The Lisbon Treaty and National Constitutions

Europeanisation and Democratic Implications

Carlos Closa (ed.)

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Preface

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RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

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RECON Scientific Coordinator

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Carlos Closa

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Chapter 1

Reconstituting European Democracy

Erik Oddvar Eriksen and John Erik Fossum
ARENA, University of Oslo

Introduction

The academic debate on European democracy is multifaceted.[1] It brings up the nature and character of the integration process; the issue of conceptualising democracy; the question of community and common values; political ambitions and possibilities; globalization's many faces; and the character of the changing world order, etc. This is so because the EU – The European Union – confronts the challenge to *forge* a viable democracy at the supra-national level. This must however be considered in light of the complementary challenge of *sustaining* national democracy within an altered European and global context. The point is that the European integration process has reshaped the workings of the member states' democratic orders to such an extent that we can neither properly understand, nor adequately assess, member-state-based democracy unless we take the EU's influence directly into account.

In terms of the scale and the scope of how democracy is envisaged to be institutionally configured, the multifaceted debate on European

[1] This chapter draws on Eriksen and Fossum 2007.

democracy can be pinned down to three core axes or institutional configurations. Euro-sceptics argue that the solution to the democratic deficit is to 'roll back' the European integration process. Is this possible *without* encountering the democratic problems that warranted European integration in the first place? Euro-federalists see the solution in the 'uploading' of national democracy unto the European level. Transnationalists and cosmopolitans see the EU as a democratic experiment which requires rethinking democratic theory. At stake is whether the proper handling of the EU's democratic deficit can be pinned down to constitutional or institutional reconfiguring or whether it actually requires a new democratic theory. In this chapter, a set of normative criteria are applied to the main positions in the literature. This yields three *democratic polity models*, each of which is assessed for its democratic viability and feasibility. The first model for how democracy can be reconstituted asks if it can be reconstituted at the national level, as delegated democracy with a concomitant reframing of the EU as a functional regulatory regime. The second whether this can be accomplished through establishing the EU as a multi-national state based on a common identity(ies) and solidaristic allegiance strong enough to undertake collective action. The third asks whether democracy can be reconstituted through the development of a post-national Union with an explicit cosmopolitan imprint. We start by addressing the three core axes of the debate on European democracy.

European democracy revisited

The first, most widespread and dominant axis, takes as its key premise that the nation state is the harbinger of democracy.

Rescuing or uploading democracy?

The conundrum facing proponents of national democracy is that in today's Europe, a range of processes generally labelled under the heading of globalization are seen to *undermine* the salience of the nation state as the embodiment of democratic government. Euro-sceptics, notably of a conservative bent, see European political integration as synonymous with the factors that drain out the essence of nationhood.[2] Social democrats and communitarians claim that the European integration process sustains a neo-liberal supranational

[2] For a selection of Euro-sceptical writings, see Holmes 1996.

order, an order that undercuts both the systems of risk-regulation and the measures of solidarity that were such characteristic traits of the European welfare state.[3] Taken together these factors are seen to sustain a system of multi-tiered democratic deficits. Many students of democracy go further and argue that the democratic deficit is not merely a contingent matter relating to the effects of globalization, but refers to lack of core democratic components such as a common European public sphere. Some underline the structural character of the problem: it highlights built-in limitations in the *scale* of representative democracy. Robert A. Dahl (1999) for instance, has argued that, beyond a certain scale, representative democracy simply cannot work; thus, extending representative democracy to the European level lengthens the democratic chain of legitimation and *heightens citizens' alienation*. The most obvious solution is to roll back integration. But can really the rolling back of European integration *rescue* national democracy under conditions of interdependence and globalization?

The merit of this solution (rolling back integration) is disputed by other analysts who argue that the main challenge to national democracy does not emanate from European integration, but instead from decisional exclusion, as a result of denationalization and globalization under which international crime, environmental degradation, and tax evasion thrive. Many of the decisions affecting national citizens are made elsewhere. Indeed, these processes reveal

[3] See Etzioni, 2007; Greven 2000; Offe 2000, 2003; Miller 1995; Scharpf 1999; Streek, 2000. The negative referenda results of the Constitutional Treaty can be construed as voters punishing the Union, as well as their own leaders, for actively taking measures to undermine both democracy and the ability to forge collective action (Nicolaïdis, 2005: 14). See also Post-referendum surveys in France and the Netherlands (Eurobarometer, 'The European Constitution: Post-referendum survey in the Netherlands', Flash Eurobarometer 172, June 2005. Available at <http://ec.europa.eu/public_opinion/flash/fl172_en.pdf> and 'The European Constitution: post-referendum survey in France', Flash Eurobarometer 171, June 2005. Available at: <http://ec.europa.eu/public_opinion/flash/fl171_en.pdf>). Siedentop (2000) gives this argument a special twist. Whilst supporting a European federal state, he argues that the present integration process is an unhappy marriage of French *étatisme* and neo-liberal economism. This mixture threatens to undercut the prospect for democracy in Europe.

decreasing steering capacities on the part of the nation state.[4] When framed in this light, analysts such as Habermas (2001) see European integration not as the nemesis of democracy, but as a means of *uploading* democracy to the European level.

Both positions in this debate take the nation state as their frame of reference and discuss the prospects for democracy in these terms. Proponents of a European federal state (Mancini 1998; Morgan 2005) would for instance argue that instituting democracy at the supranational level is the best assurance for sustaining democracy also at the member-state level. But within such a configuration the member states could no longer be sovereign *nation* states. Whether the European level could foster a viable nationalism is highly questionable. Hence, the standard federal solution fails to lay to rest the question of nationalism's relationship to democracy. The answer hinges at least in part on how we view the communitarian claim that without a collective identity, there can be no democracy.

Decentring democracy?

The second axis of debate is made up of transnationalists and multilevel governance scholars, who argue that the challenge facing Europe is neither to rescue the nation state, nor to upload state-based democracy to the EU level. The EU is seen as a possible *alternative* to the nation-state model.[5] Further, some analysts hold the EU up as a type of polity that has prospects for developing democracy *beyond* the nation state.[6] Ruggie (1993) sees the EU as a case of unbundling of state authority, and with this a change in the constitutive principle of territoriality. Transnationalists and multilevel governance scholars portray the EU as made up of a host of new governance structures that combine to make up an alternative to a government above the nation state. To them, sovereignty resides with the problem-solving

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[4] See Nielsen 2004. Bartolini (2004) sees this in weakened power of centres' ability to control peripheries. Against this view we find analysts who argue that European integration *strengthens* the state. See notably Moravcsik 1994; Milward 1992.

[5] Hooghe and Marks (2003) outline two models of multilevel governance, among which MLG II is the one closest to the non-state approach to governance.

[6] See notably Schmitter 1996; 2000. See also Hoskyns and Newman 2000; Preuss 1996; Weiler 1999; id. Weiler 2001; Zürn 1998. Lord's (2004) second democratic standard, 'concurrent consent', is explicitly designed for a multi-level system of governance, without this necessarily being tied to the state form.

units themselves.[7] Dense transnational networks and administrative systems of co-ordination have been intrinsic to the legitimacy of the EU, and some see these as amounting to a form of *transnational constitutionalism*.[8] They are based upon the private law framework of legal institutions 'that claim legitimacy beyond their own will or self-interest' (Möllers 2004: 329). This debate focuses on the conditions under which such issue areas can be deemed to be legitimate. If the self-governing collectivity is part of several communities – national, international and global – the locus-focus of democracy becomes a puzzling matter (Held 1995).

Multilevel governance scholars and transnationalists share the focus on new forms of governance, but they also differ in disciplinary orientation and focus. Multilevel governance scholars (who are generally political scientists) focus mainly on structural features of the EU. Hooghe and Marks (2003) for instance sketch two models of multilevel governance that are both radical departures from the centralized state. Transnationalists (many of whom are lawyers, political theorists and sociologists) focus less on structures and more on modes and forms of interaction. Some, notably Cohen and Sabel (1997; 2003), and Bohman (2007), straddle the line between the second and third (cosmopolitanism) axes of debate through opting for a 'cosmopolitanism restrained' which blends elements of cosmo-politanism[9] with (a regional notion of) transnational governance. They argue for the normative validity of a kind of polycentric system of directly-deliberative polyarchy (Bohman 2005). This entails a model of direct participation and public deliberation in structures of governance wherein the decision-makers – through 'soft law,' benchmarking, shaming, blaming, etc. – are connected to larger strata of civil society. The claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts – national, organizational and professional – come together to solve various

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[7] Bohman 2005; Cohen and Sabel 1997, 2003; Dryzek 2006; Gerstenberg 2002. For an overview of the governance literature in a European context, see Kohler-Koch and Rittberger 2006.

[8] See Fischer-Lescano and Teubner 2006; Joerges, Sand and G. Teubner 2004; Möllers 2006; Slaughter 2004.

[9] Cohen and Sabel expressed this cosmopolitan stance more explicitly in their most recent article (2006).

types of issues and in which different points of access and open deliberation ensure democratic legitimacy. The EU is seen as a multilevel, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and of diverse and dispersed democratic authority.

There are observations to support such a view and also the notion of the EU as a non-coercive deliberative system, with re-regulatory and market redressing effects.[10] The critical question, however, pertains to whether transnational governance structures can meet with the core democratic requirements of public accountability and congruence. Can the democratic requirements of equal access, transparency and openness be met or is citizens' participation restrained to *a limited segment of the citizenry*? In other words, does deliberation and problem-solving in transnational networks have democratic value? If so, what are the institutions and mechanisms we should look for? The crucial question that this debate brings forth is whether the state form and a collective identity are necessary preconditions for democracy to prevail. In short, can democracy prevail without state and nation?

Cosmopolitan democracy?

The third 'cosmopolitan' axis of debate focuses on Europe as a particularly relevant site, for the emergence of cosmopolitanism (Archibugi 1998; Beck and Grande 2004; Delanty and Rumford 2005). This cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'normative power' or 'civilian power' (Rumford 2005; Manners 2002). Cosmopolitanism, Rumford notes 'is not part of the self-identity of the EU' (2005: 5). Scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic world order. It is seen to connect to the changed parameters of power politics through which sovereignty has turned conditional upon respecting democracy and human rights. It is posited as one of several emerging regional-cosmopolitan entities that intermediate between the nation state and the (reformed) UN, and which become recognized as a legitimate

[10] Egan and Wolf 1999: 253. See Joerges and Neyer 1997; Cohen and Sabel 2003; Gerstenberg 2002; Joerges and Vos 1999; Wessels 1998; cp. Majone 2005: 143ff. See also Stone Sweet 2004 for the role of the ECJ with regard to positive integration.

independent source of law (Eriksen 2006; Habermas 2001; Held 1992, 1995). In the Westphalian order, states are sovereigns with fixed territorial boundaries and are entitled to conduct their internal and external affairs autonomously; without any possibilities for external actors to control the protection of human rights. But one of the main thrusts of legal developments over the last half-century has been to protect human rights. The development of the UN (and regional entities such as the ECHR), whose global entrenchment has been re-enforced through multilateral arrangements for regulating economic international affairs (such as Bretton Woods, the GATT and the WTO), and their accompanying set of institutions, first delimited, and later redefined, the principle of state sovereignty. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized. State sovereignty is in the process of becoming *conditional*; conditioned on compliance with *citizen's sovereignty*. Democracy can thus no longer stand for a national 'community of fate' that autonomously governs itself.

Democracy's demands

The debate on European democracy makes it clear that the core issue is to establish what democracy *can mean* when the nation state no longer serves as the taken-for-granted foundation. The most critical issue that the multidimensional debate on democracy in Europe brings up is how to conceptualize democracy as an organizational arrangement within a post-Westphalian global context, where states are deeply intertwined. It is marked by *complex interdependence embedded in a multilevel governance configuration*. Europe's conundrum is that it cannot simply do away with this structure without facing democratic losses. But neither can it simply rely on this structure to resolve its democratic problems. The solution is to *reconstitute* democracy, which starts from the recognition that only a political system that is able to address the complexities and contradictions brought forth by the process of continental integration – which has been step-wise through several rounds of enlargement – can ensure a viable democracy in Europe today.

Different theoretical conceptions of the EU exists, but there is no work that properly bridges these with the mainstream debate on democracy, so as to make clear what is at stake for democracy in Europe. The relative disconnect between general democratic

theorising and the European case is also apparent in that many of the innovative proposals to capture the EU's complex character are not properly attuned to democracy. Hence, proposals such as *consortio* and *condominio* (Schmitter 2000), *deliberative supranationalism* (Joerges and Neyer 1997), *cosmopolitan empire* (Beck and Grande 2004: 81ff.), *empire* (Münkler 2005: 245ff), and forms of *multilevel governance* (Hooghe and Marks 2003), such as *hierarchical and plurilateral* (Zielonka 2007), are descriptive categories devoid of normative content. None of the forms of consortio, condominio or empire speaks directly to democracy. Further, how deliberative supranationalism or multilevel governance can be democratic, remains to be demonstrated.

Deliberative democracy's point of departure is that democratic legitimacy derives from the public justification of the results to those affected, in light of agreed-upon standards. This constitutes the normative thrust of the democratic principles of *autonomy* and *accountability*. With autonomy we refer to the basic democratic principle that those affected by laws should also be authorised to make them. This criterion is more institutionally committing than what the transnationalists see it as. It posits that publicly authorised bodies of decision-making react adequately in the determination of the political community's development, insofar as the citizens can be seen as acting upon themselves. Accountability designates a relationship wherein obligatory questions are posed and qualified answers required. This principle also comes with distinct institutional requirements: It speaks to a justificatory process that rests on a reason-giving practice, wherein the decision-makers can be held responsible to the citizenry, and where, in the last resort, it is possible, to *dismiss*, incompetent rulers (Held 1995: 16; Bovens 2007: 107). These principles may, to be effective, presuppose representative democratic arrangements.

Reconstituting democracy

Reconstituting democracy in Europe should take the European multilevel structure as the point of departure. This structure consists of intergovernmental as well as supranational and transnational elements; each of these entails different model constructions of how a democratic Europe would look. In other words, when we apply the

democratic principle to the multilevel structure we get to three different European democratic orders.[11]

Reconstitution through audit democracy

The first model envisages democracy as directly associated with the nation state. The presumption is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals, as well as continuously through public debate. In this model, the emerging structure in Europe is seen as a regulatory regime deeply embedded in extensive institutional arrangements of public (or semi-public) character.

The model posits that the Union be mandated to act within a delimited range of fields. The model presumes that the member states delegate competence to the Union, a competence that in principle can be revoked. Democratic authorization by member states today, however, takes the form of a supranational Union-wide representative body. In order to account for this in an intergovernmental perspective, its democratic purpose would have to be delimited to serve as an agent of *audit democracy*, not representative democracy. The representative body would, together with transnational and/or supranational institutions (such as a court and an executive), be set up to help member states supervise and control the Union's actions. These would be specifically mandated to hold intergovernmental decision-making bodies to account. They would be constitutionally barred from legitimising and authorising law-making, as well as from expanding Union competencies. Delegation works better in some issue-areas than in others: the general stipulation is to solve problems that the member states cannot handle alone, and to delegate control where this will not undermine national democratic arrangements.

In accordance with the logic of democratic delegation, that is, which issues can be delegated without severe loss of democratic self-governing ability, the EU's conferred competencies would be foremost in the operation of the Common Market. The scope for

[11] For further information on this reconstruction – and the models – see Eriksen and Fossum 2007.

common action in other policy fields would be quite narrow, as would be the scope for redistribution. According to this model, the present-day EU would have to be slimmed down and would not be suited to handle many of the challenges of the nation states posed by globalization. Since the fate of national democracy is intrinsically linked to developments at the EU level, another strategy is that of reconstituting democracy at this level.

Reconstitution through federal multinational democracy

The democratic credo posits that all political authority emanates from the law laid down in the name of the people. The legitimacy of the law stems from the presumption that it is made by the people or their representatives – the pouvoir constituant – and is made binding on every part of the polity to the same degree and amount. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation, and in possession of its own coercive means.

For this model to work properly within the complex European setting, which has obvious traits of deep diversity, we have to take heed of the existence of *multiple* nation-building/sustaining projects. This model can then also be modified to accommodate the fact that nation-building at the EU level would be taking place *together with* nation-building at the member state (and partly even regional) level. The modified version would be a *multinational federal European state*. In its institutional design, such an entity would have to coordinate the self-government aspirations and the rival nation-building projects that would occur within the European space (Norman 2006: 96). In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of 'recognitional parity', for national communities at different levels of governance (in the EU at Union and member state levels). Wayne Norman cites seven such principles: (a) partnership; (b) collective assent; (c) commitment and loyalty; (d) anti-assimilationism; (e) territorial autonomy as national self-determination; (f) equal right of nation-building; and (g) multiple and nested identities (Ibid: 163-9).

This model is premised on the tenet that a uniform national identity is not a core precondition for the democratic constitutional state. The multinational federal state requires citizens' allegiance; in the form of a *constitutional patriotism*, which is embedded in contextualized basic rights that ensure both an individual sense of 'self' and a collective sense of membership. This requires a positive identification of Europe, and the distinguishing of Europeans from others so as to make up the requisite social basis and 'we-feeling' for collective action and for regulatory and redistributive measures. However, as there is not much support for the idea of a 'super-state' in Europe, a third strategy is that of a regional-cosmopolitan variant of democracy.

Reconstitution through regional-European democracy

The third model envisages democracy *beyond* the template of the nation state and the states' system. This model posits the EU at the trans- and supranational level of government in Europe, and as one of the regional subsets of a larger cosmopolitan order. This implies that the Union will be a post-national government, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to 'the cosmopolitan law of the people'.

The EU has obtained competencies and capabilities that resemble those of an authoritative government, which we may define as the political organization of society, or in more narrow terms, as the institutional configuration of representative democracy and of the political unit. The idea is that since 'government' is not equivalent to 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government structure can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or collective identity that is needed for comprehensive resource allocation and goal attainment. Such a governmental structure is based on a division of labour between the levels that relieves the central level of certain demanding decisions. The problem is how such an entity can be effective – implementing decisions against a dissenting minority, in the absence of state-type coercive measures. When it is the member states that keep the *monopoly of violence in reserve*, such an order can only be effective to the degree

that actors comply on the basis of voluntary consent. The EU's decisions are implemented through authorized and democratically supervised national administrations. Collective decision-making and implementation in the EU thus takes place within a setting of already legally institutionalized and politically integrated orders, which can help ensure compliance. However, one may ask how such an order can 'deliver'; how can it bring about changes required by justice? How can it ensure equal access and public accountability in the complex multilevel constellation that makes up the EU? Any attempt to set up such a system in one corner of the world only, with Europe as a vanguard, is likely to be a fickle construction

Conclusion

The real challenge facing Europe pertains to the nature and status of *democracy,* or rather democratization, in Europe. Europe's democratic conundrum is that it cannot simply do away with the structure that has been wrought at the EU-level, without facing democratic losses. But this structure in its present form and shape also produces democratic problems. Therefore, the key issue facing Europe is the need for *reconstituting* democracy in Europe. Acknowledging this does not foreclose the issue; it offers a wide range of conceptions of democracy and standards of legitimacy. We have demonstrated that, within an interdependent world, this can take the EU in a statist or in a cosmopolitan direction. The Union's ability to pursue these directions hinges on internal as well as external factors, *including* macroscopic ones such as the future of the states' system.

Given this range of options, there is an obvious need for a clear intellectual map which sets out the main democratic options, and serves as key to more detailed assessments of the *multilevel constellation* that makes up the EU in order to establish in what direction it moves and where it fits within this vast terrain.

We have here proposed three such models for democratic reconstitution of Europe. The analytical framework that makes up these models permits us to engage with the many paradoxes, aporias and dilemmas that haunt Europe, and global processes more generally. They help shed light on the profound challenges facing contemporary Europe: overcoming nationalism without doing away

with solidarity; establishing a single market in Europe without abolishing the welfare state; achieving unity and collective action without glossing over difference and diversity; preserving identity without neglecting global obligations; achieving efficiency and productivity without compromising rights and democratic legitimacy; and ensuring law-based rule as well as popular sovereignty.

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Chapter 2

The Lisbon Treaty and National Constitutions More or Less Europeanisation?

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Introduction: EU Law and national constitutions after the demise of the European Constitutional Treaty

The attempt to elaborate a formal Constitution for the European Union drew, as one of its side effects, renewed attention to the relation between the proposed European constitution and the national constitutions of the EU member states. One strand in the constitutional law literature in Europe, which was particularly prominent in Germany but was present in many other countries as well, wondered whether it made sense at all to conceive of a 'constitution' for the European Union, given that the EU is not a state and is not intended to become one.[1] However, the drafters of the Constitutional Treaty had given little or no attention to this preliminary epistemological question and happily assumed that they were justified in calling the result of their drafting efforts a 'Treaty establishing a Constitution for the European Union', and they certainly did not envisage that this new denomination could affect the continued existence and relevance of the national constitutions of the member states.

[1] See for example Grimm 2004: 279; Favoreu 2006: 85.

Now that the Lisbon Treaty has eliminated the word 'Constitution' from its title, and deleted any reference to a European Constitution in its text, this whole meta-constitutional debate on whether it is at all possible or legitimate to speak of a constitution of the European Union when its member states have their own long-established constitutions, will probably subside. What will not disappear from the scholarly agenda, though, is the question of the legal and political impact of the European integration process (as it stands today or as it may stand in the future after the entry into force of the Lisbon Treaty) on the national constitutions of the member states. This debate predates the elaboration of the Constitutional Treaty and will continue after the abandonment of the term 'Constitution for the European Union'.

In the first part of this chapter, I will sketch a brief outline of the types of influence and pressure which the European integration process has exercised on national constitutions during the past four decades. I will then, in the second part, offer some elements for the discussion on whether or not the Constitutional Treaty and its 'scrambled' version - the Lisbon Treaty - will lead to a further Europeanisation of the constitutions of the EU member states.

European pressures on national constitutions

The European integration process, and EU law specifically, has put constant pressure on national constitutional systems since the very start. One can identify three broad and distinctive dimensions of that pressure, which were acknowledged one after the other. The *first* and most obvious *challenge*, which became apparent already in the 1950's for the original six member states, is that the Community Treaties (and also the EU Treaty when it was adopted later on) vested law-making powers in the European Community institutions, and by doing so they removed those powers away from their 'natural' locus, namely from the domestic institutions of the member states. The *second challenge*, which became most visible in the 1970s and has remained a constitutional headache ever since, was to accommodate the claims of European law to have direct effect and precedence over conflicting national law within the existing constitutional hierarchy of sources of law in which the Constitution itself 'naturally' claims to occupy the highest rank. The *third challenge*, which is more diffuse and has not been openly acknowledged in most national

constitutional texts, consists in the major reshuffling of the internal institutional balance within each member country that results from the operation of the EU institutional system, and from the exercise of EU powers. Such a reshuffling has occurred in three different respects: between the courts and the political institutions, between the government and the parliament, and between the centre and the regions in federal states (in each case, to the advantage of the former).

How did national constitutional systems react to these multiple pressures over the years? By and large, one can say, they have tried to persevere in their being; there have been relatively few express adaptations of constitutional texts to the European integration process, but there have been many flexible adaptations (falling short of constitutional revision) through judicial interpretation and institutional practice, and there have occasionally been some forms of resistance against the pressure.

The *first challenge*, namely the transfer of law-making and regulatory powers away from the national to the European institutions, is the one that is most clearly acknowledged in the constitutional texts of the EU member states. In the post-war constitutions of the three largest founding states of the European Communities (France, Italy and Germany), provisions had been inserted that allowed for limitations of sovereignty or transfer of powers to international organizations by means of a treaty.[2] Indeed, the European Coal and Steel Community appeared, alongside the United Nations Organization, as one of the 'novel' international organizations to which these new constitutional clauses were meant to apply. All the other member states, apart from the United Kingdom and Finland, have enacted similar constitutional clauses prior to their accession to the European Union. Today, the situation is rather mixed. Some countries have specific clauses in their constitution dealing with the transfer of powers to the European Union; these were either introduced by old member states such as France and Germany at the time of the Maastricht Treaty or by new members at the time they acceded to the

[2] In France, paragraph 15 of the preamble of the Constitution of the Fourth Republic (1946); in Italy, Article 11 of the Constitution of 1948 (which still acts as the constitutional basis of EU membership today); in Germany, Article 24(1) of the Basic Law of 1949 (supplemented since 1993 by a new Article 23 referring more specifically to the European Union).

EU. However, a surprisingly large number of countries continue to follow the generic approach of allowing for transfers of powers, or limitations of sovereignty, for the benefit of international organizations *generally* speaking without mentioning the EU with so many words. So even today, after more than fifty years of European integration, there is only a limited amount of 'Europe language' in national constitutional texts.[3] Even in the constitutions that have special sections dealing with the EU (such as those of France, Germany, Ireland and Portugal), those sections stand apart from the well-worn domestic part of the constitution whose provisions are, very often, identical to what they were before the country joined the EC or EU. So, if one reads the central chapters of national constitutions which deal with the organisation of legislative, executive and judicial powers, one finds no trace there of the country's membership of the European Union, and therefore no acknowledgement of the fact that the operation of the internal *trias politica* is affected by this membership in many crucial ways. A good example of this schizophrenic practice is Article 15.2.1 of the Irish Constitution which, even to this day, claims that: '*The sole and exclusive power of making laws for the state is hereby vested in the Oireachtas* [the Irish Parliament]*: no other legislative authority has power to make laws for the State.*' Thus, the clauses on transfer of powers are treated as limited adjustments of the exercise of popular sovereignty, rather than as a radical challenge to traditional conceptions of sovereignty.[4] The new member states of Central Europe have been as culturally conservative as the old member states when they adapted their constitutions to EU membership, doing this often in a very minimalist way (Albi 2005: 399). The most striking thing of all is that the texts of several member state constitutions (including those of a founding member, the Netherlands) fail to make any mention whatsoever of the fact that the country is a member state of the European Union.

The *second challenge* has proved to be more traumatic for national constitutional law. The European Court of Justice's formulation of a duty for national courts to recognise the direct effect of EC law, and its primacy over national law in the case of conflict, has upset the

[3] See the comparative surveys of the relevant constitutional provisions by Claes 2005: 81; and by Grabenwarter 2005: 95.

[4] On this theme, see de Witte 1995: 145 and Walker 2003: 3.

traditional constitutional rules dealing with the hierarchy of sources of law, and more particularly with the place of the Constitution itself in that hierarchy. In federal states such as the USA and Germany, the supremacy of federal law is effectively guaranteed by the fact that its enforcement is largely in the hands of federal courts. In the EC legal order, by contrast, the inconsistency of a national norm with a Community norm can be directly examined by the European Court only in the framework of an infringement action brought by the Commission under Article 226 EC, where the European Court can make Community law prevail as a matter of course, just like any international court will give precedence to international law over the domestic laws of the states parties to a dispute. Usually, however, inconsistencies between national law and EC law will come to light through litigation before member state courts and will have to be solved by them. For that reason, it becomes crucially important that the national courts should faithfully absorb and apply the direct effect and primacy doctrines laid out by the European Court of Justice, and this explains the insistence of the European Court, and of legal commentators, on the 'essential' character of primacy. In other words: promoting the acceptance of the primacy doctrine is essential, because the effective application of the doctrine is in the hands of the member state courts, unlike what happens in a really federal system.

This institutional characteristic of the European integration process has important consequences. The national courts conceive themselves primarily, and quite naturally, as organs of their state, and have tried to fit the 'European mandate' formulated by the European Court of Justice within the framework of the powers attributed to them by their national constitutional system. For these courts and, indeed, for most constitutional law scholars throughout Europe, the idea that EU law can claim its primacy within the national legal orders on the basis of its own authority seems as implausible as Baron von Munchhausen's claim that he had lifted himself from the quicksand by pulling on his bootstraps. The national courts consider the domestic authority of EU law to be rooted in their own constitution, and seek a foundation for the primacy and direct effect of EU law in that constitution. Since the courts and other national authorities consider that European law ultimately derives its validity in the domestic legal order from the authority of the constitution, they are unlikely to recognise that European law might prevail over the very foundation

from which its legal force derives.[5] In most member states, the constitutional provisions allowing for the transfer of powers to international organisations (or to the EU specifically) have not been viewed as allowing alterations to the basic principles of the constitution going beyond that transfer of powers itself. The essential question, then, is where to draw the line between minor adaptations caused by EU law and essential changes imposed by it, and, consequently, where to set the limits of the penetration of EC law into the domestic constitutional order.

The question of the constitutional limits to supremacy was, for many years, presented as an issue pertaining specifically to the relation between the European Court of Justice and the German Constitutional Court in Karlsruhe. Although the latter's *Maastricht* judgment of 1993 at first seemed to confirm the German nature of the problem, it also triggered a broader interest in the underlying problem. It has stimulated the legal discussion throughout Europe, and has spawned a broadly shared new approach in the legal literature, in which the relation between EC law and national constitutional law is seen as a multidimensional question, for which there is no clear and straightforward solution. Also in the practice of national constitutional courts (including those of the new member states of central Europe) one finds a renewed insistence on the supreme status of the national constitution, even though this theoretical affirmation of the constitution's supremacy has not, so far, led to major practical clashes with EU law.[6]

The *third challenge* is less palpable. It relates to the way in which the operation of the institutional system of the European Union has an important indirect impact on the functioning of the domestic institutional system. Two central dimensions of this indirect impact are well known and documented. On the one hand, the national governments of the member states play a central role in the EU decision-making system by being represented in the Council of Ministers and its ancillary bodies, and in this way they affect the

[5] Summary evidence for this statement can be found in de Witte 1999a: 177 and 199-200 and, in much greater detail, in the following comparative law discussions (which all have further references to the single national situations): Claes 2006; Mayer 2006: 281; Louis and Ronse 2005; Celotto and Groppi 2004: 287.

