allot powers to institutional actors, which implies the (legal) stabilisation and protection of authority structures. More significantly, they *provide horizontal checks* against the use of power (Friedrich 1953: 147, McHugh 2002: 3) – most prominently (in historical perspective) against the power of the majority. Such checks can take the shape of minority (veto) rights which are the more relevant the more heterogeneous the society is.
6. In addition to the values embodied in the civil liberties constitutions can explicitly formulate certain *normative standards* or value systems (such as the social state, or the Christian state) which are not only supposed to guide institutional actors but furthermore to provide citizens with a good reason to identify with the respective political system (cf. Friedrich 1953: 196), thus furthering integration and the formation of a suitable 'collective identity'. Such attempts at 'cultural homogenisation' (see Hurrelmann 2004) may, however, backfire in heterogeneous societies where the desired cohesion of beliefs is hard to obtain.
7. Last but not least the constitutional document is supposed to be of some use to make structures of authority *visible* (cf. Friedrich 1953: 155) and lay open responsibilities to citizens.

## 2.2. Constitutions' contributions to legitimacy

We could expect any constitution to contain these elements although in varying degree and with differing weight attached to them, according to different ways of birth and different structures of society. Constitutions may deal with these matters in more or less adequate ways, however, and thus contribute more or less to the legitimacy of the respective polity. The notion of legitimacy is a diffuse and complex one, usually combining the aspects of (formal) legality, (normative) acceptability and (empirical) acceptance of a system of government (Abromeit 2000: 60/61). While constitutions do in fact constitute some sort of legal order, and actual acceptance may vary according to circumstances and quite irrespective of the contents of a constitution, it makes sense to concentrate here on the aspect of acceptability, i.e. on the question whether the constitution constitutes a legal order and system of government which is of a kind that, in the given societal context, can be reasonably expected to be acceptable to all its members as the one that suits their needs and basic values. Hence we have to compile a second list of requirements, resembling the first but specifying the way in which constitutional elements affect legitimacy.

1. First and foremost, and in a purely formal sense, the constitution as a ‘power map’ and basic legal order contributes to the legitimacy of the authority structures it constitutes by the *explicit consent* it has been given to. In the strictly contractualist view this consent would have to be unanimous (see Friedrich 1953: 191). The ‘social contract’ deserved that name only because it was supposed that each and everyone had agreed to it – if tacitly. In the normal nation state this is of course a fiction, to be interpreted in the way that the rules laid down in the document should be of such a nature that every reasonable citizen *could* have consented had he been asked to do so. Assuming, however, that a constitution is *only* about rules and that the partners to the constitutional contract labour under a ‘veil of uncertainty’ as to who is to benefit from which rule (see Brennan/Buchanan 1985: 29 p.), the requirement of unanimous consent sounds less unrealistic than at first hearing. Assuming further that the differences between (groups of) partners to the contract are very great the stipulation gains in – legitimacy – importance or, in other words, virtual unanimity must come close to actual unanimity, or else those outvoted in the initial contract will feel to be losers and resent the rules imposed upon them. As regards content, the corollary to this formal stipulation is that the partners to the contract – not only in the initial act but thereafter as well – are considered (political) equals; that the ‘rules of the game’ are fair; and that in the new constitutional order no one must fear to be worse off than before. For were it (foreseeably) otherwise consent would have been withheld.
2. In federations, in particular, a constitution acquires legitimising force from its resemblance with an actual contract and from *the contractualist way it is dealt with*. As alluded to under (1) already, the relevance of this requirement increases with the divergence of sub-units and the distinctness of their respective collective identities (see Abromeit/Hitzel-Cassagnes 1999: 40). The contractualist way of handling constitutional rules generally shows in the procedures of constitutional amendment and, more particularly, in the treatment of rules delimiting spheres of action and allocating competences to the federal state. Acceptance and legitimacy will grow with the security sub-units may feel that their internal autonomy will not be impinged upon beyond the extent they have assented to beforehand, or not beyond what they are ready to assent to from case to case.
3. Federations (again) can survive only when the principle of supremacy of federal law is upheld; at the same time, legitimate constitutionalisation cannot imply that federal law is permanently imposed upon reluctant sub-units. The apparent dilemma can be resolved by firmly sticking to the *principle of compatibility* (Abromeit 2000: 64) which, at the constitutional level, means that constitutional rules must not devalue the sub-units’ constitutional orders nor undermine their particular value systems and political cultures (cf. Loewenstein 1975: 332). This sounds an intricate feat to achieve but becomes plausible once we think of the democratic and participatory rights people in the sub-units are used to enjoy: rob them of those and dissatisfaction will be the result.
4. It is indeed the *participatory rights* granted to citizens, their associations, and sub-units which are of paramount importance for acceptability (see Zippelius 1999: 113/114) – yet not only the old ones which people would resent to be taken away from them but also the new ones specific for the new layer of collective decision-making. Identification with and acceptance of a new political regime grow with the existence and effectiveness of opportunity structures allowing citizens to influence the rules they are subjected to thereafter.
5. People cannot, in the real (modern) world, themselves participate in every decision taken for the community; inevitably and everywhere decisions are taken vicariously. Yet they would want to know *who is responsible* if such decisions turn out to their detriment. Hence legitimacy of government accrues from the clarity with which constitutions allot responsibilities and from the degree and effectiveness of public accountability and of popular control they prescribe.

6. Yet one might argue that the legitimising quality of a constitution does not only hinge upon its contents and on the consent it has met. Republican tradition will have it that the truly democratic constitution – as well as genuinely legitimate politics – is based on the public discourse continuously upheld between citizens over the best and most reasonable rules, good for all. Hence deliberative democratic theory stresses the relevance of the right *process of constitutionalisation*: by way of meaningful participation in the said discourse, citizens can see themselves as authors of the constitutional norms they are afterwards obliged to obey; if they cannot, constitutionalisation will provide but the pretence of legitimation (see Asbach 2002: 289). This is, of course, a stiff requirement, difficult to be met in polities yet to be formed and, hence, lacking a *demos* and a public literally speaking ‘in one tongue’; where no halfway united society exists no ongoing public debate can be expected (see Grimm 1995).

Instead of concluding therefrom that in a certain (i.e.: diverse) type of federation no genuinely democratic constitutionalisation is possible we suggest that a trade-off exists between process (of birth) and content. Lacking the ideally required modicum of homogeneous public and of cohesion of beliefs, the higher the relevance of contents which ‘compensate for problems of integration’ (Hurrelmann 2004: 7 p.) – meaning: the greater the need for the requirements (1), (2) and (3).

Thus, we have assembled a number of criteria against which the legitimising qualities of the European Constitutional Treaty can be evaluated. It is, of course, debatable whether and to which degree these common place criteria of liberal constitutionalism can be transferred to the special case of the EU (see Weiler/Wind 2003: 2/3). We do not address this topic in detail because of two reasons: First, both the Convention and the Intergovernmental Conference explicitly chose the same “conventional” constitutional rhetoric, apparently regarding it as applicable not only to the nation state but to a supra-national community as well. Hence the academic observer should be allowed to feel free in using it, too, in his scrutiny of the results of their endeavour, in order to find out how satisfactorily those constitutional principles have been dealt with. Second, though the EU’s political nature is as *sui generis* as maybe, it undoubtedly has the power to make binding law, same as the nation state has. The individual is affected by supranational law as he/she is by national law. Thus, it seems appropriate to evaluate the Constitutional Treaty with common normative criteria derived from the federal framework, especially. ‘We should not lower our normative standards to make them fit the EU reality’ (Kohler-Koch 1999b).

### 2.3. The ‘Constitutional Treaty’: a special case? ↑

Of course, not all observers – nor all participants in the (wider) constitutional process – share this view. According to some commentators the European Convention ‘broke a taboo’ (Schieder 2004: 15) when it presented the European Council with a draft constitution. In the first place, in their Laeken Declaration of December 2001 European heads of government had not asked for it but rather asked themselves whether or not – ‘ultimately’ – the ‘reorganisation and simplification’ of the Treaties they deemed necessary ‘might not lead *in the long run* (italics ours, H.A./S.W.) to the adoption of a constitutional text in the Union’. In the second place, the notion of a constitution for a long time was considered a synonym for the European ‘super-state’ which some members clearly did not want. This is why the Convention cautiously named its product ‘Constitutional Treaty’ instead of ‘constitution’. The two, or so the baffled public were told, were very different pairs of shoes: a ‘treaty between states’, ‘to be ratified by every national government’ like any other international treaty, the one – ‘a constitution for a single state’ passed by decision of its own *pouvoir constituant*, the other (The Economist June 21<sup>st</sup> 2003: 21; Schieder 2004: 15).

The distinction is over-subtle, however. Of course there is no other *pouvoir constituant* in the EU than the whole of its member states, and if their heads of government come to fundamental decisions it seems quite logical that those decisions be ratified by their people “at home”. No federation could boast of a genuine constitution if there were something in that distinction since they are all based on contracts between polities thereafter to become sub-units of a greater whole, and these contracts had to be ratified by the same polities, one way or another. But the very essence of the notion of *all* democratic constitution-making is the normative concept of the mutual consent of equals.

Constitutions are (legal) “meta-contracts” laying down the basic rules for further contracting’ (Abromeit/Hitzel-Cassagnes 1999: 31): ‘meta-contracts’ agreed upon and explicitly or implicitly ratified by *virtually all* because rules cannot be imposed by one group upon another (Brennan/Buchanan 1985: 27).

As mentioned above the unanimity thus presupposed is not what marks actual processes of constitutionalisation in nation states, though; rather, it is a legal (and normative) fiction. Therefore, it has become common to pinpoint the requirement of *actual* unanimity among states as the decisive difference between contract or treaty on the one hand and constitution on the other (ibid.; Grimm 2003; Weiler 2002: 565). It is debatable whether so much stress should be laid on this practical point. If we consider the mutual consent of equals to be the normative core of constitutionalism, *in essence* no fundamental difference between constitution and constitutional treaty exists. From a narrowly legal perspective, of course, the Constitutional Treaty is nothing more than a treaty of international public law, none other as all the previous European Treaties. In this regard, the new constitutional terminology might be criticised as being mere window-dressing, anyway.

Another matter to be discussed under the same heading is that of the *need* for a constitutional treaty at the present stage of European integration: is it not sufficiently constitutionalised already? ‘The question “Does Europe need a Constitution” is not relevant, because Europe already has a “multilevel constitution”: a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties (*Verfassungsverbund*)’ (Pernice 1999: 707). Pernice even goes so far as to trace back, in a somewhat heroic construction, this ‘multilevel constitution’ to a ‘European social contract’ based ‘on the will of the “sovereign” people(s)’ having decided in favour (for instance) of the primacy of European law (ibid.: 710; 715) – which in actual fact they were never asked to do, nor their governments either, for the respective doctrine was elaborated by the European Court of Justice. Yet many other constitutional experts would agree that the EU, before the Convention went to work, did possess a constitutional order (in the shaping of which the ECJ took a major part); hence, ‘what Europe needs ... is not a constitution but an ethos and a telos to justify, if they can, the constitutional order it has already embraced’ (Weiler 1996: 518).

The answer to our question derives just from the character of that (quasi-) constitutional order as a *Verfassungsverbund* which forms a complex, inconsistent, unintelligible whole of varied parts. The European citizen cannot be expected to know all those various bits nor understand the meaning and relevance of each nor the way they interconnect, he cannot anticipate the ways in which they impinge upon his own life. Hence the need for a European constitution proper arises, first and foremost, from the invisibility of the structures of Europe’s constitutional order. What is primarily asked of the constitutional document is to bring about ‘clarity and coherence about where [the EU’s] powers come from, and how decisions are made’ (Jack Straw, in: *The Economist* July 10<sup>th</sup> 2004: 30).