[6] See among others Albi 2007: 25; Baquero Cruz 2008: 389; Sadurski 2008: 1.

traditional control function of national parliaments on the activity of the government, as well as the autonomous policy-making space left to sub-state levels of government. On the other hand, national courts at all levels are integrated into the judicial enforcement of EC law through the preliminary ruling mechanism, which allows them to feed in to the enforcement role of the European Court of Justice, and implement the latter's rulings within the domestic legal order; in this way, they upset the internal division of tasks between courts (in particular between ordinary courts and national constitutional courts) as well as the traditional deference shown by judges to the national legislator.[7]

More recently, additional inroads into the internal constitutional arrangements have been made through secondary EU legislation. Whereas traditionally the EU legislator respected the so-called institutional autonomy of member states[8] by imposing duties to implement substantive norms of EU law without specifying the institutional route or mechanism to do so, recent EU legislation increasingly adds institutional requirements to the substantive norms which it contains. To give just one example of what is becoming common practice: the EC directive combating discrimination on the grounds of race and ethnic origin requires all the member states to set up public bodies charged with promoting the effective application of these non-discrimination norms.[9]

Not all these indirect institutional effects of EU membership are genuine *constitutional* challenges, but a number of them are. Sometimes the constitutional text is adapted so as to respond to those pressures, as for example with the constitutional reforms enacted in Austria, Belgium and Germany that have provided for a mechanism for regional governments to influence the country's positions in the EU's Council of Ministers; but more often the national constitutional

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[7] On the empowerment of national courts through EU law, see the classical study by Alter 2001 and see also the national reports dealing with this question in Slaughter et al. 1998.

[8] On the existence and meaning of that principle in current EU law, see the discussion in Diez-Picazo 2005: 865.

[9] Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Communities* 2000, L 180/22, Article 13.

texts ignore these challenges, leaving it to the constitutional courts and to the ingenious practice of the legislator or government to cope with the institutional demands of European integration. Through this process of informal adaptation of constitutional law to European legal reality, the distance between the formal text of the constitution and day-to-day constitutional practice becomes ever larger.

The Lisbon Treaty
More Europeanisation of national constitutions?

The long-term trends sketched in the previous pages will, no doubt, continue after an eventual entry into force of the Lisbon Treaty. Again, some new competences will have been transferred to the European level, and some existing competences will have become subject to qualified majority voting in Council rather than unanimity. The question of how to accommodate European norms within the domestic constitutional order will acquire new salience with the disappearance of the pillar structure (meaning, in particular, that police and criminal law cooperation will be subject to the 'Community method' and acquire the stronger legal effects associated with it). Apart from this continuation of long-term trends, the Lisbon Treaty also contains some novelties that may have special relevance for the national constitutions and which I will examine more closely in the following pages: the formal recognition of the role and importance of national constitutions in the context of the national identity clause which is being added to the Treaties; the creation of new roles, and duties, for national parliaments; and the granting of binding legal force to the EU Charter of Rights. On all three points, the main innovations were contained already in the Constitutional Treaty, but the Lisbon Treaty has modified them either through direct textual changes or through modifying the context in which they will operate.

Before moving to consider these points, one may also note that the interrupted ratification phase of the Constitutional Treaty has itself had reverberations in the constitutional law of some member states. In those countries where the constitution provides for a plurality of procedures for parliamentary approval of international treaties (as, for example, in Austria or Denmark), a discussion arose on which category the Constitutional Treaty fitted in: was it to be treated like

previous European revision treaties or was it special to the extent of requiring a heavier ratification procedure, if only because of its name? Also, the political debate as to whether ratification would be preceded by a popular referendum, although it was usually not directly related to constitutional law considerations,[10] has nevertheless provoked in many countries a renewed reflection on the respective roles of representative and direct democracy.

The national constitutional identity clause

The Treaty of Maastricht contained, in the first paragraph of its Article F (which was later, after the Treaty of Amsterdam, renumbered as Article 6 EU Treaty), an enigmatic little phrase stating that 'The Union shall respect the national identities of its Member States.' One may wonder why this phrase appeared precisely at that time – why the drafters of the Maastricht Treaty, in 1992, thought it necessary to incorporate this sentence in the Treaty. Little or nothing is known about the concrete circumstances in which this sentence emerged during the Maastricht IGC, but three aspects of the Maastricht Treaty could arguably have appeared problematic for national identity so as to prompt the inclusion of the reassuring words in Article F, first paragraph. First, the Maastricht Treaty provided for the creation of a Monetary Union which implied for the participating states the abandoning of their monetary sovereignty, which is a traditional element of statehood. Secondly, the creation of the concept of European citizenship and the recognition of a right to vote in local elections to European citizens living in a country other than their own affected a traditional conception of the state as being defined by the existence of a group of persons who are 'its' citizens and who possess the exclusive right to vote for their political representatives. Finally, new forms of cooperation on foreign policy and justice and home affairs were set in place which again could appear to affect the hard core of national sovereignty.[11]

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[10] On the variety of factors explaining why 10 member states decided to have recourse to a referendum on the CT, and the others not, see Closa 2007: 1311.

[11] Among the rare commentaries of the national identity clause in the Maastricht Treaty and its later evolution, see Bleckmann 1997: 265; Diez-Picazo 2004: 437; Magnani 2006: 481 and Ponthoreau 2008: 49.

The generic reference of the Maastricht Treaty to national identities could be read as referring also, and perhaps mainly, to the national *constitutions*, and in particular to what distinguishes those constitutions from each other. This implicit reference to constitutions was made very explicit by Article I-5 of the Constitutional Treaty, which elaborated the text inherited from Maastricht.[12]

The new version adopted by the Constitutional Treaty referred to the fundamental *constitutional structures* which must be respected by the Union, that is, by the EU institutions when they act in the exercise of the powers entrusted to them. Thus, detailed or non-fundamental rules of the constitutions are not protected by the clause, and the protection refers to the *structures* of national constitutions, rather than to their substantive *values*.[13] The term structures would seem to cover, among other things, the following matters for which the constitutional autonomy of the member states is recognized and protected: whether the states prefer to have a written or unwritten constitution, a monarchy or a republic, a presidential or parliamentary system of government, a proportional or majority voting system, constitutional review by the courts or not, and a unitary or rather a regional or federal state structure.[14] In addition to the reference to national constitutional structures, the same paragraph goes on to safeguard what it calls 'essential state functions' related to the maintenance of law and order and security. This is a confirmation of the currently existing situation, but this renewed insistence on the fact that certain functions remain, as of their essence, with the separate states, coupled with the protection of national constitutional structures,

[12] Article I-5, paragraph 1: 'The Union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'

[13] However, it must be remembered that, elsewhere in the Lisbon Treaty (and in the Charter of Rights), there are many provisions pointing to the existence of common *values* and the need to protect them, as well as to the value of *diversity*, which presumably encompasses diversity of substantive constitutional values.

[14] I borrow this list from Diez-Picazo 2004: 440.

is a strong reaffirmation of the non-federal nature of the European Union (Diez-Picazo 2004: 443-4).[15]

Interestingly, this reference to national constitutional identity in Article I-5 CT was used by both the French and Spanish constitutional courts when they examined the compatibility of the Constitutional Treaty with their respective national constitution, and more particularly when addressing the question whether the proposed codification of the principle of primacy of EU law (in Article I-6 CT) raised new constitutional problems. The text of Article I-6 stated that EU law 'shall have primacy over the law of the Member States' without distinguishing between the constitution and other types of national law. Given that Article I-6 was intended to codify the existing case law of the European Court of Justice, one might have considered that, by ratifying this Article I-6, the member states would also accept all the implications of the ECJ's primacy doctrine, and therefore forego their existing reservations which limit the primacy of EU law in respect of national constitutional law. However, this is not the way the *Tribunal Constitucional* and the *Conseil constitutionnel* saw it in 2004. Both these supreme constitutional authorities held that ratification of Article I-6 did not require a prior constitutional revision because it did not modify, in their view, the nature of the relations between European law and national constitutional law. In order to deny to European Union law the highest rank in the domestic legal order, despite the apparently clear language of Article I-6, both the Spanish and the French constitutional courts made use of the immediately preceding Article I-5. They read the national identity clause included in that article as containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures.[16] This combined interpretation of Articles I-5 and I-6 of the CT allowed the two supreme judicial authorities to conclude that, after all, Article I-6 was compatible with the national constitutional order and did not affect their existing doctrine about the constitutional 'counter-limits' to the domestic application of EU law. In a later decision, the *Conseil constitutionnel* expanded further on

[15] For an analysis of the notion of essential state functions, as used in Article I-5, see Cantaro 2006: 507.

[16] See also, along these lines, the analysis of Articles I-5 and I-6 proposed by Kumm and Ferreres Comella 2005: 473.

the national identity theme by specifying that the limit to the application of EU law in the French legal order was formed by the *règles et principes inhérents à l'identité constitutionnelle de la France.*[17] This terminology was new; the *Conseil* had not previously referred to the concept of identity in this context. This can be seen as a direct reflection of Article I-5 of the Constitutional Treaty.

The Treaty of Lisbon made two notable changes to the Constitutional Treaty in this matter: it expanded somewhat the national identity clause, and it deleted the article dealing with the primacy of EU law. The national identity clause (which now became Article 4 of the EU Treaty, as renumbered by the Lisbon Treaty) was confirmed, word for word,[18] by the Lisbon Treaty but a new sentence was added to it at the end (which emphasizes the last words of the previous sentence): 'In particular, national security remains the sole responsibility of each Member States.'

The article stating the primacy of EU law (Article I-6 CT) was deleted as part of the 'undoing of the constitution'. When the European Council formulated its mandate for the IGC in June 2007, primacy was listed among the provisions that were to be deleted because they expressed the so-called constitutional character of the earlier treaty which the Reform Treaty would seek to undo.[19] Instead of the Treaty article, a Declaration (nr 17) was added to the Treaty of Lisbon which states the following: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.' The replacement of a prominent and binding Treaty article (I-6 CT) by a well-hidden[20] and non-binding declaration is the result of a pressing demand by the UK government. The other national governments may have easily

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[17] *Décision 2006-540 DC*. See discussion by Mathieu 2007: 676-81.

[18] Except that, like everywhere else in the text, the word 'constitution' was replaced by 'treaties'.

[19] Draft ICG Mandate (Annex 1 to the Conclusions of the European Council of 21/22 June 2007), point 3.

[20] Declarations are part of the 'Final Act of the Intergovernmental Conference', which has been published together with the Treaty of Lisbon (and its Protocols) in the *Official Journal of the European Union* C 306 of 17 December 2007. This Declaration nr 17 is published at p. C 306/256.

accepted this request on the ground that Article I-6 was mere codification of an existing unwritten principle of European law, so that its deletion would not make much of a difference. But is that so? The Declaration is profoundly ambiguous when it affirms that there is well-settled case law of the ECJ on the primacy of EU law over national law; in fact, what we have is well-settled case law on the primacy of European *Community* law, but the Court has not so far extended this doctrine to European *Union* law adopted under the second and third pillars. Should one now interpret the Declaration as stating that, because of the merger of the European Community and the European Union, the primacy of EC law will be *ipso facto* extended to the whole of EU law, including also the acts of Common Foreign and Security Policy? This is not clear, and could well become a bone of contention between the ECJ and some national constitutional courts.

More generally, it may be expected that the deletion of the primacy article (and hence, its failed codification) will weaken the authority of EU law within the domestic legal orders of the EU member states. The tendency, observed in recent years, whereby national constitutional courts act as guardians of national constitutional values and institutions against European threats, may be expected to continue and be encouraged by the inclusion of the national constitutional identity clause in the EU Treaty. In particular the two countries where the Constitutional Treaty was rejected in a referendum may see a reaffirmation of the central role of the national Constitution. This has happened already in France, where the *Conseil constitutionnel* has assumed for itself a more active role in setting the boundary between 'normal' and 'unacceptable' EU law. In the Netherlands, there is no constitutional court at present, but existing calls for establishing a system constitutional review have been added fuel by the argument that a constitutional court could also serve to protect the integrity of the Dutch constitutional order against EU encroachments, on the model of what happens in Germany, Italy and elsewhere.[21]

[21] See discussion in the report 'Rediscovering Europe in the Netherlands' of the Dutch Scientific Council for Government Policy (2007: 98-103), about the introduction of 'constitutional safeguards'. See also van den Brink and van Meerten 2007: 482.

European duties for national parliaments

The role of national parliaments in the European institutional architecture was one of the four themes which the Nice Declaration, in December 2000, singled out as requiring a 'wider and deeper debate'.[22] Accordingly, this theme figured prominently in the work of the Convention on the Future of the Union, and more particularly of two of its Working Groups: the WG on national parliaments and the WG on subsidiarity. Their proposals were encapsulated in two Protocols annexed to the Constitutional Treaty[23]. Later on, with the Lisbon Treaty, the same two Protocols were annexed, in slightly modified form, to the Treaty on European Union and the Treaty on the Functioning of the European Union. These two Protocols seek to enhance the European role of national parliaments within their national constitutional context.[24] The rival option of incorporating the national parliaments *within* the EU institutional system through some kind of new parliamentary Chamber or 'European Senate' was often mentioned in political speeches, but it never stood a serious chance of being adopted.[25]

The new Protocol on the Role of National Parliaments develops the lines already set out in the existing Protocol with the same name, which was adopted in 1997 as part of the Treaty of Amsterdam: it expands the duties of the EU institutions to inform national parliaments and to give them time for expressing their views on emerging European policy measures, but it does not *force* national parliaments to do anything they do not want, nor does it directly affect the institutional balance at the national level.

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[22] Final Act of the Intergovernmental Conference, December 2000, Declaration nr 17 on the Future of the Union.

[23] The decision to incorporate these proposals in separate protocols annexed to the Constitutional Treaty rather than in Part I or Part III of the CT itself was not very logical, since it detracted from the legibility of the CT. This choice was path dependent: because there are already separate protocols on the national parliaments and on subsidiarity annexed to the current Treaties, it was thought better to continue along those lines despite the fact that the current Treaties were to be repealed by the Constitutional Treaty.

[24] The work of the Convention in this field is analyzed, among others, by Sleath 2007: 545; by Levade 2007: 869; by Michel 2007.

[25] For a discussion of this option, see for example House of Lords 2001.

Contrary to what one might expect, the more important of the two Protocols, from a national constitutional point of view, is the one on subsidiarity and proportionality. This Protocol does create a new 'European duty' for national parliaments, namely to participate in a newly created mechanism for monitoring respect of the principle of subsidiarity by the EU institutions (the so-called early warning mechanism). This widely publicized new procedure will allow national parliaments to wave a 'yellow card': if one-third of national parliaments consider that a legislative proposal by the Commission (or by other actors of the EU system, in the rare cases were they are entitled to propose a piece of legislation) does not comply with the principle of subsidiarity, the Commission will have to review its proposal and, if it decides to keep it as it stands, explain why it does so. On the insistence of the Dutch government, the Treaty of Lisbon added to this an 'orange card' mechanism: if a majority of national parliaments finds a breach of subsidiarity, then the Commission will only be allowed to keep its proposal in place if the Council and Parliament agree so.[26]

Strictly speaking, a national parliament might decide not to play the game, and refrain from participating in the subsidiarity scrutiny of Commission proposals. But if it did so, it would affect the effectiveness of the voice of the other national parliaments: since the effect of the monitoring crucially depends on the number of parliaments expressing a negative opinion, the non-participation of one or more parliaments (or the failure to deliver an opinion in time) would weaken the role of the others. One might therefore say that the duty of cooperation between the member states puts an actual obligation on national parliaments to take the monitoring mechanism seriously. Accordingly, the Lisbon Treaty imposes a genuine duty to act on all national parliaments and thereby interferes with a national constitutional matter.[27]

This does not mean that the application of the subsidiarity monitoring mechanism requires an explicit amendment of the national constitution. In the case of France, the constitution was

[26] The 'yellow card' is described in Article 7, para. 2 of the Protocol, and the 'orange card' in Article 7, para. 3. It is disputable whether the latter procedure has, practically speaking, any added value compared to the former; see discussion by Barrett 2008: 75-83.
[27] See, in the same sense, Rovira and Roig Molés 2004: 478.

indeed amended in order to allow for the early warning mechanism, after the *Conseil constitutionnel* held, in its Constitutional Treaty decision of 19 November 2004, that this new role was beyond the scope of the French Parliament's existing competences; [28] and the further powers granted to national parliaments by the Lisbon Treaty once again triggered a revision of the French Constitution.[29] But this is a typical reflection of French-style *parlementarisme rationnalisé*. In most if not all other national constitutions, the powers of parliament are defined in much broader terms than in France and would appear to accommodate easily their new power and duty created by the Treaty of Lisbon. What is required, though, in all member states, is a change in existing laws and rules of procedures defining the functioning of the parliament. One country that made such changes is Germany, through its Law of 17 November 2005.[30] In many other countries, the parliaments are currently devoting considerable attention to the implications of this mechanism, and to the question of how to effectively organise their work in this respect. The coordination problems will be considerable: the national parliaments are given only eight weeks (the Lisbon Treaty added two more weeks to the six weeks originally allocated by the Constitutional Treaty) in which to express their views on compliance of Commission proposals with subsidiarity: during this brief period, they must hear the views of their national government, allow for debate both in committee and in the plenary (although some countries may decide to concentrate the monitoring role at committee level), possibly organise the consultation of regional parliaments,[31] and try to liaise with the parliaments of the twenty-six other member states especially when trying to reach the 'threshold of protest'. Furthermore, the view that a legislative proposal does not comply with subsidiarity must be reasoned, which will require some deliberation and careful drafting.

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[28] New Articles 88-5 and 88-6 of the French Constitution, enacted in 2005.

[29] See Roux 2008: 24-27. New versions of Articles 88-6 and 88-7 were enacted by the post-Lisbon constitutional amendment of 4 February 2008.

[30] *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union* of 17 November 2005, *Bundesgesetzblatt*, 2005 I, 3178.

[31] Article 6 of the Protocol states that: 'It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.' See Ziller and Jefferey (2006) for an analysis of the regional dimension of the new monitoring mechanism.

Without waiting for the entry into force of the Constitutional Treaty or the Lisbon Treaty, the national parliaments have already conducted some experiments under the aegis of their European-level body, the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), in relation to selected Commission proposals. [32] The European Commission, for its part, has started in 2006 an informal dialogue with all national parliaments on its draft legislation.[33] So, it would seem that, more than any other changes proposed by the CT and Lisbon Treaty, the enhancement of the national parliaments' role is already being put in practice to some extent well before the entry into force of the treaty amendments. However, the new role of the national parliaments may not be entirely beneficial for them. Apart from the strain that the new mechanism, with its tight deadlines, will put on national parliaments, there is also the risk that it may divert their attention from the scrutiny of the *content* of European policies that do *not* raise a subsidiarity issue.

Apart from these Protocols, the national parliaments also make their appearance in the body of the amended EU Treaty. They do so, first of all, in its new Article 10, para. 2[34] which states that '*Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens*.' This spells out an implicit line of democratic accountability which exists from the early days of the European Communities, but its codification expresses the increased emphasis being laid on it, to counteract the growing range of powers and activities which the Council and the European Council have assumed in recent decades.

To this very general reference to the role of national parliaments, which it inherited from the Constitutional Treaty, the Treaty of Lisbon has added a new Article 12[35], which was not contained in the

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[32] See the relevant documentation on the website of (COSAC): <www.cosac.eu/en/info/earlywarning>.

[33] For a first account of this new practice, see Haenel 2007.

[34] In the consolidated (and renumbered) version of the EU Treaty as published in the *Official Journal* C 115 of 9 May 2008.

[35] Article 12 EU Treaty (as renumbered):
'*National Parliaments contribute actively to the good functioning of the Union:*

CT and summarizes the various roles given to the national parliaments elsewhere in the Treaties and Protocols. Although this new provision was clearly intended to 'further enhance' the role of national parliaments [36] by increasing their visibility, its opening phrase did stir controversy in the UK Parliament. The original version of that opening sentence stated that 'National parliaments *shall* contribute actively to the good functioning of the Union.' The UK Parliament thought that such commanding language was inappropriate and insisted with the government that it should require the elimination of the word *shall*; a deletion which the other member state governments graciously accepted (House of Lords 2007: 9)![37] Still, however ridiculous this controversy may seem, the fact remains that the Lisbon Treaty does indeed *require* national parliaments to act in the application of the Protocol on subsidiarity, as was argued above.

A binding Charter of Rights

A third change in the Lisbon Treaty which might prove to be meaningful from a national constitutional standpoint is the fact that the Treaty would transform the EU Charter of Rights and Freedoms into a formally binding document which, according to the revised text of Article 6, paragraph 1, of the EU Treaty, would have the same

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(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 61 C of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 69 G and 69 D of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.'

[36] See, in this sense, the IGC Mandate adopted as an Annex of the 21/22 June 2007 European Council, at point 11.

[37] See also 'Europe's horse whisperers', *The Economist*, 20 October 2007, at p. 44.

binding and supreme legal status as the Treaties themselves. In combination with the fact that the Charter is also binding on the Member States when they implement EU law in their domestic systems (as stated in its Article 51), this could be seen as a momentous change from the point of view of national constitutional law. The EU Charter of Rights will become a supplementary catalogue of rights for citizens and duties for national authorities, alongside the national constitutions and alongside the European Convention of Human Rights and other multilateral human rights instruments.

In reality, the novelty is much more limited than it may seem at first blush, because the function of the Charter of Rights was, from the time of its enactment, that of codifying the 'unwritten Bill of Rights' which the European Court of Justice had developed over the years and which itself is largely inspired by what the ECJ calls the common constitutional traditions of the member states. This reference to national constitutions had been invented by the ECJ in the 1970s, in order to reassure national constitutional courts that the primacy of EC law would not lead to a diminution of existing fundamental rights protection.[38] It was, and still is, a crucial formula in organising the delicate question of the formal relationship between EU law and national constitutional law as regards fundamental rights protection – not just from the side of the ECJ, but also from the side of the national courts. For example, in the recent *Arcelor* case, the French *Conseil d'Etat* decided that a legal challenge of the validity of an EC directive based on the *French constitutional* right to equality should be referred instead to the ECJ so that it could examine the question in the light of the *common European* principle of equality.[39] Once the case had reached the ECJ, the Advocate-General Poiares Maduro, in his Opinion submitted to the Court, praised the attitude of the French supreme administrative court and underlined the importance of a judicial dialogue between national supreme courts and the European Court of Justice in matters of fundamental rights protection.[40]

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[38] See, for example, de Witte 1999b: 863.

[39] Conseil d'Etat, 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*. See also, more elaborately, the *Conclusions du Commissaire du gouvernement* Mattias Guyomar in this case (published in the *Revue trimestrielle de droit européen,* 43(2): 378-415, 2007). See a summary of the case and comment in English by Pollicino 2008.

[40] ECJ, Case C-127/07, Opinion of Advocate-General Poiares Maduro, 21 May 2008, paragraphs 15 to 17. The judgment of the ECJ itself, in its judgment of 16 December

However, one should not assume that constitutional courts and other national courts will necessarily accept that the protection given to fundamental rights provided under EU law, and by the European Court of Justice, is equivalent to that offered by the national constitution. In fact, the Charter of Rights gives them an additional argument for insisting on respect for their own, higher, standard of fundamental rights protection. Article 53 of the Charter, entitled 'Level of protection' states that 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised […] by the Member States' constitutions.' This most-favoured-protection clause is similar to that contained in the European Convention of Human Rights. However, it does not address the increasingly numerous cases of conflicting fundamental rights. For example, the question whether public authorities can compel electronic service providers to disclose the names of those among their users who exchange copies of music works protected by copyright involves a potential conflict between the right to (intellectual) property and the right to privacy, both of them contained in the EU Charter and in most national constitutions. The European Court of Justice may decide to privilege the right to property, whereas one or other national court may want to give greater weight to the opposed right to privacy (or vice-versa), and it is impossible to decide which of the courts is then offering a higher protection to fundamental rights. Such dilemmas exist already under current EU law (indeed, the facts of the example mentioned above are drawn from the *Promusicae* case decided by the European Court of Justice under the current treaties)[41], but the greater legal prominence given to the Charter of Rights by the Lisbon Treaty may exacerbate such conflicts by emboldening both the European Court and the national court to defend their 'own' conception of fundamental rights.[42]

2008, did not dwell on the underlying judicial dialogue question and just addressed the substantive question, concluding that the EC directive did not violate the general principle of equality.

[41] ECJ, Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España*, judgment of 28 January 2008.

[42] For an articulation of the view that the Charter is likely to embolden the European Court of Justice to the detriment of national constitutional autonomy, see Cartabia 2009.

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Chapter 3

What is Left of the Charter?

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The Charter as a panopticon

For the analyst of European affairs, the Charter of Fundamental Rights and its fate constitute a panopticon from which to see the whole constitutional experiment launched by political leaders at the start of the new millennium with a view to reinforce the legitimacy of the Union. A panopticon, indeed, in the various possible meanings listed in the *Oxford English Dictionary*. First, 'a place where everything is visible', and many things do become visible if we *read* properly the Charter and its story. Second, 'a show-room for novelties', or, as is often the case in markets, including political markets, for things which are offered as novelties but may not be so novel. Third, 'a powerful telescope and microscope combined', for, in Proustian fashion, the Charter allows us to approach very small and extremely detailed things that sometimes seem to be placed at a great distance, and which are worlds in themselves. And, finally, Bentham's

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invention (1995), whose metaphorical potential attracted Michel Foucault (1975), defined by the dictionary as 'a prison of circular shape having cells built round and fully exposed towards a central 'well', whence the warders could at all times observe the prisoners'. Here interpretations abound: the Charter as a device of power, as a Foucaultian instrument of discipline, normalisation and hierarchy, as a space in which drafters, interpreters and sceptics alike are prisoners to received notions and expectations, as a circular place of risky exposure to many constitutional warders…

A panopticon, in any event, that takes us beyond the law. The Charter, like the ill-fated Constitutional Treaty, is a privileged locus for political and semiotic analysis. Its legal aspects are certainly important, but they are secondary to its mythological content. The Charter is mainly a symbolic normative and political space in which the tensions and paradoxes of contemporary European integration are deployed. It is not only or mainly about rights, it is mainly about legitimacy. It is not about actual democratic legitimacy, which is channelled through institutions and processes, but about symbolic or mythological legitimacy. Thus, when I ask myself what is left of the Charter after the constitutional crisis and the Treaty of Lisbon, the leading question of this chapter, I am really asking two questions: what is left of its legal dimension and what is left of its symbolic dimension?

I will address these questions in turn. Indeed, one cannot think about them simultaneously, for the second question requires the lawyer to put the law in brackets. When we focus the legal analysis of the Charter it is very difficult to see it as a myth. We work within the myth, within its underlying ideology. We accept it and become part of it. We need more distance from the law to see the Charter as mythology. But we need to think about the law seriously before taking that second step.

'Junkspace'
The Charter and Fundamental Rights in the Union

To know what is left of the legal content of the Charter after Lisbon we need to have an idea of what the Charter, as originally drafted in 2000, would have changed with regard to the current situation of fundamental rights in the Union, and of how and to what extent that

was in turn modified by the Constitutional Treaty and by the Lisbon Treaty. Five aspects seem to be the most important: the *clarity* of rights; the *visibility* of rights; the *interplay* between the *rights* of the Charter and the *competences* of the Union; and the consequences of the British and Polish Protocol.

It has been argued that the Charter would increase *clarity* concerning fundamental rights protection in the Union. In the current situation, according to Article 6(2) of the EU Treaty, 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. This means that there is no single text in which the fundamental rights protected within the scope of Union law may be found: they are scattered in a number of documents and in the case law of the European Court of Justice. It is not clear which rights are protected and what is their content. The Charter, it is argued, would change this situation by providing a single text enumerating a number of rights and making their content clearer. It would become, in other words, *the* text of reference.

The argument is neat, but it may be exaggerated. In addition to the general open texture of human rights provisions, the 2000 version of the Charter was never a self-contained document. It included complex instructions for the interpreter regarding the interaction between the rights of the Charter and those of the European Convention of Human Rights, of other international instruments and of national constitutions. This network of normative cross-references was made more complex by the additions due to the European Convention and the intergovernmental conference. The current wording of the horizontal provisions of the Charter is not an example of clarity. The many simultaneous demands on the interpreter are sometimes contradictory, and could easily clash. Everything depends on the interpretation of the horizontal provisions, but one option is to see the Charter as an additional source of fundamental rights in the Union, alongside the traditional sources. The other sources remain relevant as general principles and also for determining the content of the fundamental rights contained in the Charter. This interpretative option is likely to be followed, for it gives the Court more flexibility in adjudication, it may help in avoiding conflict with other courts and

legal orders, and it fits with the current case law, ensuring continuity. The recent judgment in *Laval*, with its simultaneous and non-hierarchical use of various international instruments and of the Charter, may well be the blueprint for the Court's future case law if the Charter comes into force.[1]

If this route were to be followed, the Charter would only add another layer of complexity to the present situation, instead of clarifying things. It would increase the current superabundance of normative sources of rights, a saturation in a legal space that has become, using Rem Koolhaas's expression for the architecture of postmodernity, a sort of 'junkspace', disordered, multicentered, chaotic, unpredictable, and ugly. To quote Koolhaas at large:

> Junkspace is a Bermuda triangle of concepts, a petri dish abandoned: it cancels distinctions, undermines resolve, confuses intention with realization. It replaces hierarchy with accumulation, composition with addition. More and more, more is more […]. A fuzzy empire of blur, it fuses high and low, public and private, straight and bent, bloated and starved to offer a seamless patchwork of the permanently disjointed. Seemingly an apotheosis, spatially grandiose, the effect of its richness is a terminal hollowness, a vicious parody of ambition that systematically erodes the credibility of building, possibly forever.
> (Chung et al. 2001: 409)

The same could be said about the Charter, about the Constitutional Treaty, and also about its *Ersatz*, the Treaty of Lisbon. They lack a coherent plan and a clear idea about how they fit with the previous structures. Together they form a patchwork, the work of an amateur *bricoleur*, a deficient constitutional design, flashy, cheap and ephemeral, full of redundancies, of cross-references to other legal texts, of repetitions, contradictions and confusing instructions. Behind the additions of different reforms, behind the follies and obsessions of politicians translated into juridical language by legal experts, we can only detect some traces of the fine normative and

[1] Judgment of 18 December 2007, Case C-341/05 (not yet reported), paragraph 90 (citing the European Social Charter, Article 136 of the EC Treaty, Convention No 87 of the International Labour Organisation, the Community Charter of the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union).

institutional architecture of half a century ago. Rights are built upon other rights, provisions are added upon provisions, while the original building cracks down.