A second reason ensues from the prominent part the ECJ has played in the development of the European quasi-constitution, alluded to above. It seems high time its major doctrines – never invested with the explicit consent of anybody – be incorporated in a document which does not only make them visible as an integral part of the constitutional order but exposes them to the consent or dissent of all partners to the constitutional contract. Both reasons apply even in the case that the constitutional document does not alter the contents of the (quasi-) constitutional order so far existing; even ‘mere consolidation’ would make sense.

A third reason is of course the over-due ‘democratic baptism’ (Weale 1995: 90 pp.) of the supra-national power structure. A *democratic* constitution is felt to be needed to close the EU’s ‘legitimacy gap’ and make up for its ‘democratic deficit’. Yet while most observers would agree with the first two reasons many would not do so with the third – not least because of divergent views about what the essence of a democratic constitution is. Clarity, visibility, coherence, legal security etc. are all preconditions of public accountability but not sufficient preconditions of democracy. The latter may, in the view of some, entail a ‘substantive normative conception’ – of ‘the good’, or of justice, for instance – and thus ‘reflect basic ethical choices of a given political community’ (Menéndez 2003: 9; 11) which presupposes a collective identity united by a consensus on fundamental values. This is exactly why some authors argue that it is too early days yet for the *democratic* constitutionalisation of the EU because Europe lacks the respective collective identity or *demos* so far (see Grimm 1995). Does this, in point of fact, lead us back to the difference between constitution and constitutional treaty? In practical life, however, democracy boils down to the right of citizens to participate in the collective decisions they are subjected to, irrespective of common values. And since the status of European citizen has been firmly established already (not least by the ECJ) even a constitutional *treaty* may be expected to grant the respective rights, thus closing the gap to the ‘normal’ democratic constitution (which must not be mixed up with its counterfactual ideal, anyway).

### 3. The European Constitutional Treaty of 2003/04 <sup>↑</sup>

#### 3.1. The ‘Laeken Process’

Allegedly, the ‘Laeken process’ was set in motion to foster public debate, Europe-wide, about the need and contents of European constitutionalisation. It was officially initiated with Declaration 23 annexed to the Treaty of Nice (of 28<sup>th</sup> February 2001), which called for a ‘deeper and wider debate about the future of the European Union’, addressing ‘all interested parties’ whether they belong to member- (and candidate-) state institutions, to civil society, or to the public in general (for this and the following see Menéndez 2003: 28 pp.). Apart from some speeches of leading politicians – commented by other politicians – nothing much seems to have happened in that first ‘signalling phase’, though. The work of the Convention installed with the Laeken Declaration of 15<sup>th</sup> December 2001 formed the core of the ‘deliberation phase’, to be followed by a more comprehensive debate in the national publics on the Convention’s recommendations before the Intergovernmental Conference (IGC) was to come to the final decision. As we know it took two Conferences and some arm-twisting of recalcitrant governments to decide upon the (revised) draft Constitutional Treaty which makes for a third – if unforeseen – phase of public discourse as well as of behind-the-scene negotiations. In some quarters the process as a whole triggered enthusiastic comments as to its ideal-type quality, for ‘never before in the history of constitutions has the process of constitutionalisation been so public, democratic, and transparent’ (Kühnhardt 2003: 9; transl. H.A./S.W.).



However, there was little response in the wider public(s). If there was debate it was more or less restricted to the ‘strong public’ of institutional actors (Menéndez 2003: 29) and to university circles. Also, the ‘convention method’ was less ideal than has frequently been given out (e.g. Maurer 2003; Schieder 2004: 13) although its composition and the rules set for its work were indeed of a kind to suggest a truly deliberative process. The members were predominantly members of parliaments (two of each member state, 16 MEPs, two of each candidate state, as compared to only one member of each government plus two representatives of the Commission). Delegates of the Economic and Social Committee, of the Committee of the Regions, of the European social partners as well as the European Ombudsman were invited to attend as observers. Finally, there was the Forum to allow for intermittent contact with representatives of European civil society (ranging from NGOs over ‘academia’ to ‘the business world’) whose contributions were meant ‘to serve as input into the debate’ – with the laudable aim to prevent conventioners from losing sight of an ongoing public debate outside. They did not, however, make a marked impact upon results. Nor did, we may presume the delegates of candidate states who were assigned a kind of second-class status allowed to participate in debates but not to stand in the way ‘of any consensus which may emerge among the Member States’.

The proceedings as interpreted by the presidium foresaw no voting which would seem to make room for relaxed discussions. According to the Laeken Declaration (which was rather vague on that head) conventioners were asked to elaborate different ‘options’ for the future of the Union, hence were not obliged to come to a decision; in case they wanted to issue ‘recommendations’ these were to be based on ‘consensus’. Apparently, the latter was expected to emerge in some mystical fashion; in actual fact, the absence of voting made ‘the Praesidium ... the *authoritative interpretor* (sic!) of the common will of the Convention, without any reference to any intersubjective test of such common will’ (Menéndez 2003: 30). The presidium was, furthermore, to guide proceedings ‘by drawing conclusions from the public debate’ and to provide the ‘initial working basis’. Before the Convention started to work its EP members voiced their fears ‘that the body risks to be marginalized by its Presidium’, and ‘that the real work is done behind closed doors, by the Presidium, while the plenary will only have to acclaim the result, and thus the public debate will be killed’ (Spinant 2002). Even without the president’s dominance plenary debates frequently were far from the deliberative ideal; protocols note that delegates often read out prefabricated statements without any reference to previous contributions of their colleagues (COMECE, EKD and KEK 2003: 13). And in the concluding phase (when Part III of the draft constitution was dealt with) Giscard d’Estaing seems to have governed the assembly in a squirely fashion, presenting the plenary with proposals they had not been informed of beforehand and were given little chance to alter or even to discuss (ibid.: 133). Nevertheless one gets the impression that in the end conventioners were relieved and happy that the president spared them the onerous task of compromising on those last controversial bits and shouldered the job of devising them alone. Thus, without any voting, the draft was completed and passed ‘by consensus’ and to the sounds of Beethoven’s ‘Ode an die Freude’.

The Declaration did not only set the rules for the Convention’s work but also the agenda: it defined problems and likely ‘options’ for their solution. As mentioned earlier the drafting of a complete constitution did not figure prominently among these but only as a remote possibility (‘in the long run’). Instead the agenda opened up a choice of how to tackle the ‘Nice left-overs’, ranging from the integration, clarification and simplification of the Treaties (‘without changing their contents’) to suggestions of reform. The headings meant to focus debates were the ‘better division and definition of competences in the European Union’, the ‘simplification of the Union’s instruments’, and ‘more democracy, transparency and efficiency’.

Items mentioned under the last heading include the improvement of the efficiency of the Commission, the possible strengthening of the Council, or of the EP, voting rules in both these institutions, the role of national parliaments, the coherence of European foreign policy, and the like. To its better part the list gives the impression that the question of enhanced democratic legitimacy was largely to be subsumed under the notion of efficiency. One may conclude that the major object the European heads of government had in view, in Laeken, was the streamlining of Union politics.

### 3.2. The constitutional elements of the Treaty

At an early stage of their work conventioners agreed that instead of merely considering different options they would produce a complete draft constitution. The surprising unanimity in this basic question may well have rested on the conviction that it is much easier to water down or even ignore single proposals than – sort of in full view of the public eye – tear apart a fully and juridically formulated constitutional document (see Göler/Marhold 2003: 319), in which estimate they were only about half proved right subsequently. In some institutional matters conventioners were moderately innovative, but for the major part they restricted themselves to the consolidation of Treaty provisions. The final document agreed on by the IGC contains all the elements one would expect to find in a normal constitution (and as listed above) – with the exception of its large Part III which reads like a kind of instructions for the usage of the rest. But it has to be made perfectly clear at the outset that both in Part I and Part III very little is actually *new*; and Part II is not new at all.

(1) Part I provides the Union with a ‘*power map*’ in enumerating its institutions, roughly sketching their interrelations, and in defining the nature and effects of its legal acts. The few institutional innovations are to be found in this part, such as the invention of a more permanent President of the European Council (elected for two years by heads of states, while the Council of Ministers’ Presidency keeps rotating) and of a Union Minister of Foreign Affairs; alterations in the composition of the Commission (creating a rotation system in a – now distant – future); and the new formula of qualified majority voting (QMV, see below) the applicability of which has been extended (though less than originally intended). New is the simplified revision procedure in Art. IV-444 which invests the European Council with the power to extend, by unanimous decision, the range of areas where the Council of Ministers may act by QMV. As for the legal acts the nomenclature has been altered but their number not significantly reduced.

What is missing in Part I is procedures by which to resolve conflicts between the institutions although the alterations concerning the personnel, powers and composition of the institutions bear the potential of added conflict. Art. I-29 states that the Court of Justice of the EU (ECJ) ‘shall ensure that in the interpretation and application of the Constitution the law is observed’ but one has to search in Part III where Art. 360 to 381 specify all the types of legal disputes in which the Court has jurisdiction. Also one has to take recourse to Part III for detailed information on voting rules (as for instance in the case of a motion of censure against the Commission, Art. 340) and on the decision-making procedures which still vary from pillar to pillar and from policy area to policy area. Much of what is set out in Part I is modified by the details tucked away somewhere in the 321 articles of that lengthy part.

(2) The second task of a constitution is to delimit spheres of authority and to *allocate competences*. This ranked highest on the agenda given by the Laeken Declaration which draws attention to the danger of ‘creeping expansion of competences of the Union’ and even considers the option of ‘restoring tasks to the Member States’.

The Constitutional Treaty does not tackle either of these questions but merely introduces a new nomenclature of ‘exclusive’ competences of the Union, ‘shared competences’, and ‘supporting, coordinating or complementary action’, a typology rounded off by extra mention of the specific Union competences in the coordination of economic and employment policies and in the common foreign and security policy. Under these headings policy areas are listed which barely leave one field of action for member states, exclusively. Furthermore, the ‘Flexibility Clause’ of Art. I-18 allows the Union to extend its powers provided a respective proposal from the Commission meets with unanimous consent in the Council as well as with the consent of the EP.

This does not sound like a ‘delimitation of spheres’ proper – were it not for the mention of the ‘principle of subsidiarity’ in Art. I-11.1 and the invention of an ex-ante control by national parliaments (Art. I-11.3, further elaborated in Protocol 2) whose objections against Commission proposals for new European laws deemed to violate the principle of subsidiarity do not legally bind the European institutions, however. For ex-post control, member-state governments and/or their parliaments as well as the Committee of the Regions may apply to the ECJ if they feel that the Union has overdrawn the line. The Union will then have to prove that ‘the objectives of the intended action ... can ... be *better* (italics ours, H.A./S.W.) achieved at Union level’ (Art. I-11.3).

(3) As for the protection of *civil liberties* and the sphere of the individual the constitution has a lot to offer, both in Titles I and II of Part I and in the extensive Charter of Fundamental Rights passed some years ago and now incorporated in the document as Part II. Art. I-9.2 and Protocol 32 state that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, a major step blocked in the past by the ECJ which probably feared that the European Court of Human Rights might overrule its decisions.