The second usual argument in favour of the Charter is that it would make fundamental rights more *visible* for European citizens. The Charter itself makes this argument in its preamble. In its more general form, this claim takes for granted that ordinary citizens will go and read the Charter like they read *Harry Potter* in order to know what their fundamental rights are in the European Union — but they clearly will not. Charter or no Charter, ordinary citizens will know as little about their fundamental rights in the Union as they know at present. In a more realistic form, the argument contends that those rights would become more visible for national legal actors (lawyers, judges, civil servants, etc.), and through them also for European citizens when they are in trouble. In this way, we would have better and more effective fundamental rights protection in the Union. This was indeed more plausible when the Charter was part of the Treaty establishing a Constitution for Europe. In that prestigious document, the fundamental rights of the Charter were indeed more visible than in the short reference included in Article 6(2) of the EU Treaty and in the European Court Reports. But after the Lisbon Treaty this may no longer be the case. The new Article 6 simply states that 'the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'. The Charter is not part of the Treaties. It is not even a Protocol. As an insufficient remedy for this demotion, the Charter has been solemnly proclaimed once again by the Parliament, the Council and the Commission, in an updated version, and published, together with the updated explanations on the Charter, in the 'C' series of the Official Journal. The so-called 'abandonment of the constitutional concept' thus moved the Charter to a sort of purgatory. From that fragile position it will not change at all the deeply ingrained habits of national legal actors. So much for visibility.

The third issue about the Charter is that of the interaction between the *rights* it contains and the *competences* of the Union. In spite of the clear reservation contained in the Charter (Article 51(2) of the text of 2000), enthusiastic academics argued that the competences of the

Union could creep as a result of the new fundamental rights added by the Charter, which sometimes extended beyond the fields of the Union's express powers (Eeckhout 2002). Enthusiastic Advocates General rushed and competed to cite the Charter with all the ardour of a neophyte. In some cases they used it as an interpretative aid to reach certain results that the Court also reached without needing to mention it.[2] This good-intentioned but at bottom disingenuous enthusiasm about the Charter has invariably been bad for it. It has aroused fears, specially in the United Kingdom, about the true scope and content of the Charter with regard to the current situation. It has been one of the reasons for the addition of more cumbersome horizontal clauses, for the British and Polish Protocol on the Charter, and perhaps also for the exclusion of the Charter from the text of the Treaties. With hindsight, the restraint of the judges of the Court with regard to the Charter until its normative fate was decided was a wiser attitude.

The British and Polish protocol

While the Charter is not part of the Treaty but stays in its own purgatory, there is a Protocol about the application of the Charter to Poland and to the United Kingdom that is an integral part of the Treaty. The Protocol is a curious and elusive document. According to Article 1(1), 'the Charter does not extend the ability of the Court […] or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.' Article 1(2) makes clear, 'for the avoidance of doubt', that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.' Finally, Article 2 states that 'to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.'

What can we make of this? It depends on the interpretation chosen, of course. One could argue, for example, that the Protocol means that the additional contents of the Charter with respect to the current

[2] See, for example, Case C-173/99, *BECTU* [2001] ECR I-4881.

situation are not applicable to Poland and the United Kingdom. This would safeguard the useful effect (*effet utile*) of the Protocol, but it is not a likely interpretation, as the Court may prefer to safeguard the integrity of Union law and of the Charter by choosing a restrictive interpretation. The good news about this Protocol is indeed that the Court is competent to interpret and apply it, and that it can minimise its destructive potential, protecting the integrity of European Union law, as it has recently done with regard to the Schengen Protocol on the position of the United Kingdom and Ireland.[3] The Protocol on the Charter is not really an opt-out. It is more of an interpretative reservation from something that could be considered essential to the Lisbon Treaty. Hence the Court may have to interpret it restrictively, in order not to damage the foundations of the Union. Most of it can indeed be interpreted that way in its own terms or neutralised through the use of general principles.

Regarding Article 1(1) of the Protocol, one could argue that the Charter does not extend the ability of the Court or any court or tribunal of Poland or of the United Kingdom, 'to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms'. If one reads this provision *procedurally*, and its wording leads most naturally to such a reading, it is clear that the Charter has not extended that *ability*: no new procedure has been introduced for the protection of fundamental rights; they will be protected through the same procedures that are used at present. In this interpretation, Article 1(1) would be a mere declaration that does not alter the normative content of the Charter. If one reads the provision *substantively*, stretching it as much as possible, one could make one and/or two arguments. One could argue that in as much as the Charter extends the *scope* of fundamental rights protection in the Union, that extension is not applicable to Poland and the United Kingdom. But if we go back to Article 51(1) of the Charter we readily see that there has been no extension in scope, that the Charter probably leaves that scope as it is today or even restricts it, so that the clause would not find practical applicability in this regard. The second avenue is that of arguing that

[3] Judgment of 18 December 2007, Case C-77/05, *United Kingdom* v *Council* (not yet reported) (dismissing an action for annulment brought by the United Kingdom against a Schengen Regulation that had excluded that State from participation in its application).

new fundamental rights recognised by the Charter which were not recognised in the case law on general principles, or *new content* of old rights, would not be applicable to Poland and the United Kingdom. This second possible reading faces a great difficulty: the case law on general principles is flexible and its contours are not clear; they are not closed either, since Article 6(3), as amended by the Treaty of Lisbon, keeps general principles as a source of fundamental rights in Union law, and this constitutes a dynamic element in the system. This means, of course, that whenever the Charter extended the substance of fundamental rights in some way, that is, whenever the Charter is not a mere codification, the Court could just apply good old general principles and find similar solutions for Poland and the United Kingdom, safeguarding the integrity of European Union law.

It is a bit different with Article 1(2) of the Protocol. This clause interprets the general clause excluding the direct judicial applicability of principles as covering the whole of Title IV (the title on 'solidarity rights'). Since that was unclear, this clause attempts to change the normative state of affairs by clarifying things for the United Kingdom and Poland. Without it, the distinction between rights and principles drawn by the Charter would have been in the hands of the Court. Now, for those two countries, it would no longer be in the hands of the Court. In other words, the States have agreed on a particular interpretation of that distinction for the United Kingdom and Poland. But this clarification could have consequences for the other States as well. It could be the case that the Court recognised for them fully justiciable solidarity rights that are not applicable to those two countries and that would derive exclusively from the Charter. In such a case, the United Kingdom and Poland could apply Community law or their own legislation within the scope of Community law in a different way than the other States, leading to inequality, lack of uniformity, and also, sometimes, to social dumping. What could then happen is that the baseline of those two countries will be extended to all other States, to avoid 'the mess'. But it is much more likely that the Court will work with general principles to look for harmonious solutions for the Union as a whole. If the Court goes on with the *Laval* model of fundamental rights adjudication when the Charter enters into force (that is, using the Charter as another source of rights), the Protocol will not prevent the Court from finding uniform solutions with regard to solidarity rights. This means that even this more incisive provision may not radically change the current state of affairs.

Article 2 is also important, defining and restricting the scope of the Charter *in* the United Kingdom and Poland. This clause excludes its application with regard to national laws and practices if there has not been an explicit reception in British and Polish law. This clearly changes the scope of the Charter with regard to the other States. We could witness the same convergence towards the baseline. But the way out of the problem is, once again, to work with general principles to reach uniform solutions.

In sum, the Protocol is potentially hollow in legal content when seen in the context of the continuing relevance of general principles as a source of fundamental rights in the Union. Using general principles, the Court can diminish or even neutralise the negative effects of the Protocol.

The Charter as a political myth

The legal hollowness of the Charter and the Protocol may lead us to think that they are not mainly about law, but about something else, that we can see them as symbolic political statements, as mythology, or better still, as attempts at creating a political mythology. They are performative statements claiming legitimacy, or rather trying to reinforce the Union's legitimacy.

According to Roland Barthes, myths are 'speech' which is not defined by its object but by the way in which it is uttered (Barthes 1957: 181). Hence everything can become a myth if it works as such in a given society: if it transmits something else, a subliminal message, in addition to its prima facie message, and this secondary message is effective in the mind of the receivers. In this way, Barthes tells us, we can find very old myths, but not eternal myths. All myths are historical creatures. In spite of their possible transcendental and intemporal allure, they are carriers of messages in history and time. They come and they go. In our post-modern times it is likely that they come and go very quickly. In more technical terms, Barthes defines a myth as a 'secondary semiological system'. It is built on an already existing 'sign'. The sign is built on three elements: a signifier, a meaning, and the relationship between the two, which is the 'sign' (ibid.: 185). In myths, a first order sign becomes the signifier on which a secondary relationship is built.

Thus, from a semiological perspective the Charter would be a signifier made of words which are given a legal meaning, forming, as a dynamic whole, a sign. That is what the lawyer sees. But that sign immediately becomes or is meant to become the signifier of a secondary system, the attempt at creating a political myth, whose meaning is as transparent for the mythologist as it is concealed for the lawyer working within the legal sign. The secondary meaning is or would like to be: *legitimacy*.

The Charter as an attempt at creating a political myth is clear in a number of classical mythological traits. I will focus on four:

First of all, the *primacy of rhetoric and grandiloquence*. In recent times, the official vocabulary of European affairs is becoming more and more hollow. The mandate of the intergovernmental conference of 2007 is a case in point: we had a problem; we resolve it by 'abandoning the constitutional concept'. We change the words, thus hoping to change reality or to seem to change it. The Charter is also rhetoric through and through: it is full of things that do not have anything to do with the Union and its operation and which may never be applied. It is grandiloquent, with its own preamble, and all the talk about civilisation, values, etc. According to Barthes, this sort of writing works as a code, that is, a system of meaning in which the words used bear little or no relationship to their content. It is a sort of 'cosmetic writing', in so far as 'it tries to cover hard facts with a noise of language' (ibid.: 128).

The second trait is *repetition and redundancy*: another way of creating a reality out of words is to repeat them ad nauseam. Let us focus on just one example among many. When the drafters of the Lisbon Treaty remind us several times that the Charter does not extend the competences of the Union, one does not have to be Dr. Freud to realise that these could be the tics of a collective neurosis, that their insistence hides something. Is it the bad conscience of holding a power that is not perceived as fully legitimate? Or is it an utterance making up for previous extensions of Union powers?

As a third trait, beyond its legal content, the Charter was designed as a vehicle for *identity*: a European identity based on values and fundamental rights. It is in this context that we understand the meaning of the British and Polish Protocol. They are saying: we are in

the Union, but not in the Union you think we are in, and not in the way you are in. We stress our *difference*. For the United Kingdom and Poland, the Protocol is an antidote against the attempt at promoting a European identity.

The fourth trait is the use of the Charter as *vaccine*: a 'very general rhetorical figure, consisting in confessing a secondary problem of an institution in order to hide the main problem. Thus, we immunise the collective imagination by a small inoculation of the problem that is confessed' (ibid.: 225). In our case, the secondary problem is rights. Indeed, the Union does not have a major fundamental rights problem. The main problem is democratic legitimacy, widely perceived as insufficient. Fundamental rights protection is a necessary condition for democracy, but it is not enough. Thus, taking into account the inability of European politicians to streamline and reinforce the democratic qualities of the political process of the Union, the Charter works as a vaccine for democracy. The leaders inoculate the citizens with a good dose of rights that they already have, hoping to immunise them against the dangerous virus of the democratic deficit.

When seen from a mythological perspective, ignoring the legal subtleties, the Charter appears as a problematic speech act, as empty or almost empty speech. It doesn't seem to connect with its target audience, like a play performed in an empty theatre. It cannot connect, at least for the time being. It cannot work as a shortcut to legitimacy, which mainly rests in the political process, in the way it is structured, in participation, in representation. It may connect in some distant future, it is true, and achieve a measure of symbolic force. Myths, including political myths, usually grasp the public imagination many years after they are conceived. It is difficult to predict what will happen with the Charter, but I have the impression that the way and the context in which it has been drafted and all the *accidents de parcours* it has suffered greatly diminish its chances of becoming an active myth providing additional legitimacy to the European polity.[4]

The exhaustion of the law of integration

When we look at the fate of the Charter we learn two main things. First, in legal terms it was never the great leap forward that some

[4] On these issues, see Haltern 2003.

thought it to be. It was always a modest achievement, made even more modest by all the additions it received. Second, in symbolic political terms, European politicians may have learned that it is risky and difficult to be successful with this kind of politics in our postmodern, affluent and bored Europe. The inner mobilising value of Constitutions and Charters of Rights is in the wane, in Europe and perhaps also elsewhere. They have become relics, simulacra of what they were one day. When it tries to adopt a Constitution with a Charter of rights, the Union is repeating a very old gesture with the hope of reconnecting with its citizens, of gaining some measure of legitimacy. But the gesture cannot be successful, for it does no longer work as a myth and it may never become one. The object used seems to be historically dated, the form of the myth is not present, and we only have its simulacrum. Something else, like a serious reorganisation of the European political process along stricter democratic lines, a more social Europe, a Community tax and budget, a really *common* foreign policy, and some other things that seem to be utopian at present, would be needed to reinforce the legitimacy of the Union. The Charter and the European Constitution, with their pompous rhetoric, were meant as a theatrical gesture to replace all that.

Third and last, if we put integration in historical perspective, we perceive the exhaustion of a model. More than thirty years ago, Pierre Pescatore tried to demonstrate how the dynamics of legal integration had led 'to the creation of stable structures capable of standing up to the assault of crisis and the erosion of time' (Pescatore 1974: 3). His argument, a legal neofunctionalism of sorts, was normatively attractive and largely consistent with the realities of the 70s, 80s and early 90s. Today perhaps he would not be able to write that. For all the normative power of his vision, the law of integration as we once knew it no longer corresponds to what we see. The story of the Charter is a good example. Crisis and erosion are the words of the day.

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Chapter 4

The Effects of Ratification on EU Constitutional Politics

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Introduction

One of the features of constitutional reform processes is strong approval rules that create a number of veto players. Their existence creates a burden for an extensive use of the reform procedures. But also and contrary to the hypothesis that may be induced from this fact, empirical evidence shows that constitutional reforms do happen and, even more, they happen often. The EU provides a clear example in which 'constitutional reform' (understood as a change of the primary rules) happens often despite very rigid ratification requirements. Leaving aside the Merger Treaty (1967), the Budgetary Treaties (1970 and 1975) and the Accession Treaties, the EU has been reformed by the SEA (1986); the Maastricht Treaty (1992); the Amsterdam Treaty (1996), the Nice Treaty (2000) and the Lisbon Treaty (2007) plus the failed EU Constitution. The 'why' of these reforms has been extensively explained (see, *inter alia*, Moravcsik for an intergovernmental account). This chapter examines 'how' constitutional rules change and, more specifically, how ratification rules condition constitutional reform. The argument will be discussed in relation to the cases of the EU Constitution and the Lisbon Treaty

although the chapter will not treat either of these in a systematic fashion.

Starting with the assumption that EU primary rules can be considered a constitution for the EU, this chapter will reveal that the Union has equipped itself with the most rigid set of constitutional reform rules that can be found both in comparison to federal states and to international organisations. These rules combine unanimity with nationally established ratification procedures. Despite of this, between 1986 and 2007, the EU has drafted five new reform treaties. How can this paradox be explained? The response is that ratification requirements lead to a model of constitutional rules that contradicts its constitutional character. EU constitutional rules are very specific, very numerous and predictable for negotiating parties. These traits contrast with the intuitive understanding of constitutional rules as general in nature. The combination of unanimity and domestic requirements reduces the probability of successful reforms in the future: an increased number of states with domestic cleavages on EU membership makes it less to reach an equilibrium result on constitutional reform. In a nutshell, this chapter will discuss the hypothesis that there is a relationship between the rigidity of the rules for constitutional reform, the number of amendments and the contents of such amendments.

The chapter proceeds in the following way. The discussion on the constitutional character of the EU is presented firstly emphasizing its evolving character: the EU constitution results (together with, of course, the constitutionalising role of the European Court of Justice (ECJ)) from an ongoing process of reform that has consolidated, developed and completed some of its constitutional traits. Reform (and, hence, the features associated with its evolving nature) depends very much on the conditions created by ratification rules. These are two. The first is the unanimity requirement that induces a strong rigidity and, secondly, that becomes the empowering factor for national veto players which are created by national constitutions. The chapter discusses briefly the role of national parliaments and referendums but it does not go into great detail on the role of other eventual veto players such as Courts or Heads of State even though their role is acknowledged. Finally, the effects of the combination of unanimity and national ratification requirements is presented as a

tendency towards a large, specific, particularistic and predictable constitution.

The Constitution of the EU

The extended consensus among legal scholars which political scientists have also come to share is that the EU has a Constitution. This evaluation is constructed on an analogy with the characteristics of constitutional order in states. Formally, EU Treaties share the kind of features we expect from a constitution (Elster 1995): they have much more stringent amendment procedures than normal legislation (unanimity is becoming a marginal requirement for normal EU legislation); they regulate matters that are more fundamental than others and, finally, these sets of norms are collectively referred to as a Constitution (ibid.: 366). Scholars and EU institutions normally use the term. This linguistic convention marks the perception of the EU politico-legal order. Criticism of these usages should be relativized: as Elster himself argues, not all constitutions necessarily fulfil all these criteria.

Most authors underline the formal character in order to proclaim the EU Treaties the Constitution of the EU. Firstly, Treaties enjoy in their relationship with other derived EU norms such as regulations, directives, decisions or framework decisions a hierarchical primacy which is akin to the one enjoyed by national constitutions in domestic legal orders. Formally, the Treaties are the supreme norm within the EU legal system. Secondly, the Treaties also create EU organs and define the legislative procedures for generating these secondary norms, what is usually understood as the organic part of any constitution. Thirdly, the practice of the ECJ has defined some principles of EU law (primacy, direct effect and direct applicability) that brings it closer to the idea of a federal constitution rather than a traditional international law treaty. Regarding this last issue, the issue of supremacy has not been definitively resolved and the situation has been portrayed as pluralism under international law (MacCormick 1999; Walker 2002) and, for this reason, some authors have preferred describing the EU constitutional order as a continuum with the constitutions of member states that jointly compose a constitutional ensemble that has been labelled a multilevel constitution (Pernice 1999).

Even in material terms, the EU Treaties can be considered a Constitution: they have finally moved closer to establish a charter of fundamental rights for EU citizens; they define the institutions, their role in law making and some sort of differentiation of functions and they enable some sort of citizens' participation in political life. Arguably, the limitations and shortfalls of the material substance of the EU constitution are the stronger reasons for not calling it a constitution. This chapter will argue that some of these material shortcomings derive precisely from the many veto players created by the ratification procedure which leave a lot of scope for modelling EU Treaties in an *ad hoc* way.

Perhaps one of the most telling features of EU Treaties is that they have followed a pattern of evolving constitution-making. Starting with some crucial elements within the legal structure (i.e. the preliminary ruling mechanism), the constitutionalization of the EU has followed a path dependent, self-reinforcing process (Capoccia and Kelemen 2007). On the one hand, the ECJ played a crucial role extracting features of a federal constitution (Stein 1981; Mancini 1989) in a process that amounted to a 'constitutional mutation'. On the other hand, the EU has passed through a sustained process of constitutional reform which started with the SEA in 1986. In each round of reform, drafters have progressively improved its constitutional character (if measured through the analogical criteria both formal and material set out above), increasing the material content of the constitution, fusing the pillar structure, establishing a clearer distribution of competences between the EU and the member states, etc. The commitment towards an ever closer union contained in all these treaties until the Lisbon one and the *rendez vous* clauses included in SEA, Maastricht etc have been decisive for this process. All these clauses signaled the path (towards new reform) although they should not be interpreted as an automatic mechanism provoking or causing reform. Rather, they provide a tool for actors to activate it.

Despite the evolving constitution-making character implicit in the Treaties and the vague commitment to European integration or any similar rhetorical form found at national constitutions in the so-called 'integration clauses', no member state authorised a discretionary and open process along these lines. Rather, all of these want to control and negotiate the concrete changes introduced at any round of

reform. Nor has there been any instance of a constitution-making coup analogous to the one performed by the Philadelphia Convention: despite the rhetoric that wanted to see the Convention on the Future of Europe as an analogous process, the latter did not create a 'constitutional moment' (Walker 2003) and it limited itself to the more modest achievement (even though an important one in comparative perspective) of granting itself a kind of constitutive-like self-mandate (Closa 2004).

Thus, the legitimacy and validity of every and all reforms of EU Treaties (so far) depends on the habilitation established in national constitutions and constructed through national ratification procedures. Even the Convention did not circumvent this requirement. The international law nature of the revision act means that in many Member States (and contrary to the orthodoxy of the ECJ's supremacy doctrine), EU and EU law are applied on the basis of national constitutional rules doctrine about the domestic effects of international treaty law (de Witte 2004: 57). As the German Constitutional Court argued in the 1990s in the *Maastricht Urteil*, the Member States remain the 'masters' of the treaties. The most powerful instruments for controlling EU constitutional evolution are the ratification requirements.

The rules for the ratification of EU Treaties have remained basically the same since its creation in 1951. Successive rounds of reform have repeated them in every new Treaty and they do not seem to have been even discussed. Basically, these rules combine two requirements: on the one hand, unanimity (i.e. entering into force of the treaties depends on the agreement of all Member States); on the other, the remission to national procedures which establishes the organs intervening. Originally, these rules were designed for the ECSC Treaty and repeated immediately in the EEC and EAEC Treaties and, afterwards, in all and every round of reform of EU Treaties. Whilst their application in the first event (in the ratification of the ECSC Treaty) did not have deep constitutional (either domestic or European) implications, its repetition in the development of the EU evolving constitution has, because it is the combination of these two rules that produces a contradictory constitutional structure.

The significance of the unanimity requirement

Rational choice constitutional theory has constructed the thesis of the functional compatibility between the unanimity rule and constitution making. Buchanan and Tullock (1962) made unanimity the necessary requirement for constitutional agreement on rules. Broadly, their reasoning was the following: since constitutional rules will remain stable in a long temporal sequence and on a broad range of options and policies, individuals cannot identify (in this broad temporal and material range) precise interests. Nor can they calculate the effect of the working of constitutional rules. Individuals find themselves in a situation of 'veil of ignorance'. In this situation, utility maximization dictates that generalizable criteria such as equity, *fairness*, or justice drive the calculus of constitutional rules more than the calculus of net income or wealth expected from the norms. In their opinion, an agreement on rules is much more probable than an agreement on the possible alternatives that can be reached with these rules because of the difficulties to precisely identify the individual interests in the domain of constitutional rules.

Now, Buchanan and Tullock take as an assumption the (rational) behaviour of individuals, on the one hand, and the negotiation of constitutional rules, on the other. But the translation of this assumption to the EU constitutional negotiation setting, on the one hand, and, hence, the applicability of their insights on the effects of the unanimity rule to the EU, on the other, is problematic. There is, first, a need to modify the assumption of methodological individualism: In the EU, governments negotiate in the name of states. Still, it may be assumed that governments behave rationally, they will aim to control the outcome of the negotiations and they will try to predict the distributive and redistributive effects of the rules that they negotiate. Of course, if could be argued following Pearson, that the politicians calculate in the short-medium term and, furthermore, that the result of their calculations is imperfect. But this does not mean that they renounce to this attitude nor that they do not follow their own imperfect calculations.

Now, what this setting opens up for scrutiny is the relationship between principal and agent which does not seem to be present in Buchanan's and Tullock's theory. Basically, the question is: to whom

does unanimity serve? If governments need to obtain domestic ratification, then, they act as agents of a given principal (the ratifying authority). In this situation, the combination of unanimity with a ratification requirement serves, mainly, to empower national governments: they have, theoretically, the support of a majority in parliament and, in parallel, no government would accept putting to ratification a treaty that has not obtained its consent. [1] In this form, unanimity in ratification is translated immediately to unanimity in negotiations. What is the 'principal' behind the governments? Governments may administer their veto in serving something as the general interest which, within pluralistic models would result from aggregating interests (Moravcsik 1998) and in institutionalist ones from institutional factors (Dimitrakopoulos and Kassim 2004). Whilst this may explain the inputs for negotiation, it is also true that national actors (i.e. principals behind governments) may react to the outcome of constitutional negotiations (i.e. the package composed after the aggregation of sets of inputs). And they may react if they are empowered by ratification processes and, hence, may alter national governments' consent to the outcome negotiated.

Originally (i.e. in the founding treaties in the 1950s), the unanimity requirement was created in a context in which the empowerment of national veto players was somehow limited. The unanimity rule was designed for a group of six member states, all of which were parliamentary democracies and this meant that governments could easily secure parliamentary majorities (on the assumption, of course, that governments had majority support in parliament). Ratification requirements in all cases were 50 per cent of the parliamentary vote with the only exception of Luxembourg (two thirds of the Parliament). On the other hand, none of the constitutions of the six contained specific provisions for the introduction of EU law lately introduced with the effect of creating limits and conditions which eventually empower and/or oblige national constitutional courts to intervene. Finally, referendums were unknown and, rhetoric aside, treaties were not perceived as incompatible with national constitutions, so constitutional reform was not required. In sum, the structure of domestic veto players in 1951 was looser than the one emerging afterwards. And even in these circumstances, unanimity prevented

[1] This derives directly from Putnam 1988.

the creation of the European Defence Community (EDC) in 1954 following a negative vote in the French National Assembly.

From this initial situation, the EU has evolved to an entity where the number of domestic actors participating and with veto capability in the ratification process has increased substantially. In a nutshell, governments, parliaments (with one, two or more chambers); parties (if there is a coalition government and/or a qualified majority is required for ratification), voters (if referendums are brought in), constitutional courts and other advisory bodies may take part along with (so far) 27 countries. The next section will detail the structure of veto players within the EU but before is worth to notice the effects that the large increase in size of their numbers has on the Constitutional outcome. Stringent ratification requirements provide a credible commitment for governments only accepting very favourable (in specifically domestic terms) agreement. However, it also involves a risk that no such favourable agreement is feasible and consequently no agreement is reached, even in situations where mutually beneficial agreements were possible (Haller and Holden 1997: 843). Within the EU, constitutional outcomes generate a suboptimal result and there is a growing uncertainty on who will be the actors with veto power in a given moment and, hence, a growing uncertainty on their eventual preferences (which obviously would act as the test for assenting to ratification).

The structure of domestic veto players

Retrospectively, these rules did not have the same blocking potential that they have reached after the 1980s and 1990s reforms. Firstly, there has been a steady increase in the number of ratifying states in each round of reform. Six states created the Union; 12 states ratified the SEA (although for Spain and Portugal was part of their accession packages); 12 ratified the Maastricht Treaty; 15 the Amsterdam and Nice Treaties and 25 the EU Constitution and 27 the forthcoming Lisbon Treaty. But, secondly, since the SEA, the ratification procedures for reforms of the EU have opened up the door to new veto players, namely, citizens through national referendums. These have been prompted following the ones used in the accession procedures in the 1970s (Denmark, Norway, Ireland and UK); 1990s

(Austria, Sweden, Finland and Norway) and the 2000s (Central and Eastern European Countries).

The increase of the number of domestic actors produce straight forward effects: The more power is dispersed across the political system and the more actors have a say in political decision-making, the more difficult it is to foster the domestic 'winning coalition' necessary to introduce changes [that the reform of the EU primary norms require]. A large number of institutional or factual veto players thus impinges on the capacity of domestic actors to achieve [political and norm] changes and qualifies their empowerment (Börzel 2005: 53). The traditional participation of governments and national parliaments has been expanded to include the voters (via referendums) and even national courts and, *en fin*, Heads of State. The following sections review summarily these actors.

National parliaments

National parliaments intervene in ratification in all of the Member States. But this is by no means a classical feature and, in fact, the involvement of Parliament in ratification processes became a regular constitutional feature during the 20th century (de Witte 2004). Classical political theorists had either neglected or rejected the role of parliament. Locke defined the external policy as 'federative power' containing, among other things, the capability to carry through all necessary negotiations with alien persons and communities. Differently to the executive power, the 'federative one' must be trusted to the prudence and wisdom of those in charge of it (the government) and not regulated beforehand by positive law. Locke's anthropological *cum* organicist vision of the body politic explains his opinion: being the state a single person and the international society under the state of nature, the norm to be followed when foreigners are concerned depends very much on the form of their behaviour and the changes in their purposes and interests (Locke 1690).

Rousseau coincided from a different anthropological view and with a more democratic bias. '*L'exercice extérieur de la puissance ne convient pas au Peuple, les grandes maximes d'Etat ne son pas à sa portée; il doit s'en*

rapporter là-dessus à ses chefs qui, toujours plus éclairs qui lui sur ce point, n'ont guère intérêt à faire au-dehors des traits désavantageux à la patrie.'[2]

These restrictive views had progressively been modified into an almost universal acceptance of the role of parliaments in ratification. Even in these countries in which ratification may be considered to be the sanction of an international treaty delegated to the executive, *ad hoc* rules have modified this perception. Thus, in the UK, ratification of an international treaty requires merely an executive act of on the part of the Foreign Secretary, acting on behalf of the Crown in the exercise of the Royal Prerogative. However, the so-called Ponsonby Rule has since the 1920s effectively required that a treaty subject to ratification to be laid before Parliament 21 sitting days before ratification, for information and to give Parliament the opportunity to debate such a Treaty. In practice, ratification of treaties such as the Constitutional Treaty requires an Act of Parliament because of the domestic and budgetary effects of such amending treaties. In summary, parliamentary votes are, in all cases, an inalienable component of ratification procedures.

The question is: how may parliamentary ratification have an effect on the outcome? In the paradigmatic USA Presidential model, Congress may have preferences totally different and even opposed to the President (who has the power to negotiate international treaties). In parliamentary democracies such as the EU member states (with perhaps the only relative exception of France which to this extent, behaves practically as such), government commands a majority support in parliament (under different forms such as single party; majority, coalition government, legislative coalition or *ad hoc* supports). Hence, ratification of a treaty negotiated by the incumbent government may be assumed as an almost automatic result. The basic assumption is thus that in parliamentary democracies *prima facie*, real veto players are governments not parliaments.