(4) Much less is to be found concerning *participatory rights*, at EU level. Such are rarely mentioned: European citizens have ‘the right to vote and to stand as candidates in elections to the European Parliament’ as well as the right to petition and to apply to the Ombudsman (Art. I-10.2); they as well as their associations shall have ‘the opportunity to make known and publicly exchange their views in all areas of Union action’ (Art. I-47.1); and they may initiate a legal act of the Union (Art. 47.4) which is the only new element in this respect.

(5) The institutional framework circumscribed by the constitution (as by the Treaties before) may be seen as a horizontal system of ‘*checks and balances*’, *in toto*: all European institutions can – in differing degree and effectiveness – provide checks on each other. With a more permanent President of the European Council and the Foreign Minister the Convention appears to have provided additional checks. Yet the constitution is fairly reticent on the specific powers of the ‘second head of the Union’, apart from the rather trivial ones as a chairperson, while the Foreign Minister seems to be intended to bind Council and Commission closer together. The draft version definitely aimed at further strengthening the President of the Commission but in this did not find favour with the IGC. The latter did not object to the moderate strengthening of the EP, though. Both Commission and EP have traditionally been motors of ever closer integration and therefore frequently acted in unison; both now obtain or remain in strong positions. This leaves (as it did before) the national veto in the Council as the one real check.

We may conclude that provisions for checks on the use of majority power at Union level were not what was uppermost in conventioners' minds. On the contrary, it will be increasingly difficult for European minorities – i.e., for instance, small member states – to find protection against an 'overbearing majority' in Brussels, made up by the Commission, the majority in the EP, and the big member states – which is the more problematic since the Brussels majority does not find its correlate in European societies. Of course there is the option to apply to the ECJ, but this institution has become known as another powerful actor promoting the 'ever closer Union' and in all probability will be even more so in the future, now bound by a constitution in which declarations postulating harmonisation, coordination, integration etc. abound.

(6) For if the constitution provides an overriding *normative model* it is just that of further integration. The document so much stresses the values on which the Union is based that the reader must come to the conclusion that the EU is in fact and already a community united by common normative standards. At the same time, these values cover so wide a range – humanistic, liberal, social – that one gets the second impression that they are merely instrumental: meant to extend the powers of the Union for the latter's task is to safeguard *all* of them. Again a look at Part III is helpful because here those numerous normative objectives are translated into the more practical ones of consistency, sustainable development, overall harmonious development and the like, which all point to the overall responsibility of the Union to 'forge a common destiny' (Preamble).

(7) Where conventioners have most signally failed is with respect to *visibility and clarity*: power and decision-making structures are neither simpler nor clearer than they were before – or if one thinks they are one has not looked at Part III. The layman will not know, from reading the document, where final responsibilities rest, and in which case, for procedures and decision-making powers still vary according to pillar and area. The different procedures of which Wessels counts 48, as compared to 50 before (2003: 289), are not listed in Part I which might have been helpful but scattered over the various titles of Part III. Nor is the citizen likely to know when, exactly, a subject matter can rightfully be dealt with by the member state and when the Union may claim it is in its exclusive – or shared, or supportive...? – competence, and what in the end the ECJ may rule. Things have been made even worse by the IGC who took some pains to re-introduce complexities conventioners had meant to streamline (or added new ones, such as the revised formula for the double majority in the council).

### 3.3. Legitimising qualities of the Constitutional Treaty

Many constitutions may be criticised from many angles but can be said to have contributed to the legitimacy of the respective political systems, all the same. That is why we have to complement the above overview and comments with a discussion of those (new or old) traits of the Constitutional Treaty which can be expected to legitimise the complex, intricate, unfinished, quasi-federal and *sui generis* political system of the EU.

(1) As stated above, the legitimacy of a federal constitution first and foremost arises from the *explicit consent* given by all partners to the federal contract, a consent which, in its turn, is based on the mutual acknowledgement of their political equality and on the mutual appreciation of the fairness of the 'rules of the game'. With respect to the 'constitutional act' the principle of political equality is in fact adhered to: all member state governments consented (if with a little arm-twisting) and all national parliaments will have to consent to the Treaty in the process of ratification. This principle – firmly stated now in the revised Art. I-5 – also applies to subsequent revisions (Art. IV-443.3) and to the flexibility clauses (Art. I-18, Art. IV-444, Art. IV-445). But what about further subcutaneous extensions of Union power by judicial means?

The Constitutional Treaty does not address the ECJ's previous role as clandestine *pouvoir constituant* and motor of harmonisation (see below). Doubts are allowed with respect to the new double majority made up of 55% of the members of the Council, comprising at least fifteen of them which, in addition, have to represent at least 65% of the EU's entire population (Art. I-25.1): it must be judged a deviation from both the principles of equality and fairness of rules. The weighting of votes in the Council customary before constitutionalisation was a violation of the federal maxim of 'one state one vote' already, the more serious since EU Treaties and the Constitutional Treaty are not fictitious contracts but contracts in actual fact. The 'demographic factor' has its legitimate place in the representation of the people ('one man one vote'), not in the representation of contracting states. Despite the new rule that a blocking minority must include at least four Council members (Art. I-25.1) the big states now get even further advantage vis-à-vis the small ones, thus arousing suspicions of hegemony – or of intentionally choosing the path to the unitary state. The actual shift of power may look marginal, at the moment, but it is the principle that counts. And the conflicts fought over the double majority demonstrate that the legitimising quality of the constitution must be called into question, in this specific aspect (see also Schieder 2004: 19).