However, national ratification procedures may empower parliamentary actors in a way that transforms this basic assumption. This may happen in two typical situations: the first is the requirement of a parliamentary majority larger than 50 per cent of the parliament, a

[2] Rosseau, J. J. Lettres ecrites de la Montagne 1764, quoted by de Witte 2004.

requirement that may empower opposition parties. A second requirement that may change the basic assumption of government/parliament agreement in parliamentary regimes refers to the participation of two or even more chambers in ratification. If majorities and/or functions of both chambers do not coincide, ratification may not result in an automatic process.

Ratification by means of qualified majorities

Ratification by means of qualified majorities currently applies in Austria (if constitutional reform is involved), the Czech Republic, Denmark, Finland (if constitutional reform is involved), Germany, Greece, Hungary, Luxemburg, The Netherlands, Slovakia, Slovenia and Sweden. Majorities larger than 50 per cent of the members of the chamber require building broad coalitions requiring eventually opposition parties. Within the EU, there now seems to be conclusive evidence that the requirement of qualified majorities has, in general, created large problems for ratification even though some cases may be referred: in 1986, the evidenced lack of the required five sixths parliamentary majority prompted the Danish government to call for a referendum to circumvent this obstacle. In the Czech Republic, the requirement of a three fifths majority combined with an almost evenly split parliament caused difficulties for ratifying the EU Constitution and also for ratifying the Lisbon Treaty (which the government wants to tie to the Treaty with the US for the creation of a radar station on Czech soil). Similarly, the opposition in Slovakia (who was fully supportive of the draft) nevertheless linked their unavoidable affirmative vote on the Lisbon Treaty to a different domestic dispute on the law on media. Finally, in Poland, where a two thirds majority is required, the party in government traded opposition support for a Declaration on keeping Poland's opt-outs from the Charter and a parallel law on executive/legislative relations on EU matters. Despite all these examples, the evidence does not show that reinforced majorities have so far been an obstacle to successful ratification, nor do the states using these requirements show a poorer performance than states using simple majority.

Participation of more than one parliamentary chamber

The intervention of more than one parliamentary chamber may transform the assumption of an automatic relationship between government and parliamentary majority in parliamentary regimes.

Thus, the approval of the two Chambers is required in Austria, the Czech Republic, Hungary and Italy; whilst in other cases, the Lower Chamber usually suffices. In Belgium, the two Chambers, plus the three Regions (if their competences are affected) plus the two linguistic communities must ratify the Constitution, which requires the participation of seven Chambers). Again, the difference between majorities in second (or other chambers) and the government majority translates into a clear determination of the latter's negotiating position. The clearest example of this situation is found in Germany, where the German *Bundesrat* has the power to veto ratification, rendering it a powerful actor in negotiations. In fact, the eventual veto of the *Bundesrat* acted as a powerful element to include the principle of subsidiarity in the negotiations of the Treaty of Maastricht. Again, during the process of ratifying the EU Constitution and facing a threat to vote against the Constitution coming from some *Länder*, German Chancellor Gerhard Schröder promised the representatives from four regions that their competences at the EU level would be widened and that the upper house would be involved in the choosing of judges for the European Court of Justice. In Belgium, the Flemish parliament was able to delay the ratification of the EU constitution to the settlement of non-related issues. However, these were not real attempts to use veto power to block ratification and available evidence does not show support for the view that second chambers have acted in the past blocking or threatening ratification.

Additionally to these structural empowerments deriving from institutional design, there are two other circumstances in which the parliament may become a real veto player depending on the political game.

Divergence within government coalitions

The first are situations in which a coalition government is formed and one or some of the partners of the government diverge on the Treaty either for substantive or tactical reasons.

The time dimension

The second circumstance is the time dimension. National elections may mediate between negotiation and ratification so that the new parliament and government does not feel bound by the result

obtained by the former government. In a climate of growing domestic divergence on EU membership, change of government may mean reversibility of agreements. The clearest example of this position is perhaps that of Poland: when the Kazynski brothers won both Presidential and parliamentary elections, substantial (and expected) changes happened in the Polish position on the Lisbon Treaty *vis-à-vis* its former stance on the EU constitution.

In summary, parliamentary ratification has so far backed government stances with strong majorities, in all cases well above the threshold required which reveals that parliamentary acceptance of the Treaty is, so far, very high in contrast to the trends in public opinion. The only clear failure of ratification because of parliamentary blockage has been the EDC in 1954 when the French National Assembly voted down the treaty. There are some other cases in which the lack of parliamentary majority in some countries was circumvented by using some other institutional devices such as referendums. This was the case of Denmark with the SEA.

Ratification through referendums

Referendums have become a feature associated with ratification processes. No less than 12 (plus the one scheduled in Ireland for the Lisbon Treaty) referendums have been held since the SEA. This increase in the use of referendums contrasts with its constitutional position, since they are in all EU member states a secondary device *vis-à-vis* representative democracy embodied by Parliament. From the purely legal point of view and strictly speaking, referendums are necessary in Ireland and semi-compulsory in Denmark (if not a majority of 5/6 is obtained in the *Folketing*). Technically, these two are different cases: in Denmark it is a direct technique for ratification of the Treaties whilst in Ireland it is an incidental technique deriving from the necessity of reforming the Constitution (Lepka and Terebus 2003: 79-80). Thus, it is necessary to expose the reasons for which states increasingly have used this institution for the ratification of EU reform treaties.

A explanation for convening referendums from a rationalistic approach holds that governments will use them (or the threat of calling them) as a mechanism for enhancing their negotiating

position: since parliamentary ratification does not seem to be a credible obstacle which governments can waive, an aggravated ratification requirement adds strategic advantage in negotiations. In the general theory on ratification of international treaties, this is a well established fact: Giving small minorities the right to veto a possible agreement implies that only a very favourable agreement is possible (Haller and Holden 1997: 826). However, evidence of EU IGCs shows that governments behave in a different way: they direct negotiations with the objective of avoiding referendums. This has been argued in the case of the Amsterdam Treaty (Moravcsik and Nicolaïdis 1999) and it has also been the case with the negotiation of the Lisbon Treaty. The only exception to this trend seems to have been the EU Constitution, on which up to 10 governments announced referendums. Why so? The reasons have been explored elsewhere and have recently become the object of a growing academic debate. In synthesis, it could be affirmed that domestic factors and, more precisely, strategic calculus of the effects of referendums on the domestic electoral struggle better explains the recourse to this specific institute of direct democracy (Closa 2007). Parties calculate the electoral advantage that may derive from using the referendum on a specific party setting. Whether or not their calculations are accurate, politicians seem to base their behaviour on a plain calculus of the hypothetical advantage. In many cases, the referendums reflect not so much an overdue aspiration to explain Europe to the citizen as a *manoeuvre* to avoid short-term domestic political problems. Additionally, other factors, such as a mimesis of practices applied in other Member States and a certain force of ideas (i.e. the belief that a 'constitution' had to be ratified by a popular vote), also played and important role. These decisions are constructed in the following circumstances:

Referendums as tactical weapons

Governments may use referendums as *tactical weapons in strengthening their power* (Bogdanor 1994: 31). Governments use non-required votes in order to strengthen their own position either by attempting to gloss over internal divisions or creating divisions in the opposition. Some of the historical experiences of EU reform-related referendums confirm this tactical use: in 1992 President François Mitterrand based his decision to conven a referendum on the Maastricht Treaty (apart from other considerations) on the thought

that the vote would undermine his political opponents. Some of the referendums convened for ratifying the EU Constitution mirror this behavior. In France, President Jacques Chirac's decision (the referendum was not constitutionally necessary) was perceived as an attempt to undermine potential rivals within the socialist party (in which divergences on the lack of 'social' provisions in the new Constitution existed). The bet pay off since the convening split over the internal party struggle between the socialist leader François Hollande and the former Prime Minister Laurent Fabius. Both aspired to be the socialist presidential candidate in 2007, and Hollande supported the constitution but Fabius opposed it. The issue was settled through an internal referendum clearly won by the yes camp.

The British case shows traits of the same pattern even though other reasons apply. British Prime Minister Tony Blair announced a referendum at a moment of great political weakness, when he faced a strong campaign from conservatives and the media in favor of a referendum. The calling aimed at neutralizing opposition arguments on the referendum and reducing Labour party internal disputes on the issue.

Referendums as circumvention mechanisms

The above section on ratification by means of qualified majorities illustrates the cases in which governments did not have the required parliamentary majority for ratification. In these cases, convening a referendum may be a mechanism for circumventing the deadlock either through the mere threat of convening it or by means of its actual celebration. During the process of ratifying the EU Constitution, these were the cases of the Czech Republic and Poland. The Czech government did not initially support the idea of holding a referendum (that had a secondary position in the Czech constitution). But the two Czech opposition parties (the Civil Democrats–ODS and the Communists) opposed the Constitution and the Czech President Vaclav Klaus was an outspoken critic of the Constitution. Facing the risk of an eventual parliamentary defeat, the government yielded to the idea of holding a referendum. Since opinion polls showed large support from public opinion on the Constitution, ratification seemed easier by means of a referendum.

In relation to the EU Constitution, the Polish *Sejm* rejected a motion in favor of a referendum in September 2003 and the two majority parties (the Democratic Alliance of the Left and the Civic Platform) opposed it. However, the ability of a weakened prime minister to forge a parliamentary majority in favour of the Constitution raised serious doubts. The parties opposed to it, *Justice and Law* and the *League of Polish Families*, campaigned in favour of a referendum. Again, the referendum resulted in this situation convenient since public opinion was favorable to the Constitution.

Internal division

Referendums may also serve *to resolve situations in which the parties of the majority are **internally** divided within themselves along anti-integrationist/pro-integrationist lines*. This new cleavage threatens to overtake the classic left/right divide on which the party structure in most European countries is built. This is a powerful element for explaining British Labour Party policy on the issue (even though it is not the only one) during the process of ratifying the EU constitution.

During the year 2003, Prime Minister Tony Blair repeatedly expressed his unwillingness to hold a referendum on the EU Constitution. Blair suddenly changed his mind in April 2004. The decision appears as a tactical (Leonard and Gowen 2004: 58) and highly partisan move with a view to the performance of his party in both the EP elections of June 2004 and the anticipated General Elections of 2005. In this way, Blair impeded that an issue that threatened the internal cohesion of the Labour Party polluted the campaign (apparently, pressure from the then Minister of Treasury, Gordon Brown, Secretary of State, Jack Straw and Deputy Prime Minister John Prescott was decisive in the U-turn). He removed a tactical weapon regarding the role of plebiscitary democracy from his political opponents and he created the possibility of a cross-party consensus of pro-European elements that could be capable of leading a successful referendum campaign. The opposition was left in a very uncomfortable situation; on the one hand, they wanted a referendum to undermine the government but, on the other, they were left without a strong alibi for criticizing the government.

Other actors with the potential to affect ratification

The actors mentioned above (parliamentary chambers and referendums) may directly veto ratification through a negative vote. Additionally, two other actors can enter the ratifying process with blocking potential: national constitutional courts and Heads of State.

Constitutional Courts

Constitutional Courts do not play a role *a priori* in the ratification process but other actors may bring them into the process. Their decisions may complicate the process. This has happened in a number of cases. In 1986, a challenge to the SEA was brought in front of the Irish Supreme Court (and the decision started the path on ratification through constitutional revision by means of a referendum). In 1992, in Germany several claimants demanded a ruling on the compatibility between the Maastrich Treaty and the German Fundamental Law. The challenge was repeated in relation to the EU Constitution (2005) and the Lisbon Treaty (2008). In the first case, the Court decided to postpone the revision of the case pending the resolution of the impasse created by the French and Dutch referendum. In 2004, the Spanish Council of State suggested to the government that it should consult the Constitutional Court on the compatibility of the EU constitution with the Spanish one (in particular, the compatibility of the principle of supremacy of EU law with the Spanish constitution). In 2008, the Czech Senate requested a ruling prior to its vote on the Lisbon Treaty from the Czech constitutional court.

In all cases, even though courts cannot directly veto the ratification of a given treaty, they introduce at least a delay in the process and, in the most radical situation, they can demand a constitutional reform as a previous step for proceeding with ratification. This has happened in a number of occasions: as a result of the ruling on the Maastricht Treaty of the German Court; as a result of the Spanish court declaration on the same treaty, etc. And this situation is aggravated because of the growing tendency of many states to introduce specific so-called EU clauses that contain limits and conditions for membership. Eventually, a proposed reform might have to satisfy 27 different tests of constitutionality.

Heads of State

The participation of the Head of State in the ratification process is normally taken for granted as the expression of a symbolic position. In fact, there are no historical examples of the EU reforms in which they could be assigned a veto player role in the ratification process. In general terms, Presidents do not have a strong role in ratification although the inclusion of a significant number of new member states with semi-presidential systems has slightly transformed the landscape. Strictly speaking, only the Cyprus Constitution grants the President the power to veto a ratifying law. In Ireland, the President can decline to sign a law, even though this power is highly constrained and, in fact, has never been used. The competence does not apply to a law amending the constitution (which is the usual ratifying procedure in Ireland). In Poland, the President can veto a bill but the veto can be waived by a 3/5 majority in the *Sejm*. In Italy, as in France and Latvia, the President can request a second deliberation on the bill, even though this soft form of veto can be waived by an ordinary majority in Parliament. In these cases, there exist the potential for at least a delay in signing the bill. This has happened, for instance, in Poland in the ratification of the Lisbon Treaty. More powerful are the cases in which the President may activate an extra player: In Poland, the President can ask the Constitutional Court to verify its compliance with the Polish Constitution before signing a bill. The stronger position is one where the President may circumvent parliament (and hence, the executive) by calling a referendum. This was the case with France and Latvia. In France, two Presidents have made use of their prerogative to call a referendum on EU reform treaties (Mitterrand in 1992 and Chirac in 2004). In Latvia, the provision allows the President to suspend a bill for two months during which it can be referred to the people if a certain number of signatures are gathered.

In summary, Presidents may be perceived as weak veto players, even though they have a very real capability to disturb national ratification processes. The key factor (with few exceptions) to explain their behaviour seems to be their alignment with governmental majority. Thus, the Czech President Vaclav Klaus has outspokenly opposed the ratification of the EU constitution. He threatened with a constitutional court process and delaying or even refusing to sign the

ratification bill. Once his own party (Civic Democrats-ODS) won the elections and assumed the burden of ratification, he withdrew to a more discrete attitude and position. Poland followed the opposite course: once the party of the President (Law and Justice) lost the election, President Kaczynski assumed the defence of their thesis on ratification, threatening to delay signing it if the demands of PiS were not complied with.

Unanimity, veto players and the model of EU constitutional rules

Now, what are the combined effects of the requirement of unanimity and the empowerment of a growing number of domestic actors through ratification procedures? Firstly, unanimity creates an environment in which every government negotiating EU reforms can show an extractive behaviour; i.e. every government wants to have explicitly included in the treaty those provisions on which specific and foreseeable results and/or benefits can be calculated. Moreover, unanimity may stimulate this behaviour since there is no reason for restraint *vis-à-vis* the eventual demands of other actors. Thus, the constitution-making setting is not inspired by compromises with constitutional meta-rules but by the negotiation of constitutionally specified pay-offs.

The form of controlling the effect of constitutional rules is to negotiate very specific and concrete ones rather than general principles and/or rules whose effect cannot be advanced before hand. In this form, the constitution tends to be a very long document: since there is no limit nor incentive to limit the number of provisions, their degree of detail or their contents, the tendency is towards increasing them *ad infinitum* and making them very detailed in order to predict beforehand the effects of their functioning thus creating something very different from a constitutional document. This structure by itself poses a limit to democratic politics, since the very precise and specific provisions constrain the possibility of using them for articulating different ideological options. Additionally, this degree of detail makes the treaties a very rigid structure that does not integrate change easily and, hence, is continuously subjected to reform pressure.

So far, all rounds of reform of the EU can be framed within the former description. They have avoided any kind of constitution-making-like appearance with the only exception of the exercise of the Convention on the Future of the EU. The attempt to draft a constitution pivoted on three exercises: simplification of the legal structure, clarification of some of the provisions and rules (for instance, classification of competences, hierarchy of normative instruments or explicit identification of the principle of supremacy of EU law) and the repeal or substitution of the former treaties for a consolidated document. This was an exceptional and unique moment (even failing short of a constitutional moment) which was made possible because the coincidence of two alternative or even antagonistic views on the constitution: a negative one that perceived the Constitution as a strong limitation to EU powers and a positive one that stressed the enabling power of an EU constitution.

Empirically, it would be very difficult to prove that the failure of the EU constitution was due to its contents or even its form. Keep in mind that there were negative votes on the Maastricht and Nice Treaties, and these did not provoke their collapse. In both cases, marginal provisions (such as European Council declarations and national declarations) provided a proxy for 'amendment' of the rejected text which was then approved integrally. The problem of the EU Constitution was strictly a ratification process matter; it opened the door to a very large number of single veto players each of which could make the exercise fail.

As a result, the new text was negotiated not as an improvement or modification of the former but as an instrument which could avoid referendums (and hence, reduce the number of veto players). Whether legally or politically committed to hold them or not, the situation created by the negative results of the referendums on the EU constitution in France and the Netherlands gave credibility to them as an implicit threat. Consequently, any government could implicitly or explicitly justify any specific preference for the final draft to the necessity of avoiding referendums.

Thus, the Lisbon Treaty has emerged as a kind of de-construction of the constitutional *acquis,* although this is more true referring to formal and symbolic aspects than to substantive contents. French President

Sarkozy unably summarised this objective under the label 'mini-treaty' which would return to the idea of a technical reform. The overarching comprehension is that the Treaty should be perceived and construed as a technical revision of former ones which are not repelled or eliminated. Simplification of provisions was abandoned as a goal. Thereafter the Dutch government sought to eliminate the constitutional symbols (even though a number of states have retained them in Declaration 52). Then, some other formal elements of constitutional nature were eliminated: the EU law supremacy clause,the law-like nomenclature of secondary norms and the explicit recognition of its legal international personality. Last but not least, the Treaty performs a U turn on the Union's legitimacy basis in relation to the advances of the EU Constitution: where this attributed its birth to the (joint) will of citizens and states, the Treaty refers to the will of the High Contracting Parties.

Then, several governments presented their shopping list. The position of the Polish government can illustrate their attitude: if the negotiation is re-opened, then, all items can be discussed. The Dutch government requested a reinforcement of the role of national parliaments (whose wording in the treaties nevertheless provoked the criticism of the UK parliament). The British government presented its famous four 'red lines' catered for in form of Protocols regulating a specific form of 'opt-in' provisions. The Danish already had indicated nine points that should be deleted from the EU constitution in order to avoid a referendum. The Polish government bargained hard for the inclusion of a tortuous temporal modification of the voting procedures using the Ioannina compromise (plus an additional general advocate). Other governments negotiated specific pay-offs with no constitutional significance beyond the rupture of a principle of unity of the legal *acquis*. This is the case, for instance, of the Austrian government which negotiated on the fringes of the IGC temporary exceptions in prosecution of infringements on the application of nationality discrimination in medical schools. Italy bargained hard to obtain an extra seat at the EP. Others forced commonsensical inclusions, such as alphabet…or Bulgarian spelling

Thus, a number of national governments have tried to maximize concessions using the reference to national ratification burden as an alibi (or merely shielded by the requirement of unanimity). Should

the treaty include these preferences, referendums could be avoided and ratification appeared as a likely successful outcome. However, the map of eventual veto players shows that apart from constant structural ones (parliaments), a number of unforeseen actors may appear ex post in the ratification process and unforeseen circumstances may empower unforeseen actors. Since they are not taken into account a priori, the possibility of anticipating and aggregating their preferences into reform is limited and this may increase the likelihood of ratification failure. The apparent solution is to settle for small-scale and technical reforms and/or to reduce the number of ratifying veto players.

Concluding remarks

Within the set of rules currently defined for ratifying EU reforms, governments do not have any incentive for rejecting the rounds of constitutional reform. The unanimity requirement guarantees that they will control the outcome of constitutional negotiations. This happens by means of negotiating very specific and detailed provisions which satisfy the whole set of governmental preferences. However, the ever growing number of member states, next to the variety of ratification procedures which empower different and large sets of domestic veto players means that the ability of governments to foresee eventual obstacles for ratification may be reduced. The alternatives followed by governments can be the following: reducing the number of reforms, restricting domestic veto players (particularly, referendums) or, else, further drive reforms to very specific and particularistic adjustments of the EU constitution.

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Chapter 5

Mass Media and Contested Meanings EU Constitutional Politics after Popular Rejection

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Introduction

The rejection of the Treaty establishing a Constitution for Europe by referenda in two founding EU member states has brought to light a deep gulf between supporters and opponents of democratic approaches to the institutional reform crisis of the European Union. For proponents of radical democratisation, the popular rejection of the Constitutional Treaty does not invalidate the constitutional project as such but rather reconfirms the urgency of democratic settlement. According to this perspective, the way out of the crisis is not less but more democracy (see Brunkhorst in this volume; Habermas 2008; Fossum 2008). This is in keeping with a consequential-expansive logic of EU constitution-making, according to which the deepening of integration has always been seen as necessary for enhancing functional problem-solving in an enlarged

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Union as well as democratic legitimacy. Inclusive public debates are therefore needed to ensure that basic agreement among EU constitution-makers extends to the general public. Political conflict is not altogether excluded, but accommodated by the very normative order it seeks to establish. This expansive approach to democratic settlement has been criticized by scholars as well as political leaders who, in the aftermath of the ratification failures in France and the Netherlands, embarked on correcting such 'misleading ideas'. The new agenda propagated was to abandon the 'high politics' of constitution making and return to a minimalist 'low politics' of treaty that entailed lowering public attention and expectations (Moravcsik 2006).

Can there be a third approach that spells out the dynamics of EU constitutionalisation beyond the normativity of Constitutional high politics and the pragmatism of minimalist treaty reform? In this chapter we propose such a third approach, which we call logics of contentious transnational constitution-making. The intention here is to shed light on the contentious politics of democratic constitutionalism. European integration is then not simply seen as achieved by instrumental action and reasoning within formal organisations and institutions, but is the product of intermediating processes of public debate and resonance. The emergence of this 'postfunctionalist' and contentious logic (Hooghe und Marks 2008) allows researchers with to engage in deeper explorations of the contested nature of European integration.

In this chapter, we seek to map, with the help of mass mediated political discourse analysis, the quality, be it high, low or contested, of democratic constitutional politics beyond the nation state in the context of the institutional re-ordering of Europe. By bringing in a public sphere perspective, the research focus shifts here to how competing logics of constitutional politics are translated into different sets of discursive practices:

- The logic of quasi-constitutional arrangements whereby successive treaty revisions occur by a process of intergovernmental bargaining (public avoidance strategy);
- The logic of constitution-making by agreement among the representatives of the governed about a universal position for

accommodating diversity, hence keeping conflict between different constituents' wishes and ways of life at bay (public consensus strategy);
- The multivariable logic of 'dialogical contestation', based on maintaining and encouraging diversity in domestic as well as trans-/cross-national interaction (public contestation strategy.

So far, analyses of deliberative democratization and constitutionalisation have focused primarily on the EU level and its main drivers, arenas and procedural arrangements that contributed to justificatory processes in forging agreements on and arrangements for democracy (Eriksen and Fossum, Chapter 1 of this volume). By putting national public spheres centre state, this analysis pursues a complementary avenue with the aim of reflecting the EU's democratic constitutional experiment.

If we take the national mass media system as representative of the national public sphere as a whole, we would find scant grounds on which to praise in their capacity as drivers of and arenas forging democratization or even deliberation in the EU. Normative expectations about the media's role in mediating collective decisions along with the information needed to make them to the public are frequently frustrated, with tabloid press and private TV channels in particular standing accused of personalization, political bias and lack of independence and pluralism.[1] So, in fact, by either simply ignoring or even by actively biasing people against the European dimension of politics, the mass media may, in fact, cognitively constrain the emergence of a European democratic order. Nevertheless, we must assume that the discourses of the mass media are necessary mechanisms for translating European democratic norms and principles into mass public practices. The mass media are in a unique position to enhance people's cognitive awareness of European political processes, and, inasmuch as they function both at a mass level and within and across EU member states, they are indispensable for instilling democratic practices into public life within the emerging European political order.,

[1] See for instance Norris 2000, Meyer 2001, and, for an overview and discussion Liebert 2007a, Trenz 2008.

So let us turn our attention to the intermediary processes of constitutional communication and how they *resonate* within diverse national publics. Constitution-making, contested democratic constitutionalisation and constitutionalisation through treaty reform are conceived as three competing modes by which the legitimacy of the European normative order is mediated. Scrutinizing constitutional debates in public arenas will allow us to assess whether the preferences of political elites and those of citizens match up. Opening this black box of communicative intermediation, we shift our research focus from formal norms and restricted political bargaining to those arenas where mass public deliberation unfolds, politicisation and contention may erupt, or public reaction to the stance of political leaders is played out. In this context we can build on existing *European public sphere* research. Our chapter sets out to reconstruct mass media debates on EU constitutional politics, seen here as large scale experiments in European public sphere building. This includes overarching general publics, strong, institutionally restricted publics and also segmented publics competing for polity solutions (Eriksen 2005). The logics of public sphere building thus reflect, resonate with and, arguably, conflict with the competing logics of constitutional politics.

For this purpose, our analysis is structured in three parts: We start by delineating three different modes of public involvement in the EU constitutional process. Subsequently, we 'operationalise' these three logics for the purposes of media discourse analysis. In the empirical part, we provide systematic empirical evidence and use our findings to judge the democratic quality of media debates and what they reveal on the mode of constitutional politics that is in play. We conclude by answering three questions about the scope of the European public sphere: First, to what extent did the print media's treatment of the constitutional ratification crisis indicate public interest in the EU's constitutional process? Second, did the mass media primarily represent the views of their national political class or did they include voices from non-national actors and non-elite groups? And, finally, did the contentious issues tackled by the mass media relate primarily to EU policies and institutions, or did they rather take issue with the EU's democratic practices, norms and procedures?

Three logics of constitutional politics in Europe

For the purpose of this chapter, we turn from EU polity models to the logics underlying constitutional politics and the dimension of mass media communication. The three procedural logics distinguished here have a lot in common with but are by no means identical to the three 'RECON models' of democracy in Europe. Following Castiglione and Schönlau (2006), there are two broad narratives of constitutional politics in EU scholarship: the 'constitutionalisation narrative' based on incremental treaty reform through Intergovernmental Conferences and low politics and the 'supranational constitution narrative' based on the high politics of explicit constitutional drafting. However, a third narrative can be distinguished too. Importing James Tully's concept from the Canadian context into the EU, Jo Shaw has introduced the notion of 'postnational constitutionalism in the European Union' (2000, 2003). Tully defines postnational constitutionalism as an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity (Tully 1995: 30).

The consensual-restrictive logic of 'quasi-constitutional arrangements' through treaty reform

In debating the future of European integration and possible paths towards democratic legitimacy, EU constitutionalisation has mainly followed the logic of integration through law (Mancini 2000). The idea that the EU institutional order can be rationally designed and calculated is expressed in the bargaining approach to European integration that claims to bring about the most substantive and stable solutions (Tsebelis 2008). In order to maintain the integrative dynamic, openness and participation must be restricted. The basic consensus about a European constitutional order or the fragile interest equilibrium must be protected at all costs from possible outside interferences. Democratic procedures are thus not essential to the basic legitimacy of the EU (Majone 1998, 2005; Moravcsik 2006) but, to the contrary, are often seen as counterproductive.

For Moravcsik (2006) political contestation is not a symptom but rather the cause of loss of faith in the legitimacy of the EU. According

to him, the project to legitimate the EU by encouraging more popular participation and debate was doomed to failure from the outset because it was 'inconsistent with basic empirical social science about how advanced democracies work' (ibid.: 219). In particular, the constitutional strategy of achieving European integration through democratic legitimacy had not taken into account the dysfunctional and counterproductive effects of politicisation, which instead of providing more long term popular support and trust in the European project, tended to undermine the EU's stability and success in incremental problem-solving. The lesson to be learned, pragmatically and normatively, would be then to de-politicize the EU and to return to the traditional, tried and tested strategy of incremental, piecemeal reform (ibid.: 237).

Following this line of argumentation, the basic constitutional consensus is achieved by intergovernmental cooperation and elite consensus about how to settle interest conflicts internally. A written constitution that enshrined the participatory rights of European citizens would only damage the functional requirements of expert governance. This explains the focus on efficient rather than on participatory governance. In terms of polity design, the consensual-restrictive logic pleads for the maintenance of the nation-state order, claiming that this is strengthened by coordinated problem solving through functional bodies. In some cases, this might even necessitate restricting integration and the excessive competences of supranational bodies.

The consensual-expansive logic of supranational constitutional settlement

Identified by Wiener and Schmalz-Bruns (2008) and conceptualized as a 'Kantian reconstitution of democracy in Europe', this logic entails a 'reasoned view of norms': While meanings with reference to specific norms will vary across contexts, and differences are to be expected when the boundaries of interactive contexts are transgressed, this logic rests on keeping diversity at bay. According to this logic, the development of a universal position based on a shared set of cultural and social conditions is used to avoid or bypass conflict. Within different contexts, representatives of the governed within a

community make sure that the governors proceed according to the wishes of the former.

The Laeken process starting in 2001 offered opportunities for intellectuals, political entrepreneurs and institutional architects to suggest ideas for reform. Their efforts were informed by belief in a rational constitutional design and deliberative procedures for constitution-making. Especially in the process of drafting the Constitutional Treaty, the political and the normative discourses on European integration were mutually reinforcing. From both sides, European integration was conceived as a project for the future of Europe that should lead to deeper and wider integration and ultimately to democracy. The question to be addressed was how this *finalité* could be achieved and how possible obstacles on this way could be overcome.