(2) The second requirement for a federal constitution which is meant to expound legitimising force is its closeness to the contract or, more precisely: the suitability of certain *rules to be dealt with in a contractualist way*. This principle applies to the procedures of constitutional amendment, in general, and to the rules governing the allocation of competences as well as the procedural safeguarding of the internal autonomy of sub-units, in particular. In all three respects the Constitutional Treaty is ambiguous, at best. In the first place, there is no reason to expect that the ECJ will lose its leading role in the interpretation of Treaty norms and in the adaptation of these norms to changing circumstances which by necessity places the judges in the position of behind-the-scene agents of constitutional amendment (see Abromeit/Hitzel-Cassagnes 1999: 33). This holds especially for the rules governing the allocation of competences which – in the second place – are so imprecise that one may lay any odds that the ECJ will get a lot of work to do with their elaboration. Furthermore, the lists of items compiled under the headings of the different types of Union competences (see above) overlap or are difficult to distinguish from each other, and are worded in such a way that lends itself to the suspicion that they are basically meant to be all-embracing. A look at Part III confirms this impression, in stating, in the introductory articles to the titles detailing the Union powers in different policy areas, the norms which should guide the use of these powers: they can all be subsumed under the headings of coherence and harmonisation. Inevitably they will minimise the practical relevance of the subsidiarity principle (Art. I-11.1) for if harmonisation and coherence are the uppermost objectives it will not be difficult for the Union to prove that the decisive prerequisite of Union action – that objectives can be 'better' achieved by it – is given. Instead it will be difficult for states and regions to prove the contrary, as well as difficult for the ECJ to judge otherwise because it is itself committed to the same constitutional norms the Union justifies its actions with (for an early critique of the subsidiarity principle of the EC and EU Treaties see Laufer/Fischer 1996: 88).

Art. I-11.1 states that the limitation of Union competences is governed by the principle of conferral ('*Grundsatz der begrenzten Einzelermächtigung*'). But the wide range of 'limited' competences laid down in Part III indicates that – contrary to the principles of dual federalism – it is often member-state action which requires justification. But even in co-operative federalism the enumeration of competences commonly rules out unspecified residual competences of the federal level (Scharpf 1991: 421).

Apart from this fundamental deviation of federal principles, and as mentioned above already, the Treaty norms taken together leave hardly one policy area to member states exclusively, where they will be allowed to enact policies of their own without being pressurised by Commission initiatives fostering at least coordination.

Of course in many cases it is the Council who decide upon the use of the manifold Union powers, but increasingly it will do so by QMV. This leaves the newly-established ex-ante control by national parliaments and the ex-post control via the Court as the only procedural brakes for the dynamics of centralisation of actual powers. But, as hinted above, the latter variant may prove toothless if the ECJ does not alter its habits of ruling and its own commitment to accelerated integration; whereas the first variant does not bind the Union's institutions. There is some hope, though, that a protest registered by national parliaments – if coming from more than one as well as from the 'more important' countries – can mobilise sufficient public pressure to turn the ex-ante control, in effect, into a kind of veto.

(3) The third prerequisite for legitimising effects is that the *principle of compatibility* be upheld. As outlined above, this requirement aims at protecting the core of the member states' constitutional orders and especially the democratic and participatory rights people in the sub-units are used to enjoy. The constitution alludes to the principle of compatibility in various places, namely with regard to 'cultural and linguistic diversity' (Art. I-3.3). National traditions and practices are to be respected as is mentioned several times where the constitution deals with industrial relations and with social policy; in the latter policy area European laws and policies 'shall not affect the right of Member States to define the fundamental principles of their social security system' (Art. III-210.5) but restrict themselves to the establishment of 'minimum requirements' and to the 'encouragement' of cooperation between member states (Art. III-210.2). Here as well as in environment protection the constitution explicitly allows members to pursue higher standards as those set by the Union – provided they do not interfere with the 'functioning of the internal market'. Furthermore, conventioners were apparently troubled by the accelerated erosion of the role and rights of national parliaments which may have been a major reason for assigning them new powers in the procedural protection of the subsidiarity principle.

What they did not trouble about was the possible erosion of direct-democratic citizens' rights, by firmly stating that the EU be founded on the principle of representative democracy (Art. I-46). Nor did the participatory rights of member-states' sub-units find due consideration: apart from the provision that the Committee of the Regions will be entitled to bring action against European legislative acts on grounds of infringement of the principle of subsidiarity, the 'third level' is hardly mentioned which may frustrate the Belgian sub-units and some *Bundesländer*. Hence the regard paid to the principle of compatibility is not without deficiencies. It is marred, too, by the obvious tendency (described above) to place members under permanent pressure to harmonise and coordinate their policies. Thus, in the teeth of the various references to the desirable maintenance of diversity (of which more could have been listed here), in actual politics it will be increasingly difficult for members to stick to their traditions even in those areas which are nearest to their hearts.

(4) Acceptability of and identification with a political system grow with the amount of *participatory rights* granted to citizens. While national participatory rights are inevitably weakened to a degree by the European layer of politics, the provision of new and effective opportunity structures gains in importance. The Treaties and European political practice had offered two paths for citizen participation in European politics: the direct elections to the EP and the more indirect way of joining associations of civil society.

To these, the constitution does not add much. It did strengthen the EP, though, yet without going the whole hog to full parliamentarisation: the EP has acquired equal rights with the Council in an increased number of cases but not in all; it may elect the President of the Commission but not select him; a motion of censure against the Commission as before requires a great coalition (and more resembles the impeachment, anyway). It is debatable whether elections to the EP can be classified as 'meaningful elections'. The answer to this question given by European voters is unequivocal: they do not consider them meaningful and abstain in growing numbers, and those who do not, take the opportunity of punishing their national governments for policies carried out at home, or vote for Euro-sceptics.

To this lamentable state of affairs conventioners reacted with the strategy of personalisation: by providing European politics with additional 'faces' in the shape of the President of the Council and the Foreign Minister. The EP tries its hand at the same strategy by insisting that no President of the Commission shall be confirmed who is not somehow connected to its strongest political group. Yet since those persons are not selected and presented to the public by the political groups themselves but sort of diced out by national heads of government, are not campaigning and not sufficiently known to the wider public before the elections to the EP, the strategy of personalisation cannot render the elections any more meaningful – the less so since the presentation of a candidate (or of alternative candidates) is not coupled with that of the political programme he or she means to enact.