Following this paradigm, the draft Constitutional Treaty can be seen as a logical step forward from strategic bargaining and functional problem-solving towards democratic legitimacy. Path dependencies and institutional learning were central in arguing for the necessity of a European Constitution. Constitution-making could thus be perceived as the legitimate output of legal reasoning and deliberation within strong publics with a constitutional mandate to agree upon the normative substance of the emerging institutional order.

This logic is based on a progressive notion of EU constitution-making as a catalyst for the building of an EU polity and a corresponding EU social constituency. In this case, the legitimacy of the EU essentially relies on the implementation of democratic procedures through constitutional design. There would be no need for a pre-established collective identity as citizens could, in the long run, be expected to support and identify with the new democratic procedures and institutions and to recognize its surplus in terms of legitimacy in comparison to the traditional model of national democracy. The launching of a constitutional project could thus be used to expand basic consensus with regard to supranational integration and to build trust and solidarity among the citizens of Europe. Following this model, democratic legitimacy is based on intermediation from strong deliberative publics to general mass publics and a channelling and filtering of voice through participatory and inclusive arenas. In terms

of polity design, the consensual logic envisages the possibility of European statehood in terms of a federation (federal Europe) or alternatively promotes the allocation of authority to multiple sub- or supranational bodies coordinated by international law (cosmopolitan Europe).

The politics of contentious constitutionalism

Compared to the 'quasi-constitutionalisation narrative' which is based on the idea of intergovernmental treaty reform, the 'contentious constitutionalism' paradigm problematises the hierarchical and legalistic logic implicit in the 'hidden process' of the former, driven as it is by intergovernmental negotiations and the judiciary (Liebert et al. 2006: 13ff). But 'contentious constitutionalism beyond the nation state' equally goes against the 'big bang' approach to European constitution-making espoused by the 'supranational Constitution-making narrative'. The logic of critical and reflexive democratic constitutional politics (Tully 1995, 2007; Shaw 2000, 2003; Wiener 2003; Wiener und Della Sala 1997) is premised, rather, on reinforcing transnational interactions, on non-teleological processes and procedures that are open to contestation and deployed as inclusive and responsive dialogues aimed at accommodating diversity of views, interests, identities. And while the supranational Constitution-making narrative is premised on the assumption of clear-cut patterns of political conflict that can be accommodated by supranational institutions and procedures, this third postnational view expects the normative order of the European Union to emerge as an 'essentially contested project' (Bańkowski and Christodoulidis 2000).

In a similar vein, Liesbet Hooghe and Gary Marks (2008) have called for theoretical soul searching, appealing to EU researchers to pay attention to the contested nature of European integration. According to these authors, mainstream integration theory - in its functional as well as in its intergovernmental variety - applies an elite perspective to European integration that rests on three empirically false premises:

> First, that the public's attitudes towards European integration are superficial, and therefore incapable of providing a stable structure of electoral incentives for party positioning. Second, that European integration has low salience for the general public […]. And third, that the issues raised by European integration

> are *sui generis*, and therefore unrelated to the basic conflicts that structure political competition in western democracies.
>
> (Hooghe and Marks 2008: 3)

The contentious mode of constitutional politics is based on an open ended notion of EU constitutional settlement, which does not necessarily end up in the body of a written constitution but rather proceeds through flexible arrangements. Different from the previous logic it abandons all belief in rational design and calculation. From this perspective, democratic constitutionalism makes a significant leap forward from strategic bargaining and functional problem-solving towards democratic legitimacy, even if this may come at the price of ratification failures. Popular responses may bring to light possible gulfs between the elites and the European citizens (European Commission 2006). In this sense, the ratification crisis of June 2005 was certainly not the first time that the EU was confronted by its deficit of public support. Yet, it was a rather unique instance of contentious constitutionalism at work, demonstrating that the articulation of public voice *can* actually make a difference.

Reconstructing constitutional politics

Media discourse analysis

Against the normative background of the three logics of democratic constitutionalism we will examine whether and in what ways mass media debates interact with EU constitutional politics. The question is whether and how the mass media have engaged with the democratic dimensions of the Treaty establishing a Constitution for Europe supporting either the path of constitutional low politics, justifying the high politics of supranational constitution-making, or enhancing a contentious approach to European integration with its concomitant ambivalent repercussions for the constitutional endeavour. More specifically, we will measure the scope and performance of constitutional media debates, see here as an indicator of the democratic quality of the process. Translated into empirical indicators, the democratic quality of media debates on the EU constitutional project is measured in terms of visibility (coverage intensity), language (different framings of same topics), substance (argumentative strategies deployed and the extent of deliberation, and hence of reason giving) and pluralism (inclusion of diversity of voices).

Empirical questions

The three process logics of democratic constitutional politics in the EU can be applied to a normative assessment of the performance of national newspapers in representing and elaborating constitutional debates on the EU. Assessing media coverage of the constitutional crisis and 'reflection period' post-ratification failure, our aim is to explore the following set of questions pertaining to the democratic quality of the EU constitutional experience as relayed by the media – each of which opens a research dimension of central relevance for understanding present dynamics and future options for integration:

1) What are the patterns, resources and dynamics of mass media communication in relation to the EU constitutionalisation process? How do constitutional debates unfold in the mass media, what kind of issues and particular concerns are raised, involving what kind of actors are involved and what kind of publics are addressed?
2) What is the degree of Europeanisation in public and media debates on EU constitution-making? Does political contestation in the different national media spheres follow similar conflict lines? How do speakers and addressees from different national backgrounds relate to each other discursively?
3) Through what kind of meaning structures and justificatory logics do constitutional debates unfold? Can attitudes expressed towards European integration be grouped along a similar cleavage line to that existing between opponents and proponents of the Constitutional Treaty? In addition, a categorisation of typical justifications used to defend particular visions of the EU as a legitimate order is proposed.

To answer these questions, the methodology of comparative discourse analysis and a data set covering constitutional media debates from May 2005 to June 2007 in 14 EU member and candidate countries will be used. We will reconstruct discursive – cognitive and normative – references in mass-mediated public discourses within the normative framework of our three 'logics of constitutional politics'.

Operationalisation of the three constitutional logics

Our analysis is premised on a 'reconstructive interpretation' of the meanings and relative salience of the various components of the three logics – or modes – of European constitution-making in media discourse. Here, we aim at not superimposing or projecting any of these logics into the media debates. Neither we are interested in the question which of the three logics is given preference in media discourse. Rather we want to assess how the latent structure of media discourse corresponds or relates to the scope conditions set by the three logics and how their corresponding languages have entered mass mediated everyday life language or have been translated for mass publics into a more familiar idiom.

a) *The exclusive-bargaining logic of treaty reform:* Five indicators establish whether this logic is reflected in constitutional media debates: preferences would be negotiated in rather closed arenas without major need for media attention. The expression and mobilization of public concerns outside these arenas would not be necessary. Communicative inputs would be provided mainly by national governments qua legitimate representatives of national interests, or by experts. EU institutions would play a minor technical role as there would be no need for the generation of legitimacy beyond the representative procedures of national democracy. Justificatory discourse would mainly emphasis national interests, efficiency and functional problem solving.

b) *The inclusive-consensual logics of democratic Constitution-making:* In order to fulfil the criteria required by the logic of limiting diversity as a means of accommodating conflict in EU constitution-making, mass media communication would have to limit growing popular contention and partisan conflict about European integration, giving voice primarily to representatives of the governed. In other words, mobilisation by affected groups and civil society would not become visible in the media. The contested meaning of the EU would be displayed in stable cleavage structures across national arenas. Politicisation would decrease over time and the issue cycles in the media would indicate recurrent debates about the EU that are stimulated by supranational actions and events. Justificatory discourse would

highlight the European collective good, and promote rights and collective identities.

c) *The contentious logics of constitutionalisation:* According to the logic of inclusive, transnational, open-ended procedures of constitutionalisation, overlapping public spheres of mass media communication must exist, structured by expanding public debates amplified through mainstream mass media. We expect these overlapping media debates to respond to a growing demand for information about the EU constitutional project within national publics. This facilitates cross-border interactions and communicative exchanges involving a wide range of actors, the participation of both state and civil society actors at different levels of governance, and growing understanding among citizens, manifested in general support for the goals of European integration and the contents of constitution-making. Constitutional referenda would be not simply a one-off opportunity for popular mobilisation but the starting point of a new contentiousness that would unfold further in the reflection period. Justificatory discourse would focus on contested sectoral and territorial interests and identities.

Table 5.1 gives an overview of the three logics of constitu-tional politics, along five different dimensions, each with a set of corresponding 'code families' that will subsequently be applied to structure our qualitative-quantitative media discourse analysis.

Method of qualitative-quantitative discourse analysis

To examine to what extent each of these competing logics of EU constitutional politics resonates with the public sphere, this chapter draws on an unique data set: A large and encompassing print media data set on constitutional ratification and reflection debates (2005-7) including fourteen old and new Member States (Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Netherlands, Poland, Spain, Sweden, United Kingdom) and a candidate country (Turkey). These data were collected as part of the RECON project.

Table 5.1: Three Logics of Constitutional Politics in the Public Sphere

	Small 'c' - quasi-constitutionalisation through treaty reform	**Capital 'C' representative Constitution-making**	**Contentious constitutionalism**
Visibility (coverage cycle)	Hidden process Limited, nationally segmented strong, sectoral, and general publics ** Coverage cycle of EU low, with peaks for national EU politics*	Strong publics (EP), translating into general public spheres (mass media) ** Coverage cycle of EU high with peaks for EU topics/events*	Trans-national public spheres ** Coverage cycle of EU variable, with peaks for non-national EU politics*
Actor type and origin	National exclusivity: Judiciary (ECJ, national courts) and IGC, Council ** Dominance of national origin and national state/government/court elites*	Multilevel inclusiveness: EU actors, European parties, European civil society ** Similar share of EU elites vis-à-vis national actors*	Social inclusiveness: Culturally diverse groups, sovereign citizens ** Similar share of national and non-national actors, including elites and civil society*
Logic of interaction	Logic of intergovernmental bargaining & compromise,structured by integration through law ** Depoliticised national relations and discursive interactions centred on national representatives, experts, courts*	Logic of political polarisation, structured by political cleavages and majority-opposition dynamics (majority rule + alternance in power) ** Polarised relations and discursive interactions encompassing EU and national elites*	Logic of contention, contingent on issues and contexts, structured by deliberation, negotiation and aimed at consent ** Contentious and deliberative transnational relations and discursive interactions encom-passing social and political actors*

	Small 'c' - quasi-constitutionalisation through treaty reform	**Capital 'C' representative Constitution-making**	**Contentious constitutionalism**
Salient topics/issues of constitutional politics, **- policies** **- institutions** **- processes**	- 'Treaty Reform', national sovereignty, - 'Union of democratic states' - national ratification referenda - national elections - Economic costs and benefits of EU enlargement ** Low salience and low politicisation*	- 'Treaty establishing a Constitution for Europe' 'Federal Republic of Europe' - Pan-European treaty reform referendum - European elections - EU absorption capacity vis-à-vis further enlargement (Turkey…) ** High salience linked to consensus orientation,(or structured articulation and accommodation of conflict),*	- Ongoing EU constitutional reform process - Deliberative Convention - Citizens' legislative initiative - International human rights and democratic practices in candidate countries ** High salience, with strong polarisation (or contentiousness)*
Argumentative strategies and justifications	Efficiency, functionality,national interests, national identities ** Justification codes*	Collective European interests, values, history, future ** Justification codes*	contested interests, values and norms ** Justification codes*

The particular strength of this data set relating to mass media debates is that it enables us to reconstruct the logics of bargaining, deliberative consensus-building and contention involved in EU In addition, at a later stage it will be possible to compare these patterns to findings from two related research projects: ConstEPS '*Constituting the European Public Sphere*' (University of Bremen)[2] and the ESF project "*Building the EU social constituency* (University of Oslo and Humboldt University Berlin)[3].

Thus, we will not only be able to describe the salience of public debates; the types of agency, and the intensity of normative conflict at particular moments in this period of over two years, but also to explore lines of conflict and possible accommodations. With regard to explaining the failure of the EU Constitutional Treaty, we expect not only to establish descriptively the kind of narrative that prevailed in the public spheres but also to assess normatively the success of the communication strategy promoted by European leaders in the aftermath of the negative votes in France and in the Netherlands with the aim of closing the gap between the EU and its citizens (Plan D and the subsequent White Paper on European Communication issued by the Commission in February 2006).

A three-step discourse analytical approach has been chosen:[4]

a) Sampling of 40 print media articles per country and qualitative coding by country specialists following a shared coding scheme; drafting qualitative country report;

b) Output of cross-national tables for descriptive comparative analysis of distribution of frequencies of actors, topics, justifications, inter-actions, context issues etc.

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[2] For publications of initial results from the ConstEPS project, see the special issue of Perspectives on European Politics and Society, 'Europe in contention: debating the constitutional treaty', edited by Liebert, with contributions by P. Rakusanova (Czech Republic), Tatjana Evas (Estonia, Latvia); Sönke Maatsch (France), Aleksandra Wyrozumska (Poland) and Kathrin Packham (UK) (Liebert 2007b).

[3] For publications of the findings from the ESF project, see Fossum and Trenz 2006; Jentges et al.2007; Vetters et al. 2009; Trenz et al. 2007, 2008, forthcoming; Firmstone and Statham 2007.

[4] For details, see Liebert and Trenz 2008.

c) Based on theoretical supercodes that are linked to models/logics, Excel-based output of comparative tables providing quantitative data on resonance of models.

Empirical findings, interpretations and discussion

Summarising the results of our interpretative reconstruction of mass media discourse on EU constitution-making, we find a major discrepancy between how constitutional politics is represented, and how the EU constitutional project is portrayed. In the representation of constitutional politics, the media largely follow routine paths of news-reporting within the nation state, giving prominence to national agency and viewing the EU primarily as an intergovernmental setting. In their portrayal of the constitutional project, however, newspapers apply a new justificatory practice, in which the EU is cast as a supranational unit which unfolds through new contentious processes of negotiating the European order. The representation of the constitutional process in the media is thus characterized by a discrepancy at the level of actors, the substance of the debate and the justificatory logics. Although the logic of intergovernmental treaty reform largely prevails as regards the dominant agency – in other words, national political elites -, dominant justifications speak to the supranational representative frame, while institutional and procedural issues at stake in the contested constitutional debates of the referenda and reflection period are frequently linked to contentious transnational politics.

In the following we present our findings with regard to the four central indicators that were developed for operationalising the three logics of EU constitutional politics (see Table 5.1):

1) Transparency and the amount of information made available in the national public sphere measured through issue salience and issue cycles.
2) Participatory structure of the debate, interdiscursivity, degree of transnationalisation measured through (a) type of agency, (b) origin of agency, (c) modes of interaction.
3) The substantive character of the constitutional debates measured through the distinction of different sets of (a) policy issues, (b) institutional issues, and (c) procedural issues.

4) The justificatory modes of constitutional politics measured through (a) argumentative strategies, and (b) patterns of justifications.

Visibility of EU constitutional politics in the mass media

Newspaper coverage is a reliable indicator for measuring the salience of EU constitution-making to the national audience. The absolute amount of information that journalists make available can be taken as a measure of the knowledge that becomes accessible to citizens. The low politics logics of intergovernmental bargaining would correspond to a low salience of constitutional debates in the media. This is incompatible, first, with European leaders' aim to broaden public debates and improve citizens' understanding of the process (the expansive-consensual logics), and second, with opposition and resistance mobilised from the outside (the contentious logics). According to these second and third logics, media salience should be high and sufficient information should be made available to either convey the basic consensus that has been generated within strong publics to the general public or to enhance broader debates and to sharpen social cleavage lines and conflicts.

The optimistic assumption that strong publics would generate mass communication through the national media has only partially translated into reality. As Figure 5.1 shows, the EU constitutional project only went through a short period of politicisation, in which media debates were synchronized. Normative debates about the constitutional design of the EU were still mainly restricted to expert publics and parliamentary arenas. By distinguishing different phases of democratic constitution-making (Fossum and Menendez 2005), the restrictive rules that apply to communication within strong public can be defended on condition that results are subsequently communicated and amplified to the broader public. Electorates must be able to ground their consent or rejection on informed and substantive debates. This condition was only partially fulfilled: countries without referenda did not generate sufficient information and contested debates about the contents and goals of the Constitutional Treaty. Countries with referenda went through rather short periods of politicisation, which focused mainly on strategic communication and the staging of a power play between domestic actors. Last but not least, constitutional contention came to an abrupt halt after the

popular vote, and the reflection period was not used as an opportunity for further mobilisation on the issue. The low salience of the issue over the whole period thus clearly facilitated the return to a 'constitutional low politics'.

Origins and types of agency

One of the principal aims of the reflection period was to become engaged in a dialogue with the people of Europe and to close the gap between the EU and its citizens. As an indicator of the degree of openness and diversity of the debate, we compare the share of state and non-state actors that were involved and active in the reflection period. Generally speaking, reflection on the constitutional choices for Europe was predominantly driven by state actors. In comparison to previous rounds of constitutional debates in the member states, reflection did not only mean a general restriction of publicity but also a considerable reduction in the plurality of participation. The invitation by the governments and by the Commission in summer 2005 to broad and plural debate in the member states and beyond clearly did not resonate with the media and society. Rather, the reflection period reproduced traditional patterns of intergovernmental negotiations with a preference for low public involvement in EU constitutional politics.

Table 5.2 provides more detailed information on the participatory structure of media debates in the reflection period. Only in very few countries such as Bulgaria, Estonia, France, Italy, and the Netherlands, did the public or voters emerge as active participants in the debate with shares of more then 10 per cent. Civil society organisations on the other hand were largely absent from the discussion – with the highest involvement level (4 per cent) occurring in Denmark

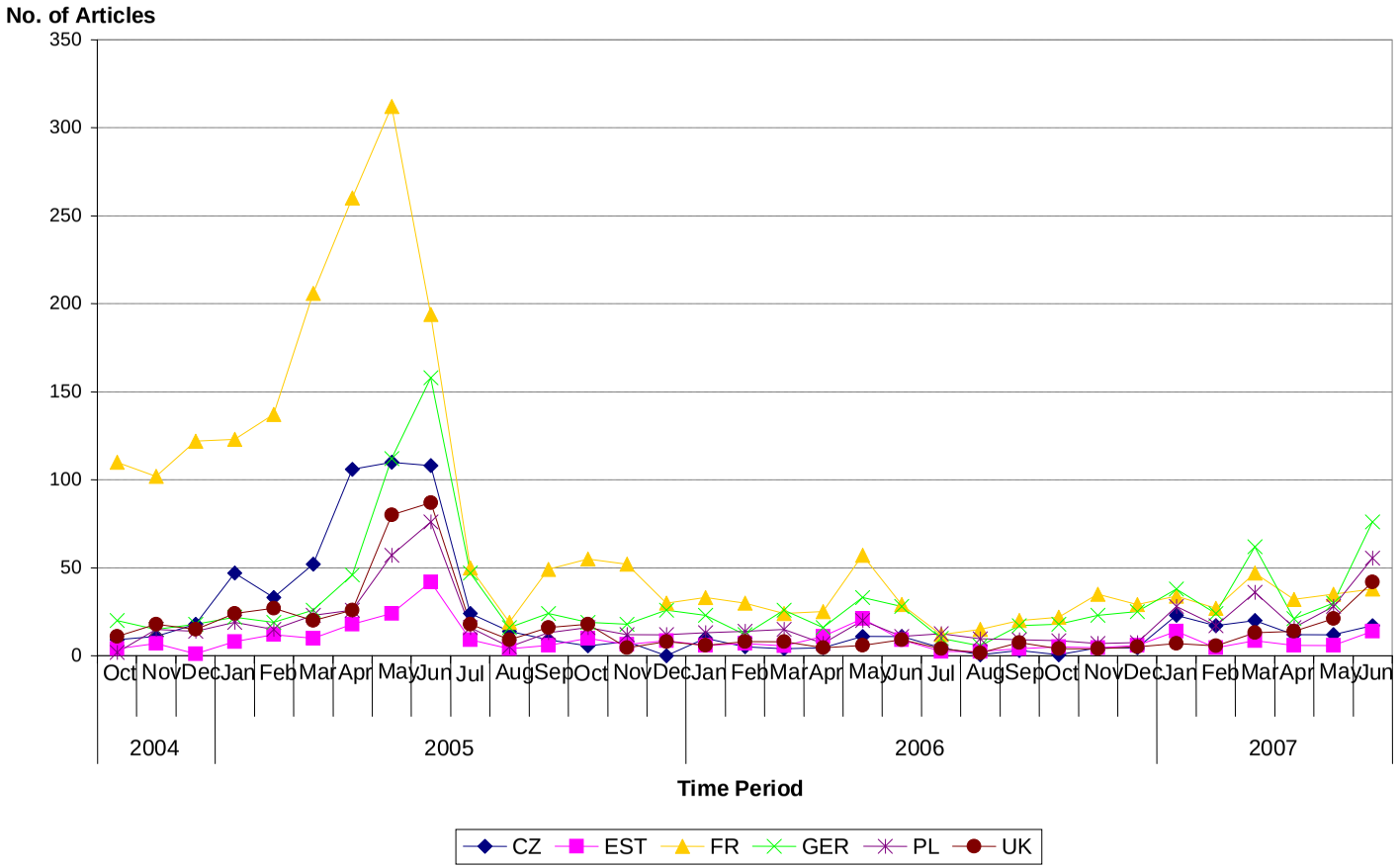

Figure 5.1: Combined Coverage Cycle of the Constitutional Debate 2004-2007

Table 5.2: Types of Agency

	BUL	CZ	DK	ESP	EST	FR	GER	HU	IT	NL	PL	SWE	TR	UK	Average
European actors	17%	8%	19%	36%	17%	18%	26%	36%	15%	15%	43%	37%	21%	22 %	24 %
Member state actors (national/sub-national)	52%	78%	59%	47%	57%	56%	59%	50%	64%	61%	20%	55%	40%	66 %	55 %
IO and non-EU states	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	1%	0 %	0 %
Economic organisations	0%	2%	1%	2%	0%	2%	1%	0%	0%	1%	0%	1%	2%	0 %	1 %
Civil society organisations	2%	0%	4%	2%	1%	1%	1%	2%	3%	1%	0%	0%	2%	0 %	1 %
Mass media/external journalists	11%	0%	1%	0%	6%	1%	1%	4%	1%	2%	1%	0%	10%	0 %	3 %
Personalities, experts, think tanks	3%	3%	11%	6%	9%	11%	6%	3%	4%	9%	29%	3%	8%	6 %	8 %
Public/voters/ people/citizens	14%	7%	5%	6%	10%	11%	6%	6%	13%	11%	6%	4%	17%	6%	9%
No. of quotations	245	245	520	444	455	500	465	376	278	532	409	189	374	403	402

How can we explain the elite dominance in constitutional debates in the media? Shifting media attention cycles are partly related to the indifference of the general public and the low level of political contestation in most member states. The fact that, among the non-state actors, only scientific experts and think tanks achieved some visibility in the media with an average share of 8 per cent, further underlines the technocratic character of the debate in the reflection period, which tended to focus on the viability of legal choices.[5] If non-state actors (at the domestic or transnational level) do not mobilise, it is either because they lack specific concerns and opportunities, or because they trust in the particular representative structure in place. We assume that both explanations apply here: The reflection period did not provide opportunities for mobilisation from below. At the same time, non-state actors were involved in corporatist partnership designs with the EU and considered lobbying strategies as more successful than public mobilisation through the media.

Table 5.2 further indicates that the particular representative structure in place is unquestioned, and governments are seen as the legitimate voice of the member states in defending EU constitutional issues. The particular type of representative voice in the reflection period thus supports the hypothesis that there is a return to intergovernmentalism in EU treaty reform. Intergovernmental theorists would be right to predict that national governments are successfully monopolizing domestic debates on the EU and excluding oppositional voices.

Patterns of interaction

In order to measure interdiscursivity and actors' relationships across countries and levels of political authority, the analysis of the post-ratification period looked at the particular ways in which actors' positions and statements were interlinked in unfolding media discourse. Interactions and interrelations were coded in all statements in which either a person was directly addressed or someone spoke about someone else. Combining these findings with an evaluation of actors' origin and level of action, our data measures the degree of transnationalism in the unfolding debate. It becomes possible to determine to what extend the debate was mainly restricted to the

[5] Note that the high share of 29 per cent in the Polish case is due to the number of interviews and guest commentaries chosen for the analysis.

nation states or reached beyond national boundaries. This results in a matrix that distinguishes nine types of actor relationship (Table 5.3):

Table 5.3: Actor Relations

	Own national addressees	Foreign national addressees	EU addressees	All addressees
Own national actor	23 %	26 %	15 %	64 %
Foreign national actor	2 %	10 %	5 %	17 %
EU Actors	3 %	7 %	9 %	19 %
All Relations (%)	28 %	44 %	28 %	100 %
All relations (N)	371	581	378	1330

The aggregated figures show that two types of actor interactions shaped the debate: discussions within the nation states (23 per cent) and forms of horizontal Europeanization (26 per cent) in which actors from different EU member states interacted with each other or more specifically, in which national actors addressed (with praise or criticism) actors from other member states. By comparison, vertical Europeanization, measured in terms of statements and opinions expressed by EU actors in interaction with national actors (or vice versa) were less important (15 per cent). Finally, contention in the EU arena, measured in terms of exclusive interactions between EU actors (e.g. EU parliamentarians addressing the Commission), was only marginally represented in the media (9 per cent).

Again, these patterns of interaction portray the EU mainly as a Union of nation states, which are either closed in domestic debates or interact with each bi- or multilaterally. In turn, media discourse overlooks the multi-level character of the EU and the allocation of political authority at the supranational level: while domestic actors (mainly national governments) are taken into consideration as active players in EU debate, there are only few instances of direct intervention of EU actors in the domestic realm. In contrast to earlier phases of the constitutional debate, the importance of horizontal Europeanisation, measured in terms of passive observation of debates in other EU member states, also diminished over the course of the

reflection period (only 10 per cent).[6] Our findings thus seem to deflate expectations of a progressive Europeanisation of the public sphere. Despite the fact that the EU hoped to launch a period of reflection and dialogue among Europeans, there is a considerable degree of re-nationalisation to be observed in media discourse of the EU.

Contentious issues

The range of issues raised by the statements made in media discourses indicates that during the reflection period a range of particular concerns has been expressed in relation to European integration in each of the single member states. A fundamental requirement for European political will formation is that public debates focus on the same topics of relevance (Eder and Kantner 2000). For the 2005-2007 reflection period the expectation would be that member state debates should primarily focus on the institutional and constitutional design of the European Union. The people of Europe were asked to deliberate about the scope and the limits of European integration, the possibilities for democratic control and the principal rules of decision-making. In order to compare the thematic character of European debates in the Member States, we have categorized the broad range of European issues into three categories

a) Policy issues: In relation to which EU public policies is the constitutional treaty mentioned? Which types of EU policy-fields are considered most relevant in the constitutional debate (output legitimacy)?
b) Polity issues: How are the objectives of the European Union debated? How is membership perceived? How should democratic participation and control mechanisms be allocated (input legitimacy)? And how are the 'polity model' and principles for which the EU stands discursively represented?
c) Procedural issues: How is the process of constitutional negotiation, ratification, crisis, reflection and relaunch perceived? How are actors' positions and strategies in the process represented?

[6] Comparative findings for France, Germany, the UK and Spain for the referendum period, in which horizontal Europeanisation was considerably higher, are reported in Vetters et al. 2009 for France and Germany.

In order to increase the relevance of the sample, our country experts were advised to give preference to those kinds of articles in which strong opinions and preferences on the EU institutional and constitutional set-up and desired reforms were expressed. We expected that this particular sampling bias should increase the salience of polity issues over policy and procedural issues. This expectation was partly fulfilled in the sense that EU policies were indeed discussed rather broadly and only mentioned on average in about 13 per cent of all statements. Against our expectations however, polity issues did not figure most prominently in the newspapers either. The EU polity was a topic in 28 per cent of all quotes, with a relatively wide range across countries, going from only 21 per cent in Denmark to 45 per cent in Turkey. Instead of dealing primarily with the substantive issues involved in the making of the EU polity, mass public debates in the reflection period tended to focus rather on strategic choices and the tactics of the main actors involved. The topics that were most hotly debated during the post-ratification debate were thus less concerned with the institutional and constitutional setup of the EU or the particular policy issues involved, dealing mainly with the process itself, reflecting on the referenda, the present impasse and possible ways out of the crisis. Overall, this emphasis on procedural issues (70 per cent on average) reflects the dominance of strategic news framing and contentious issues. This can be correlated to the actor variable to reveal which national government leaders were the main promoters of European debates. Our analysis demonstrates that the activity of national governments is characterized in the media as: promoting national or shared European interests, searching for coalitions and possible compromises in conjunction with European partners, and devising strategies to rescue the treaty reform process. Given this focus on strategic-procedural issues, media debates largely reflected the agenda of intergovernmental negotiations (logic one) that was dominant over the period with the aim of arriving at a compromise of minimal Treaty reform beyond constitutional high politics.

Justifications

The justifications used by actors to explain or to give reason for their views or proposals were analyzed along three broad categories connected to interests, values and rights. Each of these categories included a range of sub-codes in order to establish to which level or

group (e.g. regional, member states, European, sectoral, gender based) the justifications referred to. The three justificatory logics (interest, values and rights) were operationalised in terms of whether a constitutional choice/strategy/policy for the EU is:

- efficient/inefficient or beneficial/unbeneficial (problem-solving/interest-based justification);
- considered relevant for a particular entity/collective (contextualized value based justification);
- considered generally valid and impartial and defended on the basis of universal principles (rights-based justification).

Furthermore, it was specified that only those justifications that were directly related to an issue of EU policy, the EU polity or the EU constitutional process or project should be coded. This condition was met in only 22 per cent of all statements.

In all countries, the dominant pattern of justifying the constitutional project was interest-based. This points, once again, to a perception of the European Union as an entity that aims primarily at problem solving through compromises between the interests of different member states. Interest-based justifications were clearly dominant in the new Member States, especially Bulgaria (76 per cent) and Estonia (74 per cent), but were also in evidence in the applicant country Turkey and in some of the old Member States, especially in Britain (66 per cent) and Italy (65 per cent). Questions of collective identity and belonging were mainly debated in Turkey as well as in France and in Germany, and in all three countries were closely related to the question of Turkish membership. Justifications referring to rights and democracy became more prominent than interest-based justifications only in three countries: Sweden (57 per cent), Denmark (36 per cent) and the Netherlands (30 per cent).