One might argue, quite rightly, that this deficiency cannot be laid at the door of constitution-makers (although the originally intended reform of the electoral system might have improved matters, in the long run) and cannot be remedied by a constitution which is restricted to offering a framework to be filled this way or another by political actors. It would be the task of national parties and their European federations, then, to make the interactions of voters, parties, parliament and government work at European level as satisfactorily as it does at national level. Yet the crux of the matter is less that this happy state does seem a long way distant; rather, it is doubtful whether the parliamentary path is the right one to follow, at all, to achieve the desired legitimacy result. The European electorate is much too heterogeneous, its basic interests, values and conceptions of the common good differ too much by half to make majoritarian democracy generally acceptable (see also Scharpf 2003: 57). Furthermore, the majoritarian system in existence *in nuce* in the EP already clearly does not operate according to the logic usually ascribed to it. Instead, a permanent 'great coalition' formed by the two big political groups EPP and SPE (and enforced by the voting rules prescribed by the Treaties) tries to hurry the process of integration while condemning the smaller groups to the status of permanent minorities. Increasing electoral success of Euro-sceptics is more than likely to aggravate this – so far latent – problem and trigger growing discontent; and thus the parliamentary path, so far from contributing to legitimacy and to the formation of a European collective identity, may end in frustration.

Apparently, conventioners did not discuss and consider alternative paths but firmly stuck to the 'principle of representative democracy'. Strangely enough, though, Title VI of Part I, headlined 'The democratic life of the Union', also mentions the 'principle of participatory democracy'. It sounds a big name for a small thing, for what is meant is nothing more than reference to the civil society and a kind of commitment of the Commission to listen to what 'representative associations and civil society' have to say, even to enter into a 'regular dialogue' with them (Art. I-47.2). Thus, the second variant of participatory rights of citizens is, via association, to take part in this dialogue. It is made out to be 'open and transparent' but in actual fact it is not.

For, in the first place, the ‘network governance’ (see Kohler-Koch 1999a) which the article alludes to is basically non-public and obscures responsibilities instead of achieving transparency; and, in the second, this informal kind of participation is anything but inclusive – or, more precisely, the degree of inclusiveness reached will be that which the Commission thinks useful and adequate. What is more: nobody, apart from the social partners, is legally entitled to be included.

The one new element the constitution has to offer, with regard to citizens’ participation, is the citizens’ initiative, giving them the right to propose a legal act of the Union. A European law will be required to substantiate the How and How much (‘at least one million’ citizens, but from how many member states?); as likely as not it will not be of a legally binding quality. One may wonder why conventioners included just this one direct-democratic instrument in the constitution’s extremely mottled Title VI of Part I. To grant citizens the right of veto against unloved laws would have seemed to be of higher priority than the opportunity to devise better laws themselves (see Abromeit 1998). At the same time, the veto could be expected to prove more effective, and probably that is the reason why the initiative was preferred.

All in all, we may conclude that, as regards democratic participation, the constitution has chosen the wrong track to enhance the legitimacy of European politics.

(5) Legitimacy also grows with the opportunity of citizens effectively to take to task state actors for allegedly acting on their behalf and for their benefit. Constitutions contribute to this not only by bestowing the respective rights – of being properly informed and to vote a government out of office – but by clearly delineating where *responsibilities* lie. While the Constitutional Treaty does grant informational rights and commits the Union institutions to the principle of transparency, it does not (as shown above) provide citizens with a clear picture of Union power structures, nor of responsibilities, and only to a limited degree allows for public accountability. At best, the picture given in the constitution (Part I) is illusionary, for European citizens may vote but if disenchanted with European politics are not given the chance to alter it. Whom ought they to vote out of office: the Commission? – not really feasible by participating in the EP elections; the Council? – not possible at all; an area-specific policy network...? – not known to the public, anyway. Seemingly, there is nobody actually to be taken to task, no ‘rascal to be thrown out’, and nobody who *visibly* assumes responsibility.

(6) Finally, the *process of public deliberation* is assumed to lend democratic legitimacy to a constitution as well as to the polity thus formed. As seen above, the public discourse actually accompanying the work of the Convention fell lamentably short of normative requirements. Nor can the discourse going on within the Convention be said to have been truly deliberative and of such a nature as to guarantee fair and reasonable outcomes. For there was no ‘veil of uncertainty’ about rules and about who might benefit from which: everybody knew perfectly well who would and who would not. One may well argue that without the ‘convention method’ we would not have got a constitution at all; but there is some reason to doubt that its deliberative elements were sufficiently pronounced to carry any farther, beyond that single act.



## 4. Conclusion: The legitimacy of the European Union – before and after constitutionalisation <sup>↑</sup>

When the Convention had finished and published their draft constitution even Romano Prodi, the then President of the Commission, lamented that it ‘lacks vision and ambition’ (see *The Economist* May 31<sup>st</sup> 2003: 27); *The Economist* was harsh in its critique of a ‘lamentable piece of work’: ‘a text which would worsen the very problems it had been instructed to address’ (June 21<sup>st</sup> 2003: 11); German academics criticised the ‘risk-averse’ attitude conventioners had adopted: so modest were the results that they would not have necessitated the ambitious ‘convention method’ (Höreth/Janowsky 2003: 72). On the other hand, the heads of European governments looked very pleased with what they had achieved in the second IGC held over the matter. Even the British government appeared to be content, priding themselves that many of their ‘red lines’ had found due recognition in the final version for of the 80 amendments passed by the IGC 39 had been proposed by Britain (see Jack Straw in *The Economist* July 10<sup>th</sup> 2004: 30). Thus, even the small-scale improvements suggested by the Convention – restricting themselves to the ‘feasible’ instead of advocating the desirable – were watered down. In resuming the two perspectives just quoted *The Economist* concludes that the Constitutional Treaty does, in fact, ‘bring some real improvements to the EU – for governments. For the people they serve, however, it does not’ (June 26<sup>th</sup> 2004: 13) – and puts this down to ‘one of the oddities of the club’: ‘the extent to which most of its leading institutions have managed to insulate themselves from public opinion’ (June 12<sup>th</sup> 2004: 33).