The reflection period is thus marked by diverging practices across the Member States with regard to justifying European integration. This contradicts in particular the second logic of European constitution-making, which relies on a convergence of interpretative patterns and unification of the debate through shared criteria of relevance. Diverging justifying practices rather point to the existence of latent

cleavage structures and the existence of incommunicabilities between nationally diverse discourses. An example are concerns with the defence of rights and democracy, which were mainly articulated in well-established Northern European democracies (Sweden, Denmark, the Netherlands, and also Germany to a degree), whereas the New Member States, the UK and the Southern Member States tended to cast the EU routinely in terms of power and interests, albeit not national but predominantly joint European interests.

Looking at the degree to which different justifications were referred to, common European interests and values were dominant, followed by national or member-state-based arguments. The EU is thus primarily constructed as a double faced – in some cases even bi-polar – entity. The multi-level and poly-sectoral character of the EU polity does not feature prominently in the discourses of the media. This also hampers the unfolding of a contentious logic of EU constitution-making beyond the classic forms of bi-lateral cross-national or EU member states conflicts. However, throughout the reflection period, such conflicts rarely become manifest. The diverging practices of justifying European integration rather point to latent cleavages which do not turn into contentious politics.

Conclusion

Lessons for democratic constitutionalism

Does media communication restrict the scope of democratic legitimacy in EU constitutional politics? According to the representative democratic logic of EU constitution-making, ratification failure is basically a failure of public communication. However, as Fossum (2008) and Fossum and Menéndez (2005) have argued, the institutional conditions for this failure can be found in the Laeken process itself which only insufficiently fulfilled the requirement of deliberative constitution-making. This accounts for why, in discursive practices the media could neither reach nor convince the relevant publics. In light of these shortcomings, the rather divergent media discourses do not come as a surprise. They cannot be seen to undermine the validity of the normative claims of deliberative

constitution-making, as long as the necessary procedures have not been put properly into practice at the level of political process.[7]

From the intergovernmental perspective of 'quasi-constitutionalisation', the constitutional treaty ratification has been viewed as a procedural defeat but a substantive victory (Tsebelis 2008). Normative shortcomings do not matter as long as the process is functionally viable. As long as better alternatives to the Laeken outcome are not available, the failure of ratification does not matter. The task is therefore to protect the fragile compromises and to rescue the substance of the Constitutional Treaty. This can be done strategically by reducing public attention, e.g. by getting rid of the symbols and unnecessary corollaries of the Treaty. The road to Lisbon proves indeed that the restrictive logics of EU constitutional settlement can still be applied successfully without European heads of states needing to worry about media interference or the mobilisation of significant popular resistance. Through these lenses, the EU is apparently not 'ripe for politicisation', as some commentators have suggested in the aftermath of the referenda (Mair 2005). It therefore appears to be premature to postulate a new logic of European integration by democratization that would be structured by stable cleavage structures to accommodate conflict within and across the member states.

Our data shed doubt on the claim that ratification failure is simply to be regarded as a communications failure that could be 'managed' by applying the right communicative procedures and norms. The EU is not simply unwilling to provide the right information to the citizens or generally incapable of talking to the public directly, but it encounters systematic constraints: on the one hand the institutional preconditions for constitutional politics, namely Council Presidency consultations behind closed doors; and, on the other hand, nationally fragmented public spheres.

Yet, the failure of communicating the European message in the ratification stage does not imply that mass media communication of EU politics to the public leads to the wholesale re-nationalising of EU

[7] In retrospective, contingencies can of course always be identified as wrong calculations.

constitutional politics. Though some re-nationalising dynamics could be verified by our data (especially with regard to the dominance of national actors and interactions), the reflection period held some quite unexpected surprises: Although the media undoubtedly give prominent voice to national governments, they do not necessarily reframe the agenda of European integration and democratization in the terms of national interests or identities. To the contrary, the comparative assessment of the democratic quality of the constitutional debate in the mass media has revealed that a substantial degree of attention was paid to supranational policy issues as well as to European interests and identity. Furthermore, we claim that across extended pockets of the emerging European public sphere, institutional and procedural issues linked to a contentious, transnational democratic politics of constitutionalism can be seen to trump national institutional or supranational issues. Finally and importantly from the perspective of democratic constitutional politics by deliberation, the same mass media discourses that largely privilege the voices of national elites do not necessarily do so to the detriment of reason giving. In this regard, our most surprising finding consists in patterns of justification where appeals to European interests, values and identities have played the most prominent role. Arguably, a reflection, if not on the democratic quality, then on the reflexive capacity of the European political class to learn from past failures and successfully stage the Berlin Declaration on the occasion of the 50th anniversary of the EU.

In light of these non-linear trends in cross-national and transnational media communication on the construction of a European political order, we cannot but conclude that these neither support the thesis that the media is a mechanism for forging permissive social consensus, nor does it promote normative contentions about European integration. They do articulate normative debates about the constitutional design of the EU, but neither build societal consensus nor reflect (as yet) stable patterns of societal contention. Generally, media attention to EU constitutional politics is low, except for short periods around specific events like national referenda, and especially crises. Nevertheless, during the reflection period the media have demonstrated an unusual readiness to cover transnational normative and political debates. EU democracy is not an explicitly prominent topic within the national media, but neither do they exclusively or

predominantly focus on the defence of national positions and interests when dealing with EU topics of general relevance.

Last but not least, our analysis also proves the intergovernmental logic of quasi-constitutionalisation wrong, with our findings contradicting its core claim that the necessary institutional settlement of the EU has already been achieved by restricting the instrumental scope and the normativity of the project. It needs to be recognised that the EU's visibility in public discourses all over Europe has become a fundamental condition for debating and negotiating its legitimacy. The question of the democratic legitimacy of the European political order can therefore not be detached from normative debates that effectively engage broader publics.

The role of publicity as a constraint on and precondition for democratic legitimacy has not yet been fully grasped. Arguably, a theory of constitutionalism beyond the state would have to put discursive intermediation centre stage, paying attention to the contingencies deriving from competing constitutional games. Their articulation is risky but unavoidable, with no guarantee of public loyalty.

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Chapter 6

Constitutions in the Face of Europeanising Governance: Falling Behind Times?

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Introduction

The contributions in the volume at hand gauge European constitutionalism within the conceptual framework of the RECON project, which seeks to conceptualise democracy at supranational and transnational level. As outlined in Chapter 1, the RECON framework offers three ways in which democracy could be reconstituted at supranational level: delegation of democracy to the Union level with the crux of the control remaining within the nation states; creation of the EU as a multinational federation with its own representative institutions; or a post-national Union with an explicit cosmopolitan imprint, focusing on citizen involvement via non-governmental organisations and civil society. While the present contribution will not engage in an assessment of the merits of the individual concepts, it highlights the general potential that national constitutions may hold in terms of fostering discussion on what might be the most effective ways to ensure democratic control and accountability at the European level.

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National constitutions have traditionally been regarded as the foundational and supreme instruments governing the distribution and exercise of powers in sovereign nation-states. Membership of the European Union, an organisation that involves unprecedented transfer of sovereign powers on the part of the member states, naturally prompts the question how the constitutions have been adjusted for the transfer of powers. The amendment of national constitutions for membership of the EU has been explored by a number of authors, offering thorough accounts of the historical background, the content of the amendments and comparative classifications.[1] The analysis here will focus on one particular issue that has emerged from the literature: it is that approximately half of the member states' constitutions are rather poorly (if at all) adjusted for EU membership, especially in terms of reflecting the extent of powers exercised at supranational level. This chapter explores why this has come to be the case, and subsequently considers some broader reasons why it might be important for constitutions to be brought up to date with regard to the ramifications of EU membership.

It will be suggested that one reason for adequate amendment, which hitherto has largely been missing in the literature, is the channelling and evidentiary function of the constitutional amendments in terms of enhancing the awareness of lawyers and of the wider public about supranational governance. This point is primarily based on the insights emerging from the process of amendment of the constitutions in view of EU membership in the new member states from Central and Eastern Europe, which offered ample evidence of a substantial shift in the constitutional rhetoric. Whereas much of the constitutional commentary in the 1990s was underlain by cherishing the absolute and inalienable sovereignty, a marked change occurred in the wake of EU-amendments. The vocabulary of transnational governance and supranational democracy entered into the discourse of constitutional lawyers, being then communicated more widely amongst lawyers and in the public debate. This observation may potentially hold important implications for the debate on democracy in the EU. While national constitutions have seldom figured in the

[1] See e.g. Claes 2005; de Witte 2001: 73. For accounts on individual countries, see contributions published in Kellermann et al. 2001; Albi 2005.

mainstream discourse on European constitutionalism and post-national democracy, the chapter will argue that the channelling function of constitutional amendments may well be of crucial importance in terms of its potential to communicate the grand European ideas to the stakeholders at national level and thus to foster debate on effective democratic control at the supranational level.

Overview of the state of play in the EU amendments in national constitutions

In the process of entry into the EU, it is incumbent upon the accession countries to align their legislation to the requirements of the wide-ranging body of the *acquis communautaire*, under the careful scrutiny of the EU. There is, however, one important legal instrument that appears to be virtually exempt from harmonisation: the national constitution. As a fundamental expression of state sovereignty, constitutions establish the foundational rules on the distribution of powers and decision-making within a state, and states thus hold the prerogative of determining whether and to what extent the participation in the EU receives a mention in the national constitution. The latest EU enlargements though offered some evidence of nascent inroads by the EU into the national autonomy in determining the content of the constitutions, for example by virtue of the European Commission's requests to amend constitutional provisions on judiciary in Slovakia, Romania and Bulgaria and to adjust the rules on the national currency in Estonia. However, the core constitutional provisions on the organisation of powers and on their transfer to the EU remain firmly within the remit of the member states.

In the absence of unified EU requirements, national constitutions represent an area of law that, intriguingly, appears to be rather poorly adjusted for EU membership. Amongst the constitutions of the 15 'old' member states,[2] four offer no mention of the EU – the constitutions of the Netherlands, Luxembourg, Denmark and Spain. Indeed, Monica Claes has noted that were an alien to land in these countries and read their constitutions, he may well miss their membership of the EU altogether (Claes 2005: 107). Three other constitutions – those of Finland, Belgium and, since 2001, Italy –

[2] For a comparative overview, see Claes 2005. For accounts on individual countries, see contributions published in Kellermann et al. 2001.

accommodate the transfer of powers under a broader clause on international organizations, but make explicit references to the EU in relation to a limited number of specific issues. A key weakness in constitutions which deal with EU primarily via a blanc *renvoi* is that they seem to be 'putting the national Constitutions on hold as a general rule' (ibid.: 123). The third group consists of those constitutions that contain explicit provisions on the delegation or transfer of powers to the European Union: the constitutions of France, Germany, Portugal, Ireland, Austria, Sweden and, after a 2001 reform, Greece. Besides the transfer clauses, most constitutions in this group contain further provisions dealing with specific aspects of EU membership, such as the control of the national parliaments over the governments in the EU decision-making process, the active and passive voting rights of EU citizens in the elections of local councils in another Member State and in the elections of the European Parliament, and issues related to Monetary Union.[3] Overall, considerable diversity exists within the constitutional landscape of the 'old' member states, with no standard model being available for the accession countries. However, for reasons which will be considered in the section 'Why do EU amendments matter', the third group were invariably recommended as a model for accession countries.

In the new member states, the constitutional amendments were predominantly introduced in 2001-2003, with the exception of Poland which joined on the basis of the new constitution adopted in 1997, and Cyprus where no amendment was deemed necessary prior to accession. As regards the countries of Central and Eastern Europe, the historical background of the adoption of the constitutional amendments, along with the legal and political context, has been provided by the author elsewhere.[4] The story of amendments contained a considerable element of drama: solemn, heartfelt declarations on sovereignty and national identity in the constitutional texts and political rhetoric of the early 1990s quickly gave way to a transfer of state powers to what eurosceptics often likened to a European superstate; cunning plots in devising constitutional amendments and shrewd procedural manoeuvring in staging the

[3] For details, see e.g. Claes 2005: 81, and chapter 2 in Albi 2005.
[4] For details, see chapter 5 in Albi 2005.

referendums succeeded in warding off any public perception on loss of sovereignty; and constitutional arguments regarding the proper content and procedure of amendment invariably paled in significance in the face of (geo-)political imperatives. The amendments that were adopted in CEE prior to accession were broadly characterised as minimalist[5], on the following grounds: (a) the amendments were predominantly addressed to international organizations in general rather than specifically to the European Union; (b) in a number of countries manifest conflicts with EU law were left unresolved within the constitutions contrary to the advice of legal experts; and (c) in some countries (mainly the Baltic states) the amendments side-stepped the rigid constitutional amendment procedures which included the requirement of a referendum for amendments affecting sovereignty and independence.

In subsequent years, however, the balance sheet changed considerably, with a number of further amendments having been adopted in the more relaxed political climate that followed the successful holding of the accession referendums. For example, in Lithuania, the Constitutional Act on Membership in the European Union was adopted in July 2004 and came into force on 13 August 2004, more than three months after accession. Additionally, Article 125(2) of the Lithuanian Constitution was amended in April 2006 to ensure conformity with the requirements of the Monetary Union. In Latvia, the constitutional amendment process was resumed on 23 September 2004, removing conflicts from Articles 101 (voting rights of EU citizens in local elections) and 98 (extradition of citizens); the amendments entered into effect on 21 October 2004. In Poland, Article 55 of the Constitution was amended on 8 September 2006, in order allow extradition of Polish citizens in the wake of the Polish Constitutional Tribunal's declaration of unconstitutionality of a national law that implemented the European Arrest Warrant Framework Decision. Similarly, in 2006 a Supreme Court decision on the same matter prompted an amendment in Cyprus, where the Constitution had not been amended prior to accession. These amendments will be referred to as 'post-accession amendments' in the remaining parts of the paper. In addition to these post-accession amendments, the above-mentioned trend of minimalism has

[5] Ibid.

additionally been reversed by the rather exemplary EU provisions that can be showcased by Romania and Bulgaria that joined in 2007. While at the pre-accession stage the model of extensive amendment had hardly resonated with the constitutional drafters of the accession countries, a rather different picture emerged in result of the additional post-accession amendments and the entry of Romania and Bulgaria; indeed in constitutional terms many new member states would now seem better prepared for EU membership than the older member states. It may additionally be worthy of note that some countries are mooting further amendments or even the adoption of a new constitution. For example, Estonia has seen a lingering debate about the need to draft a new constitution with a clear EU chapter, following the constitutional disarray that resulted from the adoption of a free-standing Constitutional Act on the EU that was adopted as a political expediency to make EU accession possible.

Besides an assessment of the member states, it ought to be noted that EU law has been transferred to a considerably wider range of countries, virtually none of which have any special constitutional provisions in place. Most of the common market legislation and beyond is applicable and binding in the EEA countries Norway, Iceland and Lichtenstein, with Switzerland being bound by virtue of bilateral agreements with the EU. Croatia, Macedonia and Turkey are adopting EU legislation by virtue of their status as candidate countries, and the various Western Balkan countries are in the process of harmonising their legislation to EU law under the Stabilisation and Association Agreements.[6] While the above groups of countries have at least vague membership prospects, a more intriguing case is the extension of the EU *acquis communautaire* to the European Neighbourhood Policy (ENP) countries which enjoy no membership agenda in the foreseeable future. The European Neighbourhood Policy (European Commission 2003), created in 2004, seeks to define the EU's relations with its newly acquired eastern and southern neighbours following the recent enlargements. The ENP was originally addressed to Belarus, Moldova and Ukraine, as well as Southern Mediterranean countries Israel, Jordan, Morocco, the Palestinian Authority and Tunisia; its geographical scope has subsequently been expanded to embrace Armenia, Azerbaijan and

[6] For an in-depth analysis of the Western Balkan countries, see Blockmans 2007.

Georgia. As Cremona and Hillion (2006: 8-18) have amply demonstrated, the ENP is a cross-pillar policy which builds on, and bears considerable conceptual and technical similarities to, the EU's enlargement policy, drawing heavily on the methodologies developed within the framework of the EU pre-accession strategy. This phenomenon of exporting EU rules to non-member countries has come to be characterised as the EU's 'external governance' (see Friis and Murphy 1999; Lavenex 2004: 682)[7]; it presents a novel challenge to the classic constitutional models that have emerged to accommodate international and EU rules within sovereign legal orders (see Albi 2009).

By way of a tentative classification in terms of the extent to which constitutions reflect EU membership, the various member and non-member states could be divided as follows. Adequate amendments have been put in place in Germany, France, Portugal, Austria, Ireland, Slovakia, Hungary, Bulgaria, Romania, Latvia (after October 2004) and Lithuania (after August 2004). Limited amendments have been introduced in Finland, Greece, Malta, Cyprus (after November 2006), Estonia, Poland, Belgium, Sweden, Italy, Czech Republic and Slovenia; the last two countries are placed into this category because of provisions that describe the EU as an 'international organisation'. Virtually no EU provisions exist in the national constitutions of the Netherlands, Luxembourg, Spain and Denmark. The last observation also concerns the EEA countries, candidate countries and the Neighbourhood Policy countries which to a different degree are affected by EU law.

Reasons behind inadequate constitutional revision

The general picture emerging from the preceding section is that more than half of the constitutions of the member states are ill-equipped to adequately address the ramifications of EU membership upon the constitutions. As Monica Claes (2005: 124) has noted, '[t]he way in which European integration is dealt with in the constitutional texts is often disappointing, often inconsistent, at times downright clumsy […] and in many cases underdeveloped'. She notes that:

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[7] The concept of external governance emerged in the literature that considered the export of the EU acquis to the CEE candidate countries; see Friis and Murphy 1999; Schimmelfennig and Sedelmeier 2004.

> In most Member States there does not seem to be a consistent policy of cleaning up the Constitution and adapting it to a changing environment. Many Constitutions contain provisions which must to say the least be read in perspective, others are simply no longer in conformity with the changed realities of membership. […] [M]ost Member States approach the problem on an *ad hoc* basis, adapting the Constitution from time to time, but not consistently and in a rather disorganised manner.
>
> (Claes 2005: 123)

These observations prompt an inquiry into the reasons that may have shaped the current situation; the following factors in particular appear to have been at play.

Firstly, in a number of cases the constitutional framework appears to be the result of various country-specific factors. For example, with regard to the Benelux countries, it has been commented that the constitutional provisions on international organisations were adopted during the 1950-70s with a view to EC membership, and amendment has not been on the agenda because these countries have traditionally been European integration friendly, with no constitutional conflicts having emerged. This has also largely been the case with Italy, whose integration provision was introduced with a view to joining the United Nations, having later also been applied in respect of EC membership. Italy embarked in the second half of the nineties on a major constitutional revision, which would also have introduced EU-provisions, but the whole plan collapsed in 1998 for political reasons (see de Witte 2001: 73-74); eventually a provision on regions in the context of EU law was adopted in 2001. Luxembourg's clause on 'temporary' transfer of sovereignty (art. 49*bis*) has been explained by the small size of the population, and the resulting paucity of legal discussion.

Secondly, there appears to be an interesting correlation in that most constitutions that lack a specific provision on the transfer of powers to the EU are subject to more difficult amendment procedures. Such procedures may involve the dissolution of parliament, approval by two consecutive parliaments, or a referendum. The parliament has to be dissolved in Belgium, Luxembourg and, when amending the fundamental provisions, in Spain, where additionally a referendum is

required. The approval by two parliament memberships is required in Greece (note the relatively late introduction of EU-amendments in 2001), the Netherlands and Finland (in Finland, urgent amendments may also be adopted by a five-sixths majority of the parliament membership). In Denmark, a referendum or a five-sixths majority of parliament membership is required for amendments. Another amendment-related factor plays a role in Finland and the Netherlands, where treaties that conflict with the Constitution may be approved by parliament by a special majority. Amongst the new member states, referendum is required for sovereignty-related amendments in Estonia, Latvia and Lithuania, for all amendments in Romania, and the possibility of holding a referendum is envisaged in Poland and Slovenia. The procedural difficulties are compounded by the fact that issues surrounding delegation of sovereignty invariably tend to fuel the outcries of eurosceptics, which makes the more politically-attuned parliament members and legal experts seek solutions less prone to generate public controversy. As Monica Claes has noted, even where the need for amendments is acknowledged, the complexity and the length of the procedure often leads to postponement of the actual amendment until a later more convenient time, for instance, after a general election or in order to profit from experiences gained (Claes 2005: 123). The above trends seem to be broadly in line with a theory proposed by Donald Lutz, who has in a cross-national analysis demonstrated that the degree of rigidity of a constitution affects the amendment rate (Lutz 1994). Eivind Smith has pointed out that it is typical in case of those constitutions that are very hard to amend (e.g. the constitutions of the United States and Denmark) to rather engage in 'a creative interpretation' (Smith 2003: 34).

The third reason for the poor record of amendment of national constitutions with regard to EU matters may lie in a deliberate quest to leave the issues related to delegation of sovereignty untouched. Amendment proposals have often met the objection of 'don't fix it if it ain't broken', in that on the whole the existing provisions on international organisations have not obstructed EU integration and thus no immediate need arises for meddling with the constitutional texts. Andras Sajo has noted that some countries may have used the strategy of what Stephen Holmes called the *gag rules*, i.e. a strategic decision to remain silent on a particular issue, for the reason that it is still unclear how the European system is going to develop (Sajo 2004:

427). Overall one wonders whether analogies could be drawn here with Steven Krasner's well-known characterisation of sovereignty as 'organised hypocrisy' (Krasner 1999): could constitutions be regarded as a form of 'organised hypocrisy', given the increasingly reduced relevance of the provisions on national exercise of powers to the realities of Europeanisation and globalisation in governance? The constitutions do tend to be amended though where a domestic change in the distribution of powers occurs; the 'hypocrisy' element thus only concerns the external dimension of governance.

The fourth reason may lie in the fact that constitutional lawyers, who often work in a domestic framework of reference, simply fail to understand the constitutional significance of the EU. Andras Jakab, in an article evocatively entitled 'Neutralizing the Sovereignty Question', has noted that 'dominant views in the member states' constitutional doctrines ignore the actual challenge of the European Union to national sovereignty and by some kind of self-deception believe that (almost) nothing has changed (Jakab 2006).

The ratification of the European Constitutional Treaty, which was subsequently replaced by the less ambitious Lisbon Treaty that remains yet to be ratified, offered a striking case in point. Out of the 25 member states at the time, France was the only country to amend its Constitution in view of ratification of the Treaty. It did so as a result of the *Conseil Constitutionnel*'s decision where certain further encroachments were identified upon the 'essential conditions of the exercise of national sovereignty.'[8] Whilst the issue was considered in some countries, the relevant institutions (e.g. the Constitutional Court in Spain, the expert committee in Estonia and Parliamentary Committee in Finland) found no need for any textual amendment, although in Finland a special procedure of 'exceptive amendment' was deployed, which enables ratification of the treaties that conflict with the Constitution. Amendment in only one of the member states can hardly be conducive to the evolution of a true multi-level or intertwined constitutionalism or 'European constitutional order'[9], where national constitutions would constitute equal and credible

[8] See for details Ziller's chapter on France in Albi and Ziller 2006.
[9] This expression is borrowed from Schwarze 2000.

building-blocks alongside the Founding Treaties and (presumably) the Lisbon Treaty in the future.

Why do EU amendments matter?

Having explored the national constitutional landscape and noted its unsatisfactory state insofar as the Europeanisation of governance is reflected, the paper will now proceed to explore some reasons why constitutions ought to be brought up to date in this respect. While the shortcomings in the adaptation of the constitutions are indeed a matter of national discretion and will trigger no sanctions on the part of the EU, the subsequent sections will argue that EU amendments do have important ramifications for the states' internal legal system as well as for the broader constitutional and judicial debates in Europe.

The risk of devaluation of constitutions

A key concern that has come to be highlighted by scholars is the issue of devaluation of constitutions: are constitutions still taken seriously, or have they perhaps in part been reduced to paper tigers? Bruno De Witte coined the expression 'European Deficit' in the national constitutions, pointing to the fact that constitutions might gradually be becoming somewhat obsolete with regard to the realities in the exercise of powers (de Witte 2001: 73). In a similar vain, Andras Sajo has noted that 'too many gag rules will lessen the constitution's functionality and undermine its social relevance (Sajo 2004: 427). In Denmark, where the Constitution in 2007 still contains no explicit mention of the EU, and the courts rarely exercise constitutional review, Hjalte Rasmussen has noted a trend towards 'waning constitutionalism' and 'constitutional amorphousness' (Rasmussen 2006: 149-56). With regard to such constitutions, Monica Claes has rightly pointed out the following:

> The least that can be said is that these States may not be taking their own Constitution seriously, and that they […] [may] not do justice to the functions of a constitutional document, which is, among others, to constitute the polity. To omit the EU and the State's participation in it from the national Constitution can even be considered a devaluation of the national Constitution, and expression of carelessness as regards the supposed most fundamental norm of the polity.
>
> (Claes 2005: 124)

In terms of the scope of amendments, it should be borne in mind that constitutions in general have been classified into two main types – 'historic' and 'revolutionary' (Besselink 2006: 113ff). The former, which include, for example, the British and Dutch Constitutions, have developed incrementally over a long-term period, being non-formalistic and at least as much political in nature as legal. By contrast, the latter group of constitutions, which include, for instance, those of Germany, Italy, France and Ireland, tend to have their origin in a political or social cataclysm, which forms the 'moving myth' that inspires the Constitution; these constitutions constitute the political reality and tend to have a distinctly legal character, being enforced by constitutional courts (ibid.) The constitutions of Central and Eastern Europe also belong into the second group: as a reaction to the Communist period marked by nihilism to constitutional rules, they have a distinctly legal character, are relatively lengthy and detailed, and their observance is rigorously policed by powerful constitutional courts, with a high ratio of annulment of legislative acts.[10] It is clear that adequate EU amendments assume greater importance in the case of those countries whose constitutions are revolutionary in nature, if the constitutional culture is to be preserved. In addition, to borrow from the terminology of 'historical' and 'revolutionary' constitutions, could it be that in the forthcoming years, the EC Treaties might evolve into a formal, legal constitution, while a number of national constitutions might gradually become historical, merely declaratory documents, at least in those areas where powers have been delegated to the EU?

Excessive burden on constitutional courts in adjudicating conflicts with EU law

The second consideration regarding the merits of amendment is that inadequate constitutional framework may place an excessive burden upon constitutional courts in adjudicating conflicts between national law and EU law, and shift their framework of reference from the legal and constitutional requirements to considerations of political and European/international expediency. Courts, and in particular constitutional courts, may find themselves in a rather vexed situation, having to find pragmatic solutions in ensuring the constitutionality of

[10] This observation has been developed in more detail in Albi 2005: 22ff. See also Smith 2003: 15ff.

the legislation without jeopardizing the supremacy of EC law. The discourse on the reception of supremacy of EC law in national law has predominantly focused on 'judicial dialogues'(see Stone Sweet 1998: 325-6) and 'co-operative constitutionalism' (see Sajo 2004), where the national courts and the ECJ have engaged in structured conversation and co-operation in resolving issues pertaining to the relationship between EC and national legal orders.[11] When the supremacy of EC law is jeopardised or questioned in any way, the relevant courts have invariably been labelled as unfriendly or uncooperative. Amongst the courts of the new member states, such reputation has been acquired by the Polish Constitutional Tribunal, which, besides a strong statement on the supremacy of the Polish Constitution in the Accession Treaty judgment,[12] annulled national provisions implementing the European Arrest Warrant (EAW) framework decision[13] due to their non-conformity with Article 55 of the Constitution, which prohibited the extradition of Polish nationals.[14]

However, the author has argued elsewhere (Albi 2007: 25) that the Polish Tribunal went in fact to great lengths to avoid clashes with EC/EU law, in its quest to find pragmatic, EU-friendly solutions, e.g. by granting an 18-months period for the continuation of extradition, during which Parliament was to amend the Constitution. Virtually identical scenario also unfolded in Cyprus, where the Supreme Court's declaration of unconstitutionality also led to a constitutional amendment. The author additionally considered some judgments of the highest courts in Estonia and Latvia where certain questionable practices in the procedure of constitutional amendment had to be

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[11] For a more detailed account, see Claes 2006.

[12] Judgment of 11 May 2005 in Case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt. K 18/04] nyr. The summary of the judgment in English is available at the Constitutional Tribunal website:
<http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf>.

[13] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, OJ 2002 L 190/1.

[14] Judgment of 27 April 2005 in Case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt. P 1/05] nyr. The summary of the judgment in English is available at the Constitutional Tribunal website:
<http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_GB.pdf>.

glossed over by the courts due to lack of any room for manoeuvre. Importantly, such cases demonstrate that on some occasions genuine limits may well exist to EU-friendly interpretation, and that the courts have instead engaged in a dialogue with national parliaments with regard to the need to remove manifest conflicts with EU law from national constitutions.[15] With the hands of the courts thus being tied by the constraints of EU membership, the role of political institutions, especially parliaments, assumes particular importance in terms of exercising self-control and extra prudence when drafting constitutional amendments. Furthermore, action at political rather than judicial level is also mandated by the concerns of legal certainty and clarity for citizens, as well as the broader concerns of legitimacy.

The channelling effect of EU-amendments
Legal education and discourse on post-national constitutionalism and democracy

The final reason for constitutional amendment that will be considered here is the channelling effect of constitutional amendments in terms of their impact on the legal education and on the broader discourse on post-national constitutionalism and democracy.

The importance of form has been highlighted by Lon L. Fuller who, writing in a seminal paper, explained the function of form in the common law doctrine as evidentiary, cautionary and channelling.[16] Although public law, particularly constitutional law, functions in a somewhat different way, Fuller's observations are of relevance here: the form of an act provides evidence of the existence of a legal commitment.[17] In the context of constitutional amendment, Fuller's point seems to be borne out by the evidence that emerged from the process of constitutional amendment over the last few years in Central and Eastern Europe. Whereas cherishing the absolute and inalienable sovereignty underlay much of the constitutional commentary in the 1990s, a marked change occurred in the wake of EU amendments. The language of transnational governance and

[15] For further cases, including the Hungarian Constitutional Court's Sugar Stocks Case of 2004, see Albi 2007: 25.

[16] Fuller 1941: 800, cited in Rodin and Ćapeta 2006.

[17] Cf. Rodin and Capeta 2006, with regard to their analysis on the importance of the constitutional form of the European Constitutional Treaty.

supranational democracy markedly entered into the discourse of constitutional lawyers. Importantly, they began to communicate it more widely, both amongst lawyers in general and via newspaper articles to the wider society. Crucially, the idea of supranational governance also became part of legal education and modules of constitutional law, which had a fundamental effect on the mindset and framework of thinking of national lawyers. Such an observation also brings us to the role of legal education in general. Studies have shown that many national constitutional law textbooks mention EU in a marginal manner (De la Sierra and Domínguez-García 2003: 53-68). Therefore, students may often leave universities with a traditional understanding of sovereignty and nation-state centred views to democratic legitimacy, which may result in a considerable gap between the perceptions of successive generations of national lawyers and EU-lawyers, who in many ways seem to live in different legal universes.[18] However, the debate set off by the German *Maastricht* decision and the process of adopting and ratifying the European Constitutional Treaty has significantly contributed towards an increasing convergence in the discourse between national constitutional law and EU law.

The introductory section to this chapter noted the ways in which democracy could be reconstituted at supranational level, which are at the heart of the RECON project (Chapter 1 of this volume). The present contribution highlights the general potential that national constitutions may hold in terms of fostering discussion on what might be the most effective ways to ensure democratic control and accountability at the European level. While national constitutions have hitherto seldom figured in the mainstream discourse on European constitutionalism and post-national democracy, the channelling function of national constitutional amendments may well be of crucial importance in terms of their potential to communicate the grand European ideas to the stakeholders at national level and thus foster discussion on the ways to reconstitute democracy at the supranational level.

[18] See on the role of legal training in Aziz 2002: 134.

National constitutions and the idea of a European Constitution

In the final part of the chapter it would perhaps be fitting to consider the idea of a European Constitution and its co-existence with the national constitutions. Even though the Constitutional Treaty has now been replaced by the less ambitious Lisbon Treaty that remains yet to be ratified after the negative result in the Irish referendum,[19] the theoretical discussions are unlikely to lose their relevance as the prospect of the EU having a constitution may well re-emerge, even if in a more distant future.

Traditionally, constitutions have been regarded as the basic and supreme instruments governing the exercise of powers in sovereign nation-states, and there has been a deeply entrenched understanding within the national constitutional doctrine that the notion of a constitution is inherently bound to the state. The process of ratification of the European Constitutional Treaty offered an interesting case study on how the national constitutional law and doctrine have accommodated the potential co-existence of two documents bearing the name constitution. The tensions inherent in the idea of a European constitution were alluded to in the famous *Maastricht* decision of the German Constitutional Court in 1993,[20] where it was found that one reason why the EU is not a state lies in the absence of a constitutional document in the EU, with the EC/EU Treaties being by nature international treaties and the member states remaining the 'Masters of the Treaties'. This decision has come to be a key point of reference in the national constitutional theory of other member states. In the discourse on whether the EU is still a confederation of states or whether it might be heading towards a federal future, the absence of a fully-fledged constitution has been regarded as a key argument against the latter scenario.

However, in the aftermath of the *Maastricht* decision, an important line of literature emerged that could perhaps be called a post-national

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[19] For details regarding the ratification process in the member states, see the European Union Constitution website of the CIDEL project, available at <http://www.unizar.es/euroconstitucion/Home.htm>.

[20] *Brunner*, BVerfGE 89, 155; [1994] 1 CMLR, 57.

or 'post-etatist'[21] approach to constitutionalism. It contests the premise that constitutions are inherently linked to states, arguing that they may exist in non-state contexts, particularly in the EU as a new type of transnational polity.[22] Indeed, examples such as the ILO Constitution of 1919 and constitutions of golf-clubs have often served to illustrate the use of constitutions in non-state contexts. In addition, various theories have gained ground that attempt to conceptualise the co-existence of constitutions at multiple levels, such as 'multi-level constitutionalism' (Pernice 1999: 707)[23] and 'constitutional pluralism' (Walker 2002). Jacques Ziller (2006) offers the concept of 'intertwined constitutionalism', which has the distinct advantage of avoiding any hierarchical connotations. The language of constitutionalisation is also increasingly deployed in public international law, in parallel to the trend of public decision-making increasingly shifting away from the nation-state towards international actors of a regional and functional nature.[24] Indeed, the 1950 European Convention of Human Rights (ECHR) has been characterized by the European Court of Human Rights as a 'constitutional document of the European public order' for the protection of human rights, because it amounts to more than a treaty between sovereign states.[25]

In the framework of a collaborative project,[26] the author sought to assess whether the ratification process of the European Constitutional Treaty may have triggered a revision of the traditional thinking in the national constitutional doctrine, in line with recent European theories such as post-national, multi-level or intertwined constitutionalism. Whilst these theories are mainly represented by what could broadly be classified as 'EU lawyers', the question for the project was to what extent have such theories made inroads in national constitutional thinking. To this end, the contributors were asked to consider the debates and official documents of the political institutions that have

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[21] The latter term has been used by Aziz 2002: 116ff.

[22] E.g. Shaw 1999; articles in Weiler and Wind 2003; Craig 2001: 137; Di Fabio 2001: 164; Arnold 2003: 85; Brand 2004.

[23] See for reflections on this concept Nergelius et al. 2004.

[24] See e.g. de Wet 2006: Walter 2001: 170.

[25] See Cases Loizidou v. Turkey, Preliminary Objections, 23 March 1995, 1995 ECHR, Ser. A., No. 310, para. 75, and Bosphorus v. Ireland, 45036/98 [2005] ECHR 440, 30 June 2005.

[26] The results of the project have been published in Albi and Ziller 2006.

been involved in the ratification process in the member states, as well as constitutional court decisions and scholarly discourse at national level.

It probably comes as no surprise that despite the denomination of the original document as a 'constitution', the various national institutions that were involved in the ratification process regarded the document as yet another international treaty. This view was taken, for instance, by the French and the Spanish Constitutional Courts in their decisions on the Constitutional Treaty, as well as by the Finnish Parliament's Constitutional Law Committee, Belgium's Council of State and Estonia's Working Group of legal experts. The main arguments for this conclusion were tellingly encapsulated in the decision of the French *Conseil Constitutionnel*: it stated that the Treaty Establishing a Constitution for Europe was an international treaty because *it would not have changed the nature of the Union or the character of the treaty as an international treaty*. This was because of the Treaty's provisions on entry into force and amendment, the reference in (the then) Article I-5 to the respect for national identities inherent in the member states' political and constitutional structures, the system of attributed competences, and the fact that the French Constitution would have remained at the top of the French internal legal order. This approach also appeared to prevail in the national scholarly communities; indeed in the Czech Republic the very idea of introducing a course entitled 'European Constitutional Law' in the leading law faculty of the country was met with considerable resistance.[27]

Overall, this appears to illustrate that the traditional approach which links constitutions to states continues to be deeply rooted at the national level: the EU's new basic document was treated as an international treaty since the EU's nature would not have been changed in a 'fundamental way', i.e. the EU is would not have been transformed into a state. In other words, a document that falls short of transforming an entity into a state cannot amount to a 'constitution'. Whilst an increasing number of commentators have, since the *Maastricht* decision, lamented the application of the 19th century constitutional concepts to the globalising and interdependent

[27] See the chapter by Kühn on the Czech Republic and Slovakia in Albi and Ziller 2006.

world of the 21st century, application of such concepts appears to persist in the national constitutional doctrines. However, a nascent change can be discerned: several contributors to the project themselves noted that thinking along the lines of multi-level constitutionalism is making inroads amongst some scholarly circles at national level.

The author of the present contribution, proceeding from the mindset of post-national constitutionalism which does not preclude the existence of constitutions in non-state contexts, analysed the nature of the European Constitutional Treaty in greater detail elsewhere, reaching the conclusion that there was certainly a case for speaking about a 'constitutional treaty', with an emphasis on the word 'constitutional'.[28] It was suggested that the document could be classified as a 'constitutional treaty', a novel category which would correspond to the EU's *sui generis* supranational character. Whether such a conclusion can be extended to the Lisbon Treaty which discarded the constitutional symbols while by and large keeping the rest of the content, is a question that remains beyond the scope of this paper and warrants a separate study.

[28] See Albi and Van Elsuwege 2004. For a similar view, see also Lenaerts and Gerard 2004.

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Chapter 7

Constitutional Courts in the Europeanisation of National Constitutions

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Introduction

It can be argued that the Europeanisation of national constitutions has a multitude of dimensions. National courts use different concepts by reference to judgments of the European Court of Human Rights (ECHR), the conclusions of the Venice Commission, the European Group of Public Law and alike. The European Union (EU) law plays an important role in these processes.

The process of Europeanisation in the EU context connotes the promotion of a European political community. It encompasses the promotion of individual allegiances in favour of European law, by both promoting individual rights and by adopting a broad interpretation of rights allowing individuals to challenge national legislation (Maduro 2005: 48). In the national context the process is

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facilitated by national courts providing interpretation of national law in the light of provisions of the EU law.

The cooperation between the European Court of Justice (ECJ) and national courts is specific in the context of Constitutional Courts (CCs). CCs and the ECJ have taken different perspectives. The CCs adopted a statist approach – by defending the conception of a sovereign nation state and positioning themselves against the intrusion by acts of the European legislation. The ECJ, in turn, explored the idea of an autonomous legal order without reference to statehood. Therefore, the Court analytically divorced the liberal ideal of the 'Rule of Law' from the conception of the sovereign state (Kumm 1998). The central question is whether the ECJ has managed to fill in the ideal with supranational values and principles and to what extent this has been accepted by CCs.

The aim of this chapter is to draw a short account on how the situation has developed and where we stand in the context of Europeanisation of national constitutions as seen by the CCs. The task is difficult because there is a multitude of positions in different contexts. Moreover, the mandates given to different national courts are limited by provisions of national constitutions.[1] For the purposes of this study the selected CCs were chosen to ensure balance between 'old' and 'new' EU member states as well as to highlight those decisions which have significantly influenced the position of CCs in relation to EU law.

The relationship between CCs and EU law in general will be discussed under three main headings: transfer of sovereignty, interpretation of national constitutional law in the light of EU obligations and the transposition of national constitutional values on a supranational plane. As a result of the study, the conclusions will be drawn within the context of three models for reconstituting European democracy – delegated democracy, federal democracy and cosmopolitan democracy - from the perspective of the CCs (see chapter 1).

[1] For instance, the Constitution of the Netherlands does not contain references to EU membership, while the Slovenian and Latvian constitutions refer to procedural issues only. See also Albi's chapter in this volume.

Theoretical framework

As outlined in Chapter 1 of this volume, Eriksen and Fossum offer three models for reconstituting democracy in Europe. The first model called 'delegated democracy' envisages democracy as being directly and exclusively associated with the nation state. It is based on the assumption that only the nation state can sustain democratic polity. In this model, the European structures are seen as a regulatory regime embedded in extensive institutional arrangements of public character. EU is a purely functional regime with the task to address problems, which the member states cannot resolve when acting independently (p. 15 in this volume). Therefore, the Union derives authority from the member states. This means that CCs would remain important players in the cooperation between the ECJ and national courts and, indeed, the courts of 'the last word' on the application of EU law domestically to ensure that EU does not overstep its mandate. They would also remain guardians of national values and constitutional principles.

The second model is entitled 'federal democracy' and entails a Union that is institutionally equipped to claim direct legitimation, and this is entrenched in legally binding form. According to Eriksen and Fossum the model is premised on the tenet that incongruence brought forth by globalisation and complex interdependence can be greatly reduced by federal democratic structures, which heighten congruence and helps alleviate the accountability problem of international and supranational institutions (p. 16). This model would affect CCs considerably and their traditional role would decrease. The relationship between EU law and national law would become hierarchical, including the constitutions of the member states. CCs would generally be guided by international uniformity, and national considerations would have only marginal relevance. However, specifics of federative agreement might still leave certain issues within exclusive competence of CCs.

The third model – 'cosmopolitan democracy' – envisages democracy beyond the template of the nation state. According to this model the EU has obtained competencies and capabilities that resemble those of an authoritative government which can be seen as the political organisation of society. As noted by Eriksen and Fossum, the model posits that the Union's democratic legitimacy can be based on a polity

sovereignty which is multi-dimensional and shared among levels, subject to cosmopolitan principles of citizens' sovereignty and the protection of fundamental rights (p. 17). This model would require to stop thinking in statal terms. CCs would have to depart from the theory of a sovereign nation-state and the safeguarding of national interests only. Although the relationship between CCs and the ECJ would remain based on cooperation, the CCs would acquire a greater share of responsibility for the success of the EU project as a whole.

Consequences of the transfer of sovereignty to the EU

Constitutional Courts can be considered as guardians of a traditional understanding of sovereignty which fits well with a belief in state law as paradigmatic for law. CCs have almost inevitability got themselves rather hooked on to the law of the sovereign state. This exemplifies some kind of juridical foundationalism (MacCormick 1993: 15).

European integration attacks hierarchical understanding of the law and the monistic conception of sovereignty. While the ECJ maintains that EU primary law is the 'higher law' of the Union and that the ECJ has exclusive authority to rule on the validity of the EU's acts[2], according to CCs EU law owes its supremacy to the extent it is recognised by national Constitutions. However, the position of CCs of some countries has liberalised over the years. In this context, the widely discussed practice of French, German and Italian CCs is the most illustrative and shows the transformations after an initial defensive role against EU law. These courts agree that there has been limitation of sovereignty and neither member states nor the EU hold an absolute sovereignty.

For the **French** *Conseil d'Etat* it took about 20 years to finally abandon its so-called 'splendid isolation' from other higher courts in France (Craig and de Burca 2008: 355). In short, the French position is that there is a limitation of French sovereignty, not a transfer of it. Limitations have to be compatible with the French Constitution and shall not affect 'essential conditions for the exercise of national sovereignty' (ibid.: 356-7). The basis for this reasoning has been

[2] C-314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR I-4225.

Article 88-1 of the French Constitution which gives the Republic mandate to participate in the EU.[3]

Since 1970s the **Italian** CC has affirmed that the Constitution does allow limited constraints to the sovereignty and only on condition that there is no breach of the '*principi fondamentali*' of the constitutional order or the fundamental rights.[4] The CC has the power to exercise a constitutional review of the norms of the Treaty, which are inconsistent with the principles of the Constitution. Moreover, the Court has the ultimate *Kompetenz-Kompetenz* to test consistency of any rule of the EU with the Constitution by means of the review of constitutionality of the Italian law for the implementation of the European Treaty.[5] The Italian Court argued that the European law prevails on the Italian law, not in terms of hierarchy of norms, which implies a problem of sovereignty, but in terms of attribution of competences.[6] Therefore, the Italian CC was prepared to adjudicate, not simply on questions of conflict between specific EU measures and fundamental Italian constitutional rights, but also on the basic question of the division of competence between national law and EU law (ibid.: 364).

The **German** Constitutional Court (*Bundesverfassungsgericht*) has strongly defended the view that EU law cannot violate the constitutional order, i.e., weaken constitutional principles, especially fundamental rights. Member states are still the 'masters of the treaties' (*Herren der Vertrage*) and the binding force of the legal order of the Community depends on German law (Królikowsky et al. 2008). However, there has been a considerable development of the German position from *Solange I* to the *Maastricht case* where the Court placed much more emphasis on cooperation in exercising control over the applicability of EU law in Germany.[7] The control has become more

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[3] For the latest amendments of Article (4 February 2008) see <http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=7F7E0376A42E23953E7AFDD9989DC678.tpdjo14v_3?cidTexte=LEGITEXT000006071194&idArticle=LEGIARTI000018077095&dateTexte>.

[4] *Frontini case,* Sentenza n. 183, 18 December 1973.

[5] *Fragd case,* Sentenza n. 232, 13, 21 April 1989 (Gaja 1990: 93-4).

[6] *Grantial case,* Sentenza n. 170, 5 June 1984 as quoted by Dicosola 2007.

[7] The decision Manfred Brunner and others (Maastricht), Second Chamber of 12 October 1993, BvR 2134 and 2159/92 BverfGE 89, p. 155. English version available at: <http://www.unizar.es/euroconstitucion/library/Brunner_Sentence.pdf>.

restricted and conditional over time.[8] It means that the CC has got assurances from the ECJ case law that the EU law guarantees protection of fundamental rights. The remaining question is the standard of protection and division of competencies between the two courts.

The **Latvian** Constitutional Court, when interpreting the national constitution, have noted that since Latvia is an EU Member State, Latvian laws shall be interpreted in conformity with Latvia's obligations in the EU, except in cases when it concerns fundamental principles enshrined in the national constitution.[9] The position of the Latvian court is similar to that of the **Spanish** Court, meaning that EU membership has introduced certain restrictions. However, the membership in the EU cannot affect national sovereignty, basic constitutional structures, values and basic principles included in the Constitution.[10] This has also been emphasised by the **Danish** Supreme Court, which has stated that supremacy applies only in relation to transferred competences.[11]

These courts are in agreement that the European Union is not a 'confederation' but a 'community of states'. There is no readiness to move in the direction of more 'federative' type model. Therefore, the legal system is best characterized as a community of courts where each court is a check on the other, but not a decisive one; the courts assert their respective claims through a dialogue of incremental decisions signalling opposition or cooperation. It is a dialogue of constitutionalism within a recognizably traditional framework of international law (Slaughter 2004: 84-5). At the same time, some of the new EU member states remain strict and hold particularly reserved positions due to sensitivities towards sovereignty (Sadurski 2006: 6-10). Polish and Lithuanian courts serve as examples.

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[8] The decision of Second Chamber of 07 June 2000, 2 BvL 1/97, BverfGE 102, p. 147. English version available at: <http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607_2bvl000197en.html>.

[9] The Judgment Case No. 2007-11-03, 17 January 2008.

[10] Judgment from 13 XII 2004, 1/2004, available at: <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/DTC122004en.aspx>.

[11] For a comparison, see Judgment Carlsen v. the Prime Minister, 6 IV 1998, I 367/1997.

For instance, **Polish** courts regard themselves as possessing the ultimate *Kompetenz-Kompetenz* (Craig and de Burca 2008: 373). The Polish Constitutional Court has concluded that the accession of Poland to the EU did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of Poland. The Court states:

> The process of European integration, connected with the delegation of competences in relation to certain matters to Community organs, has its basis in the Constitution […] It is insufficiently justified to assert that the Communities and the European Union are 'supranational organizations' – a category that the Polish Constitution, referring solely to an 'international organization', fails to envisage […] The member states remain sovereign entities – parties to the founding treaties of the Communities of the European Union. They also, independently and in accordance with their constitutions, ratify concluded treaties and have the right to denounce them under the procedure and on the condition laid down in the Vienna Convention on the Law of treaties 1969.[12]

The Court based itself on Article 8(1) of the Constitution which states that the Constitution is the 'supreme law of the Republic of Poland'. The possible collision between Constitution and EU norms 'may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm'.[13] Similarly the **Lithuanian** CC declared that:

> Thus, the Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied, but also, in regard of European Union law, establishes *expressis verbis* the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the

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[12] Poland's Membership in the European Union (the Accession Treaty), Judgment of 11 May 2005, K 18/04. Unofficial summary by the Polish Constitutional Court available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf> , pars 1 and 6.

[13] Ibid. par. 13.

> European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), save the Constitution itself.[14]

Therefore, Lithuanian and Polish Constitutions as a whole, not only their general principles, are supreme over acts of the European Union.

The third group of CCs acknowledge the equal rank of the Constitution and the EU law. Apart from the very specific case of the UK (Craig and de Burca 2008: 371), Austria and Estonia should be mentioned as examples.

For instance, the **Austrian** Constitutional Court has decided in two cases that neither the Constitution nor Constitutional law could be applied since that would entail a conflict with directly applicable provisions of EC law.[15] Similarly, the **Estonian** Chamber of the Supreme Court has pronounced that there has been a material amendment of the entirety of the Constitution to the extent that it is not compatible with the European Union law. Those provisions of the Constitution that are not compatible with the European Union law are inapplicable, and suspended. This means that the European Union law shall apply in the case of a conflict between EU law and Estonian legislation, including the Constitution.[16]

The practice of CCs exemplified that a widespread belief in sovereignty as essential for statehood still holds strong. The differences remain in how the process has been formulated; as 'delegation', 'transfer' or 'limitation' of sovereign rights and

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[14] Case No. 17/02-24/02-06/03-22/04 14 March 2006, paragraph 9.4. Available at <http://www.lrkt.lt/dokumentai/2006/r060314.htm>.

[15] Civil Servants Salaries Restriction Case, available at Venice Commission website <www.codices.coe.int> and Telecom-Control-Commission Case, VfGH 24.02.1999, B 1625/98=VfSlg. 15.427/1999.

[16] See 'Euro case', Constitutional judgment 3-4-1-3-06 on the interpretation of Constitution, 11 May 2006. See paragraphs 15 and 16. The case concerned the competence of the National Bank which according to the Constitution had the sole right to issue Estonian currency (Article 111). This Article raised problems when Estonia amended its legislation in order to be able to join the euro zone in the future, as the European Central Bank would become one authorizing issue of banknotes and coins. Available at <http://www.nc.ee/?id=663>.

hierarchical relationships between two regimes. The courts acknowledge that there exists a complex interaction of overlapping legalities in the contemporary European Union. Strictly speaking there is no compulsion to regard 'sovereignty', or hierarchical relationships as necessary to our understanding of the legal order. At the same time, the vigorousness to at least preserve fundamental constitutional principles and structures suggest that there is no, and perhaps will never be any, perspective to introduce a federal model for the time being. What can be argued, is that we are still living within the model of 'delegated democracy' with certain signs of 'cosmopolitan democracy'.

In order to move to a 'cosmopolitan democracy', there is a need for a redefinition of sovereignty, which should result in a departure from a positivistic and static vision of sovereignty. The conclusions of Philip Allott seems to be correct when he, although sharply, argues that 'the so-called 'sovereignty' of the member states is unaffected by their participation in the constitutional system of the Union. This fantasy of an inviolable and inviolate national constitutionalism is a lie, and ignoble lie, and a fraud on the people of Europe' (Allott 2002: 177). In his view, the evolution of the reality of social organisation has made the idea of 'sovereignty' into an anachronism and an illusion, inappropriate as a theoretical explanation of the totalising structure of society. The alternative would be to understand sovereignty as a collective noun which conveniently identifies a bundle of the most general internal and external powers of a society's constitutional organs ('sovereign rights') rather than the iconic name of some indivisible supernatural monad (ibid.: 178).

What could be proposed, is the suggestion made by Dan Sarooshi of sovereignty as a term in constant contestation. He argues that the contestation of the concept of sovereignty has always moved to a more transcendent level of human institution: from tribe to city-state to region to the institution of independent and sovereign nation-states and now, finally to international organizations. However, there is no single authoritative definition of the concept (Sarooshi 2007: 6-7). Sovereignty has always been subject to sovereign values that have conditioned its exercise and required answers to simple questions such as who 'we' are, who is our friend or enemy, where do we come from, how we became friends, how we got here, where we are and where we are going in the future (ibid.: 9-11). The sad note to be

made in this regard is that the Lisbon Treaty does not address these concerns because it offers no answer to the question of why the people of Europe should require such a document and this type of cooperation (Kruma 2007: 80).

The overall conclusion is that the member states 'have opened' their closed internal orders to the supranational EU. The degree of openness depends on past experiences, constitutional traditions and the context of the case. However, the differences do not necessarily bring different legal effects in the context of application of EU law, as will be exemplified in the next section.

Relationship between EU and national legal systems in delegated fields

As seen in the previous section, there are two possible approached to the relationship between EU and national law – hierarchy or discourse. International law in general and EU law in particular gradually penetrate into the national legal systems through the doctrine of monism. They determine the contents of national norms (Battini 2006: 33). Through this process the European legal order can be understood as the product of a cooperative process between different levels of courts (Maduro 2005: 50-52). Essentially, the supremacy and direct effect of EU rules transformed all courts into constitutional courts.

In this context, the jurisprudence of Constitutional Courts is of interest when establishing how the courts ensure autonomy of national and EU law system and how active they are in defending the monistic approach by exploring the preliminary ruling procedure. This, of course, depends on the question at issue, i.e., is it incompatibility with the Constitution or EU law only, or also with the Court's national constitutional mandate..

Most of the Courts have adopted the dualistic approach suggested by the ECJ in the *Simmenthal case*[17]. For instance, the **Austrian** and **Polish** CCs take the view that domestic law has to be set aside in favour of EU law in cases where a contrary Community law rule applies directly. The provision of the national law has then to be read by ordinary courts as if the internal rule contrary to EU law did not exist,

[17] Case 35/76 Simmenthal SpA v. Ministero delle Finanze [1976] ECR 1871

or to refer the question to a preliminary ruling.[18] The **Latvian** Constitutional Court, in a case concerning the 1965 London convention on maritime traffic, established that the Latvian legislation was not in conformity with the international convention signed before Latvia became a EU Member State.[19] However, the provisions were in harmony with EU requirements. The Court therefore declared national provisions null and void in relation to signatory States of the London convention, except those who are EU member states. Thus, the norm was applicable only in relation to a certain number of states. The **Polish** CC argued for a dualistic system because not every law contradicting the EU Treaties would be contrary to the Constitution. Therefore, the Court refused to refer to the preliminary ruling itself. The non-application does not prejudge the necessity to repeal the act, even though it may 'express' a strong demand that the legislator amend such provision.

However, this approach does not exclude situations when Constitutional Courts are confronted with application of EU law themselves. For instance, the Constitutional Court of **Poland** uses references to EU law when it interprets the Constitution. In a number of cases related to consumer protection the Court noted that relevant articles of the Constitution must be decoded and taken into account as existing standards of EU law.[20] Another possibility is for the CCs to refer to preliminary ruling. The **Lithuanian** Constitutional Court,[21] in its decision to apply for a preliminary ruling, has noted that the norms of the EU law shall be a constituent part of the legal system of Lithuania. The Court referred to its constitutional mandate to rule on compatibility of laws with the Constitution and the practice to use rulings of international courts, such as the European Court of Human Rights as a source of construction of law. The CC noted that the same

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[18] Austrian cases: Mineral Water Ordinance Case, VfGH, 12.12.1995, Telecom Control Commission Case, VfGH 24.2.1999. Polish case: Procedural Decision of 19 December 2006, 176/11/A/2006, Ref. No. P 37/05.

[19] Judgment 2004-01-06, 7 July 2004. See also dissenting opinion of judge Juris Jelagins. Available at <http://www.satv.tiesa.gov.lv/upload/2004-01-06E.rtf>.

[20] April 2004 (K 33/03), September 2005 (K 38/04), January 2005 (P 10/04).

[21] Decision on the application to the Court of Justice of European Communities for a Preliminary ruling, 8 May 2007. The ruling concerns Law on Electricity and the transposition of Directive 2003/54/EC which petitioners – MPs considered as discriminatory in relation to freedom of the customer to choose electricity transmission provider.

approach is valid in relation to jurisprudence of the ECJ and the Court of First Instance of the European Communities.[22]

The importance of the need for cooperation between the ECJ and Constitutional Courts can be exemplified by a judgment of the CC of **Romania**. The Romanian Court stated that it should examine the domestic legislation on state aid as to its compatibility with the EU legislation, because in accordance with the Constitution, EU law prevails over any contrary provisions of domestic law.[23] Instead of referring the question to the ECJ, the Court itself decided that the national regulation corresponded with the EU law while two dissenting opinions argued that EU law was not observed. Therefore, the lack of understanding of CCs on mutual relationship between EU and national legal systems, as proposed by the ECJ in *Foto-Frost*[24] and accepted by most of constitutional courts so far, might lead to detrimental effects on functioning of EU legal system.

The question whether Constitutional Courts are under the obligation to refer questions for preliminary ruling, is not easy to answer. For the time being, the **Estonian** position is the same as in both the Austrian and Polish cases, meaning that EU law is supreme in application and the national act, which is in conflict with the European Union law, should be set aside in a dispute. The General Assembly of the Supreme Court noted that the Estonian legislation did not provide for a system where national laws, contradictory to EU law, should be declared void.[25] The Court stressed that it is the responsibility of the Commission to check the compatibility of national legislation with EU law. However, there was disagreement among the judges and several dissenting opinions where submitted on the issue whether the Constitution should be interpreted by taking into account the Accession treaty, and whether the Court was obliged to ask for a preliminary ruling.

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[22] Case No. 30/03, 21 December 2006 TV broadcasting case on budget and subsidies. Available at <http://www.lrkt.lt/dokumentai/2006/r061221.htm>.

[23] Decision no. 59/2007 on the issue of constitutionality of the provisions under Articles 1 and 3 from the Law on the approval of some financial measures for the small and medium enterprises in the beer industry.

[24] Case 314-85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199

[25] Constitutional judgment 3-4-1-1-05, 19 April 2005. Available at <http://www.nc.ee/?id=391>.

The same difficulties are faced by the **Italian** Constitutional Court. In the *Granitial case*[26] the Court accepted the dual approach in relation to directly applicable EU law in the spheres which have been transferred to the EU according to Article 11 of the Constitution. In these cases there is no need for common judges to appeal to the CC. This, however, does not erase the possibility that the Court will have to deal with the compatibility of national and EU law. It may happen that the conformity of law to a constitutional provision, other than Article 11, depends upon its conformity with EU law, i.e., in cases where the parliament delegates the task of enacting legislation to the government, provided that the government conform such legislation to EU law (Onida 2004: 102). The Italian constitutional practice has been affected by amendments to the Constitution in 2001. Article 117 now reads: 'Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations'. As a result, the Italian CC has accepted jurisdiction in a number of cases dealing with compatibility of domestic laws with EU law.[27] This has led to a doctrinal debate on whether Italy is moving towards a monistic system. The answer for the time being is ambiguous.