Even if not adopting this scathing view one has good reason to harbour doubts about the surplus of legitimacy the new Treaty will bestow upon European integration. Before constitutionalisation the legitimacy of European politics used to be seen as resting on its output: on its efficiency in meeting public needs which no longer could be satisfactorily dealt with by national governments acting independently from each other. This output or ‘technocratic legitimacy’ (see Lord/Magnette 2002) was indirectly coupled with the input legitimacy of its component states whose governments, as leading actors at Union level, were, all of them, democratically legitimised at home. Direct input legitimisation – whether parliamentary or otherwise – was regarded as rudimentary at best, the existence of a directly elected European Parliament notwithstanding. Hence the common view that European politics suffered from a legitimacy gap mainly originating in its democratic deficit. The Commission for some time now has attempted partly to close the gap by including corporate actors into its decision-making, i.e. in trying to achieve a modicum of ‘corporate legitimacy’ (ibid.). And the European Court of Justice did its best in generating ‘an original normative order that confers new rights and entitlements to citizens’ and thus to contribute to ‘legal legitimacy’ (ibid.).

One might argue that the legitimacy derived from these different sources could be considered sufficient for supra-national politics strictly limited to a few areas. But this is just the point: European powers of action are *not* strictly limited but have grown out of bounds. With the completion of the internal market and the inclusion of the second and third pillar the Union has acquired state-like powers; its laws not only induce more than 50% of national legal norms (BVerfG 1993: 173) but also increasingly supplant originally national laws, thus eroding its own indirect or ‘derivative legitimacy’ for national parliaments are no longer free to act according to their people’s wishes, and national governments can no longer be held fully responsible by their people. Hence, it takes more than the surrogate sources of legitimacy named above to close the Union’s legitimacy gap. Yet will the Constitutional Treaty do so?

This brings us back now to the questions this essay set out to answer.

1. What is the ‘added value’ of the constitutional document in the Union’s present state – and in view of the fact that the material norms of the previous Treaties have been barely altered? The surplus could simply rest in its readability and in the clarity with which it expounds the formers’ intricacies and makes power structures visible and understandable. Unfortunately this is exactly what the Constitutional Treaty does *not* achieve: the complicated nature of Union powers and Union decision-making will be no more intelligible to the general public than it was before, and what little improvement the draft had offered was ruined by the IGC’s final version (and, what is more, the new Treaty is somewhat longer than the EC and EU Treaties taken together; the Euratom Treaty is not even included).
2. The constitutional features most generally contributing to the legitimacy of a polity are the checks on powers provided, the ways prescribed to hold them responsible and accountable to citizens. Again, the Constitutional Treaty fails to offer adequate provisions. Conventioneers were concerned less with making governance accountable than with making it easier (and, hopefully, more efficient).
3. *If* there is a definite need for an actual or quasi-constitution in a *sui generis* and multi-level polity it is that to demarcate levels of responsibility as well as to protect spheres of autonomy of member states where they are safe from unwanted and unforeseeable interference by the Union, thus providing an optimum of legal security both for the constituent units and their citizens. Once more, conventioneers barely troubled with the question. On the contrary, by defining Union competences as vaguely and as single-sidedly as they did, and by re-iterating, in various places, the over-riding norms of coherence and ever closer integration, the constitution obviously aims at security mainly for the Union. Its members are referred to the good will of Union institutions and to the ECJ who, bound by the constitution, may be somewhat at a loss about what to rule in cases of conflict. They may decide this way in one case and that way in the next which amounts to the opposite of legal security – in more than one respect: having to rely upon varying Court rulings implies that the general public will never be sure about where actual responsibilities rest.
4. Finally, which constitutional elements could democratically legitimise politics in a Union composed of extremely heterogeneous parts? Full parliamentarisation and majoritarian democracy cannot be considered the adequate and sufficient way of ‘input legitimation’ but the Constitutional Treaty does not offer plausible alternatives, pointing to consensus democracy. The national veto in the Council – gradually losing in relevance, anyway – does not make for *democratic* legitimation; for that, it would have to be complemented with the right of people to contradict (see Abromeit 1998). A constitution normatively binding together divergent units should also contain elements facilitating the formation of a collective identity. Arguably the most plausible way to achieve this object is to offer citizens sufficient means of effective participation at all levels of the polity, and not rob them of their respective rights at unit level. The second (complementary) way is to grant citizens fundamental rights, enforceable at all levels. While the Treaty does not bother much with the first requirement it does not fail with respect to the second – although the British took some pains to have ‘explanations’ added to the final version stating that fundamental rights were applicable to member states only when they were implementing EU law (see Art. II-111 and Declaration 12), and that the ECJ was held to pay ‘due regard’ to this restriction. All the same, ‘European citizenship’ may, in fact, gain some – normative and emotional – relevance in the future. Hence, as regards enhanced legitimacy, the overall picture, albeit somewhat daunting, is not altogether bleak.

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## Epilogue <sup>↑</sup>

The No of the French and the Dutch electorates in the referendums held over the Constitutional Treaty indicates that our criticism has not been too far-fetched. Not many of those voters will have read the Treaty; but those who did will have been as baffled and irritated by its complicated nature and illegibility as we were; it definitely is not the kind of text which makes it easy to ‘put two and two together’. Their No cannot be explained away by their disenchantment with the government of the day. At least as much it was caused by growing discontent with the state of European integration: by a feeling that the twin processes of ‘deepening and widening’ the Union have gone to far and are growing out of bounds; that the referendums might be the last opportunity to halt their dynamics; and that it is high time to tell ‘those in Brussels’ not to lose the peoples of Europe out of sight.

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