It can be concluded that the Courts predominantly respect the dualistic approach to EU law, i.e., in cases where the national law contradicts EU law, national norms remain inapplicable. This does not mean that the national courts shall refer questions to the CCs, which rule only on compatibility of national laws with Constitutions. This leads to the conception of law which is no longer dependent upon a hierarchical construction and a conception of sovereignty as single and indivisible (Maduro 2005: 55). The different systems can overlap and interact, without mutual hierarchical subordination (MacCormick 1993: 9). In this context it seems that most of the Constitutional Courts have recognized that systems, as systems of rules, are partly overlapping but capable of compatibility. As argued by Feldman, such an overlap can grow, shrink, or change over time (Feldman 2006: 150). Therefore, the overlapping systems develop over time through the process of judicial discourse and without predetermined finality.

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[26] Sentenza No.170 of 1984.

[27] Sentenza n. 406, 10 October 2005, and Sentenza n.129, 23 March 2006 as quoted by Dicosola 2007.

For the time being the system corresponds to the first model. The difficulty to qualify existing state of affairs to the third model can be exemplified by a hypothetical case of conflict, not between two norms regulating the same subject matter, but between a domestic norm and a principle of EU law (Onida 2004: 103). For instance, in a case of principle of non-discrimination conflict would involve national norm and fundamental principles of both constitutional and EU law, and the question of jurisdiction would arise. This leads to the next section of this article on values and principles of national and EU law.

European values and democratic accountability

Article 6 of the Treaty of the EU and Article 1 of the Lisbon Treaty amending the EU Treaty both make reference to common principles and values of the member states. Principles at the EU level operate at the level of common denominators, given the special nature of the EU. In this they differ from identical principles of the member states (Kruma 2007: 72). Moreover, while the constitutionalism as such is a conservative method of political theory, because it is meant to strengthen the State as a permanent subject of international law, defining the basic elements of its activities, the EU is dynamic, and requires responses to new needs and challenges (Ipsen 1972: 984). The question to be answered is whether the EU has effectively offered one and whether the CCs have accepted the offer.

The conflicts of values in the field of protection of fundamental rights arose in the 1960s and 70s. The reason was that Europe's constitutional developments appeared as purely functional consequences of the economic integration, while at the same time affecting individuals directly. Since the EU placed limits on the capacity of the State to act, this affected democratic accountability and human rights protection as envisaged by Constitutions.

The jurisprudential debate between the ECJ and national courts on fundamental rights and democratic accountability has influenced the mutual relations between the courts. Thus while the strong German constitutional tradition has affected EU law, the UK's tradition of constitutionalism was affected by the EU far more than the UK's constitutional design has influenced the EU (Feldman 2006: 151).

The **German** Constitutional Court has over the years elaborated its position in relation to the EU's standard of protection of fundamental rights. The German CC stated that it may reassume jurisdiction in a case if the EU standard should fall below the standard envisaged in the Constitution (*Solange I, Solange II*) (Arnold 2000). This German position, followed by other CCs, led to changes in the EU's position. So far, the Constitutional Courts have exercised their function of 'constitutional watchdog' by biting back and exerting counterinfluence on supranational or international institutions, to some extent neutralizing the pressure from them (Feldman 2006: 143). The result is what the German CC has called a 'cooperative relationship' between the ECJ and the national high courts. This is a relationship defined court to court and based explicitly on both entities' respective competencies in domestic and international law (Slaughter 2004: 83). This has fostered a process of international constitutionalism which by itself is not new (Feldman 2006: 158). Currently both the EU and national legal orders make more or less explicit concessions to the other legal order's authority claims. Along Dworkian lines of law as interpretative concept, they make the necessary adjustments to their respective claims in order to prevent an actual collision.[28]

The possibility of conflict between EU law and constitutional law is nonetheless still present, as exemplified by the decisions of the CCs on the European Arrest Warrant. Apart from constitutional debates in a number of member states before amending national Constitutions, the Constitutional Courts of the **Czech** Republic[29], **Germany** and **Poland**, as well as the Supreme Court of **Cyprus,**[30] became

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[28] 'Ronald Dworkin and others who take a view of law as an essentially interpretive concept, essentially a matter of principle and of the interpretation of legal obligation and legal right in the light of values ascribed to a political community characterized by integrity in political judgment and practice' (quoted by MacCormick 1993: 9).

[29] Decree of the Czech Constitutional Court issued on 3 May 2006 (ref. Pl. US 66/04) stating the conformity of articles on EAW to the local Constitution. The control blueprint for the Czech legislative was Art. 14 section 4, 2nd sentence of the Chart on Essential Rights and Freedoms, according to which the citizen cannot be forced to leave his homeland.

[30] In the sentence from 7 November 2005 (ref 294/2005) the Supreme Court of Cyprus decided that the act implementing EAW is inconsistent with the Constitution because of the unconditional ban on the extradition of Cyprus citizens included in Art.11 section 2 of Cyprus Constitution. Summary in English available at <http://www.eurowarrant.net>.

confronted with the constitutional issue of arrest warrants. The German and Polish examples will be discussed in greater detail.

The **German** Constitutional Court was approached by a complainant, holding both German and Syrian citizenships, who was about to be extradited to Spain to be prosecuted for supporting the terrorist group Al-Qaeda. Although the government argued that the Court should approach the ECJ for a preliminary ruling, the Constitutional Court decided on the case by itself. In general, the German Constitution allows extradition of a German citizen to another EU Member State, thus opening the national legal system to European Law and public international law. The German Court emphasized the fundamental importance of citizenship and ban on expatriation and extradition in German system. It noted, however, that the general developments on supranational level and in public international law have limited this fundamental rule. In general, the Basic Law tolerates these developments, for instance in the UN context. The Court positioned itself in relation to EU citizenship qualifying it not as a fundamental status but as a derived status in relation to which ban on discrimination is not laid down comprehensively, but in line with the principle of conferral. The Court stated:

> Due to the area-specific restriction of the European ban on discrimination on grounds of Member State citizenship, a loss of the core elements of statehood, which would be inadmissible pursuant to the regulations of the Basic Law, cannot be established in this context as concerns the extradition of German citizens to other member states. Not only do tasks of substantial importance remain with the state; the restriction of the ban on extradition is also not tantamount to the waiver of a state task that is essential in its own right.[31]

The Court emphasized that the Framework Decision is situated outside the supranational decision-making structure of Community law and 'in spite of the advanced state of integration, European Union law is still a partial legal system that is deliberatively assigned to public international law'. Therefore, member states' legislative bodies retain the political power of drafting in the context of implementation. This led the German court to conclude that the

[31]Judgment of the Second Senate of 18 July 2005, 2 BvR 2236/04, par. 76.

Framework Decision on the European Arrest Warrant infringed on certain principles of the German Basic law such as proportionality and guarantee of legal protection.[32] A number of dissenting opinions were attached to the judgment, some regretting that the Senate refused to make a positive contribution to European solutions and by declaring national act void by over-emphasising the role of citizenship and proportionality.[33]

The **Polish** Constitutional Court, in ruling on the European Arrest Warrant,[34] has noted that it is an act of the third pillar which constitutes international public law. At the same time it is a constitutional requirement to implement Framework decisions according to Article 9 of the Constitution. The Court used reference to *Pupino case*[35] to substantiate this conclusion. However, this obligation might create a conflict with the Constitution, which prohibits extradition of Polish citizens in absolute terms. The Court agreed with the observations of some representatives of the significant role of the EU citizenship, which gives different meaning to the concept of Polish citizenship, but emphasized:

> Nevertheless it cannot constitute a sufficient premise for the derivation of the existence of such limitation of the scope of normative regulation Article 55 Paragraph 1 of the Constitution only by means of dynamic interpretation of this provision ... Moreover, as long as the Constitution attaches a certain set of rights and obligations with the fact of possession of Polish citizenship […], such citizenship must constitute an essential criterion for assessment of the legal status of the individual. The weakening of the juridical significance of citizenship when reconstructing the significance and scope of obligations of the state stemming from the provisions of the Constitution – […] would have to lead, in consequence, to the undermining of the

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[32] Judgment of the Second Senate of 18 July 2005, 2 BvR 2236/04.

[33] See especially dissenting opinions of Judges Lübbe-Wolff and Gerhardt.

[34] Case P 1/05, 27 April 2005.

[35] According to the ECJ, member states are still bound by obligation of loyal cooperation to take all appropriate implementation measures. National courts, according to the ECJ, must interpret national laws so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues. See C-105/03 *Pupino case* [2005] ECR I-5285.

> obligations of the citizens linked with them, as formulated in Article 82 and Article 85 of the Constitution.

The Court defined EU citizenship as an 'accidental and dependent' relationship and at the end, the Court declared the European Arrest Warrant incompatible with the Constitution, granting 18 months for the Constitution to be amended.

The European Arrest Warrant cases are of particular importance since they involved 3rd pillar acts and challenged the usual guarantees of the State towards their citizens. The cases in the Constitutional Courts demonstrate that the proceedings on the Arrest Warrant in the ECJ, although relevant and started at the same time when petitions reached the CCs, went largely unnoticed in the constitutional debate.[36] This implies that the CCs are hesitant to acknowledge supranational principles and values, and give preference to their own national Constitutions. The constitutional debates and outcomes of the proceedings also suggest a weakness of the fundamental status of EU citizenship claimed by the ECJ[37] and distrust among at least certain CCs concerning the level of protection of fundamental rights in other EU member states. The ones to blame under the circumstances are not only the CCs but the EU project as a whole because it has failed to foster a common identity building.

Constitutional Courts have achieved a lot by initiating a debate on values and democracy at the EU level. This can be seen as a part of the discourse among various actors in the legal community. Discursive understanding also means a foundation for legitimacy of the European legal order (Maduro 2005: 54-55). The dilemma which is now faced by the member states is connected with the processes of globalisation when the members of each national community are increasingly subject to the effects of measures adopted by the authorities of different, even non-governmental, communities. These processes affect their democratic legitimacy and accountability. States lose control of their constitutional agendas. But the question remains

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[36] See Case C-303/05 Advocaten voor de Wereld VZW v. Leden van de Ministerraad [2007] ECR I-3633

[37] See for instance Case C-413/99 Baumbast and R. v. Secretary of State for the Home Department [2002] ECR I-7091, para 82.

how to preserve national constitutional values, including effective protection of human rights, and democratic accountability.

There is no global agreement on a common set of values that are to guide the making and operation of constitutions at various levels. Any consensus as to the content of values can be found at a very high level of abstraction, and the nature of constitutionalism continues to be hotly contested (Feldman 2006: 148). The doctrine on principles might be of help because principles embody European values in systemic exposition and serve as framework of orientation (von Bogdandy 2003: 12). This should foster an identity formation on the European level with common understanding about the Community. The challenge is to construct an identity for the cosmopolitan democracy, which as *sui generis* is less clear compared to the model of 'federative democracy'. The 'federative' model is unlikely while the first model – 'delegated democracy' has exhausted its possibilities under the current level of integration. At the same time there is room for the argument, in the context of the European Arrest Warrant cases, that we have not yet reached the level of properly functioning 'delegated democracy' model.

It has become clear that there is a need to put more effort into building a collective identity for EU citizens and fundamental rights on the EU level. Although we have the Charter of Fundamental rights there is still homework to be done in terms of identity building. The simple projection of national concepts to the European level is unnecessary and even dangerous if the EU is to fulfill its potential (von Bogdandy 2003: 12).

Conclusion

The discussion of the practice of the Constitutional Courts revealed that the first model of 'delegated democracy' is currently the strongest one. However, it cannot offer solutions if the EU project is to develop further and facilitate building of an EU identity, which is essential for reconstituting democracy on the EU level. The impetus will also not be forthcoming from the CCs due to their specific functions in the State model. The task requires to revisit different concepts and to move in the direction of 'cosmopolitan democracy' entailing the so-called 'European dream'. This emphasizes community relationships over individual autonomy, cultural

diversity over assimilation, quality of life over the accumulation of wealth, sustainable development over unlimited material growth, deep play over unrelenting toil, universal human rights and the rights of nature over property rights, and global cooperation over the unilateral exercise of power (Rifkin 2004: 3).

At the level of rhetoric, the European Union is considered to be *sui generis* and it is believed that the Union must pursue the aforementioned dream. Once a pursuit of the dream move from theory to practice however, news reports are full of information about battles over the EU's voting system, the number of votes on the European Council, a reduction in the number of European Commissioners, the transfer or preservation of competence in the defence and foreign affairs sector, and alike. All of this suggests that the EU member states, which are supposedly pursuing the European dream, do not have a unified vision of the EU's further development, and they also lack any real desire to undertake joint responsibility for the development of the EU in the interests of everybody, as opposed to the interests of national agendas (Kruma 2007: 70)

There are three main questions pertaining to whether there is a will to change the situation. First, is the conceptual issue along the lines suggested by Dan Sarooshi quoted above, requiring definition of sovereignty. The EU has to develop its identity. During the Cold War, the rhetoric suggested that the basic constitutional principles of the EU included promoting economic welfare, avoiding war, and contrasting the EU against the communist territories to the East and, possibly, even against the United States. This rhetoric is no longer valid. Since the EU is based on international law, where general principles of law are based on the practice of nations in their mutual relationships, the EU can have no source other than principles which member states have accepted on a collective basis. The EU absorbs the principles of States, but it also creates special contents for those principles (Kruma 2007: 71). Therefore, by identification of so-called *Inbegriff des Primärrech* – set of primary law, the EU should attempt to arrive at a supranational cosmopolitan identity (Ipsen 1972: 4).

European States as 'nation states' and Constitutional Courts as guardians of the concept have adhered to Hegel's view. He considered that nationalism motivates 'nation state'. In this context, preferred values were genealogical origins, language and historic myths. If we change the

course and try to identify supranational primary law aiming towards multicultural liberal state, different social values shall be given preference, i.e., non-statal civil society, tolerance and accommodation of freedom of conscience, liberty and personal mobility (Franck 2004: 44).

The second question is related to the need to acknowledge the truism that sovereign states, in the meaning in which they were established, is a passing phenomenon. The Statist framework is increasingly unable to explain or to act as a mechanism for the major contemporary circuits and flows of political, economic and social power, which escape the state (Walker 2002: 319). Although the State remains central in the international context, the global market, deregulation and privatization bring other independent units such as corporations, NGOs, terrorists, organised crime, regional and global institutions, banks and other formations that affect sovereign states at the same time challenging traditional understanding of sovereignty (Clapham 2006: 56). States still exist in this world; indeed, they are crucial actors. But they are 'disaggregated'. They relate to each other not only through the Foreign Office, but also through regulatory, judicial, and legislative channels (Slaughter 2004: 5). The EU and its member states have to position themselves in this context.

The third issue has to be addressed by legal theorists. In this context the problem is that legal theory for too long has privileged state law over all other forms of law. The *Grundnorm,* invented by Kelsen, seems to be outdated as well as Austin's theory of law and state grounded in the theory of sovereignty as a matter of habitual obedience to sanctioned commands. These approaches have been traditionally supported by the Constitutional Courts in their rulings (MacCormick 1993: 9).

However, if we want to move towards new frameworks of 'cosmopolitan democracy' we have to consider the possibility of taking a broader, more diffuse view of law. We need to escape Constitutional fetishism, which overstates the potential of constitutional discourse and detracts attention from other mechanisms through which power and influence are effectively wielded and through which the political community is formed (Walker 2002: 319).

Constitutional Courts have done their homework to the extent possible within existing theoretical framework. However, we should

go further in redefining statal terminology of law. What is possible is not independent of what we believe to be possible (MacCormick 1993: 9). To move the European project further, our task is threefold: first, the need for system oriented approach; second, redefinition of sovereignty and thus the role of CCs and, finally, the need for a consolidation of supranational values and increased democratic accountability.

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Chapter 8

The Future of the European Constitution

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On what matters

Words matter. It makes a difference if we call a legal norm *law* or *directive* or *regulation*, and it makes a difference if we call a legal textbook a *constitution* or a *treaty*. What difference in matter these semantic differences make depends on the historical situation. Today in Europe, after the failure of the Constitutional Treaty the differences between the words 'treaty' and 'constitution', and the words 'regulation' and 'law' have become the difference between *democratic politics* and *technocratic administration*. The difference between democracy and technocracy is not only a political but also a legal difference because democratic constitutions *forbid* the replacement of democratic politics with technocratic administration.

Symbolic forms matter. If there exists a Charter of Basic Rights written in the text of the Constitutional Treaty, or if there is only an un-visible reference in one of the many articles of the so called Reform Treaty of Lisbon, may be that makes no difference for the *judges* of the European Court, but it makes a difference for the *citizens* of Europe, and this is the difference between democracy and expertocracy. This difference again is not only a political but also a

legal difference because democracy allows no '-cracy' (*kratein*) except that of the people.

Public opinion matters. The emerging transnational ruling class of the 21st Century that already governs Europe today, with the step from the Constitutional to the Lisbon Treaty, has made a turn from (what Susan Marks strikingly calls) *low intense democracy* to *post-democracy* after the French and Dutch referenda from June 2005 (Marks 2000; Buchstein and Jörke 2003). The already closely united political class of Europe in June 2005 first has ordered themselves a two years break of public silence which in particular silenced public opinion. Then came the Reform-Treaty with some minor changes which all went in the same direction: Reducing the democratic meaning of the new treaty to avoid the dangerous emergence of public opinion – or as Angela Merkel put it bluntly in German TV on 14 May 2008: 'My friend Sarkozy and I have suggested to call it not a constitution but a *reform-treaty* because only then another French referendum could be avoided'.

Following the spirit of the white papers of the European Commission the political ruling class of Europe has replaced democratic *public opinion* by aristocratic *public spirit*, and its 'retinue of lawyers, professors, and smooth-tongued orators' (Marx 1852), and especially the branches of political theory and international relations hastily began to condemn public opinion for populism or worse, and to rediscover the wisdom and higher truth of public spirit. Forget Rousseau and Kant, study Tocqueville and John Stuart Mill! The silent work of the public spirit of Europe's political class during the last two years break has split the one Constitutional Treaty again into two treaties, with names nobody can remember. Nothing of the now two treaties resembles a constitution any longer, and the result is a post-citizen *de facto* constitution that is not at all a 'laymen's document' (Roosevelt 1937) but only a document for lawyers. The Charter of Basic Rights in legally included but shall not appear publicly in the treaties. The participation of the Parliament and the Constitutional Convention in the amendment process silently disappeared, and the great name of the Constitutional Convention was never mentioned again. Instead of public debates we had some comedy-TV with the funny Polish twins. Was it that what the French people wanted when they said 'No' in 2005? Have they rejected the

constitution after a long and substantial public debate because of the name? Were they against a Charter of Basic Rights? Did they say 'No' because they disliked the word 'constitution' and loved what they supposed was its neo-liberal content? Did they say 'No' because they did not want a Bolkestein *law* but a Bolkestein *regulation*?

The answer of the transnational political ruling class to all these rhetorical queries was their political basic maxim: 'Never take a people's 'No' serious. Don't care about public opinion, it is not rational, informed, deliberative but seduced by the dangerous voice of populism, Europe's darkest legacy.' In other words, they cheated the people, silenced their voices and bypassed their votes. The more or less intentional effect is a new post-democratic regime of soft Bonapartism. This new regime of *good governance without democratic government* has gained the power to impose on the European citizens what they deliberatively and democratically already had rejected, and they impose it without a democratic public, without a convention procedure, without any national referenda – except that of the Irish who were stupid enough not to modernise their constitution to transform it into a more flexible and concrete order.[1] What is left from low intense democracy is parliamentary ratification without alternatives for the deputies (who as in Germany with a few exceptions do not know anything about European law supremacy but usually comply with European amendments in 80 or 90 percent of the votes, a bit like in the former GDR-*Volkskammer*).[2] The technocratic *bypassing of public opinion* in the name of *public spirit* and *good governance* makes the crucial difference between 2005 low intense and 2008 post-democracy.

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Yet, there are *democratic alternatives* to both evils, to low intense democracy *and* to post-democracy. One of the alternatives was

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[1] On the latter see Schmitt 1934.

[2] See Abstimmung der Ahnungslosen – Die EU-Verfassung im Bundestag, Panorama, 12 May 2005 (public German broadcaster ARD), available at <http://daserste.ndr.de/panorama/media/euverfassung100.html> (accessed 12 August 2009); see also the overview '"Abstimmung der Ahnungslosen in Deutschland-Frankreich hat es besser', at the University of Kassel website: <http://www.uni-kassel.de/fb5/frieden/themen/Europa/verf-ratifiz-komm.html> (accessed 12 August 2009).

recently outlined by Jürgen Habermas in a debate with the German Foreign Minister Walter Steinmeier. Habermas argued that the only way to go ahead and take the 'No' of 2005 seriously is not less but *more democracy*. Therefore he suggested a fresh start with a more (social) democratic constitution that takes up more of the major criticisms against the new European 'property-market-society' (MacPherson 1973) than the constitution of 2005, and then to try a European wide referendum which actually has a very good chance for the constitution because the vast majority of all European Citizens is still in favour of a closer Union and a European Constitution. But whatever the fluctuating polls say, true is, if we want a treaty with the more symbolically than legally important name *constitution* we (or they, our political leaders) must take the risk, and give the *pouvoir constituant* of the people a fair chance of expression (Habermas 2008).

Steinmeiers reaction was revealing. He praised himself, and Merkel, and the Reform Treaty, and in the following panel-discussion he resisted more than four attacks of the chair, Nida-Rümelin, a former German States Minister, who tried desperately to get *any* content-addressed answer to the pretty concrete political suggestions of Habermas out of Steimeier. Steinmeier talked and talked and said nothing, no word on *political* alternatives, not even a 'No', only *technical* statements on, how hard the political business is once the doors are closed, and how good our government is to muddle through this overcomplex world of politic strategies. Then his short measured time was over. A living example of what Alexander Somek calls *Demokratie als Verwaltung* (administrative democracy) left the room (Somek 2008). Hence, when we talk about Europe we must talk about post-democracy.

Administrative democracy or post-democracy is nothing else than a strategic system of policies to avoid politics and to repress political conflicts, the only means in politics to reach a rational understanding.[3] This is just what our transnational political ruling class needs to keep in charge. They denounce any political activism of an 'untameable public' (*unbezähmbare Öffetlichkeit*) as *populism* (Brunkhorst 2003a). On the other hand they deconstruct formal

[3] On the difference of strategic communication and communication oriented to reach an understanding, see Habermas 1981.

democracy by more and more national and, in particular inter- and transnational *soft law regimes*. They know very well that there is no democracy without *legal formalism*, and they know that there is also no democracy without a certain amount of *populism*, or an anarchic, untameable public and incalculable communicative power. Hence, they must try to reduce both to keep in power, and to stabilise their administrative power beyond democratic control.

One must say that the transnational political class was very successful in both respects, to bypass public opinion, as we have seen from the Lisbon process, and to bypass legal formalism, hence, to stabilise their own informal power and class domination. Informal rulership was introduced by Giscard d'Estaing's and Helmut Schmidt's 'fire side chats' during the 1970s which are now called *Council of Europe*. This kind of a highly informal regime that smoothly bypassed democratic and legal control worked very well also in other fields of politics and with other groups of politicians and selected high ranked citizens. A good example is the Bologna process which performed in high speed one of the greatest university reforms Europe ever had experienced. The whole process started with a couple of informal meeting of European Educational Ministers and an invited deputy from the civil society, a member of the Bertelsmann executive committee, and was initiated and ruled by a *protocol* without any binding legal force. Finally it was finished by parliamentary legislation which behaved towards the Bologna protocol *as if* it would have been a European regulation or a legally binding international treaty. Hence, we can read in the preamble of the university law of Schleswig-Holstein's sovereign parliament: 'The Bologna process *must* be implemented' (*muß umgesetzt werden*).

Informal domination means that on the top the social and political hierarchy law has no longer binding force but keeps it a the bottom. This was always the case in countries like Brazil (Neves 1992). Now it seems that we, with our *normative constitutions* are no longer the future perspective of Brazil but Brazil with its *nominalistic constitution* (Löwenstein 1959: 151ff) represents the future of Europe. The only resistance against this development apparently is, as Marti Koskenniemi has suggested that we insist on the reconstruction of a *culture of formalism* because 'only legal formalism can *emancipate us from informal domination*' (Möllers 2006, author's emphasis) and, one

should add, only legal formalism can keep *democratically necessary* populism democratic, and *emancipate us from the darker legacies of European populist movements* (Joerges and Singh Ghaleigh 2003).

Principles

What else can we do to save democracy in the storms of globalisation? – I do not know. Therefore I would suggest to take a break, and to *rethink democracy*. With rethinking democracy I mean *first* with Susan Marks (2000): rethinking democracy beyond *representative government* and *national borders*. The *second* conceptual move in rethinking democracy is a move back to Kelsen, and that means *to take Kelsen's critique of legal dualism seriously* (Brunkhorst 2008: 30-63). Both points are internally connected.

The *concept of representation* already has been deconstructed by the philosophy - and scientific praxis - of the 20th Century (Dewey, Cassirer, Heidegger, Wittgenstein) (Rorty 1981; Brandom 1994.; Habermas 1997). Yet, in political philosophy, constitutional theory, and German *Staatsrecht* the concept of representation is still vivid. Therefore the classical *representational* idea of the two bodies of the king, the people and their representative government has to be replaced by the idea of one body of people who *build* and *express* their political will in different organs (like parliaments, courts, governments, administrations, federal, inter-, trans- and supranational regimes), forms and procedures (like 'participatory', 'deliberative' 'representational' or 'direct' will formation). These different organs, forms and procedures are *all in equal distance to the people*, and no organ is left to represent the people as a whole: 'No branch of power is closer to the people than the other. All are in equal distance. It is meaningless to take one organ of democratic order and confront it as the *representative* organ to all others. There exists no democratic priority (or supremacy) of the legislative branch.'(Möllers 2008) State organs that perform power under a full-fledged democratic constitution are simply, and this is Kelsen's basic point, collections of different means or *methods* of forming and coordinating the expressions of the will of the people in a fair and equal procedure, or as Habermas put it later in *Faktizität und Geltung*, after the deconstruction of the ides of representation of a substantial popular sovereignty the state organs, popular sovereignty has completely

retreated into *subjektlose Kommunikationskreisläufe* – circulations of communication without a subject (Habermas 1992).

Concepts like *representation*, *legitimacy*, *sovereignty,* substantial notions of *people* or *demos* all are relying on a series of metaphysical dualisms and a dualistic construction of law which is state-centered. The following are the dualistic distinctions dissolved by Kelsen and his students already in the 1920s: *Staatenbund* vs. *Bundesstaat*, international vs. national law, constitution vs. treaty, public law vs. private contract, state vs. society, politics vs. law, law-making vs. law-application, legislative will (which cannot act) vs. executive action, *pouvoir constituent* vs. *pouvoir constitué*, heterogeneous population vs. homogenous people, people vs. representatives, legitimacy vs. legality and so on. All these dualisms hinder us already conceptually to construct European democracy, and to join the *civitas maxima*. What Dewey and the pragmatists did with classical idealistic and metaphysical dualisms in philosophy, Kelsen and his students did with the dualisms in political, legal and constitutional theory. They have replaced each of them by a *continuum*. Kelsen's and Merkle's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*). The doctrine of *Stufenbau* transformed the dualism between political legislation and professional application into a *continuum of concretisation*. Hence, if on all levels or steps of the continuum of concretisation, legal norms are (politically) created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fair and equally (in this or that, and to be sure, very different manners) on all levels of their creation. This is the most general meaning of what Susan Marks (2000) calls the *legal principle of democratic inclusion*.

The only, and deeply ideological function of the old and still effective legal dualisms is to restrict our understanding of democracy to representative government (or the priority of representative government) and to national government alone. Both restrictions are deeply undemocratic. This is so because it belongs to the *necessary meaning of democracy that is modern* that the 'meaning' of 'democratic self-rule and equity' never can be 'reduced to any particular set of institutions and practices' (Marks 2000: 149). Without the 'normative surplus' (McCarthy and Hoy 1994) of *democratic meaning* or the *meaning of democracy* which always already transcends any set of *legal*

*procedures of democratic legitimisation (*Arendt 1963: 188*),* the people, the 'subject' of democracy no longer could be a self-determined group of citizens or better, a self-determined group of all men who are affected by a given set of binding decisions. If they are not able to exhaust the meaning of democracy, and to experiment within the unlimited meaning-variance of key-words like equality, equity, freedom, constitution, rights or rule of law, if we the people are not able to determine, discover, construct or disclose new meanings of democracy (input-legitimisation), then there is no democracy at all but only a heteronymous people of – may be happy – slaves (output-legitimisation).

Democracy therefore is not, as the young Marx once wrote, the 'solved riddle of all constitutions' (Marx 1988: 231)[4], but much more radical: the 'unsolved riddle of all constitutions' (Marks 2000). Constitutions that are democratic have to keep the riddle open, simply because it is up to the individual and collective *self-determination* of the people to determine, interpret and re-interpret the altering *meanings* of democratic self-determination, self-rule and equity, again and again in ever new terms of institutional design, be it representative or not, be it national, sub-national, trans- or supranational. To such an understanding of democratic meaning only a concept of democratic legality and legitimacy, national and international law, people and 'representatives' does fit that is not dualistic and representational.

Whereas the concept of the (higher) *legitimacy* of a ruling substantial subject (the king or the state as '*Staatswillenssubjekt*' [Brunkhorst 2003b]) is as fundamental for power limiting constitutionalism as it was for medieval Christian, Papist or later absolutist regimes with its 'two bodies of the king' (Kantorowicz 1957) – democratic and power founding constitutionalism replaces *legitimacy* completely by a legally organised procedure of egalitarian and inclusive *legitimisation*. (Möllers 2005) The procedures of legitimisation have no longer any higher legitimacy. They are themselves nothing else than products of democratic legislation, hence legitimisation is circular, a *subjektloser Kreislauf*, but not in the sense of a closed and *vicious* circle but in the

[4] On Marx theory of constitution, see Brunkhorst 2007.

sense of an open, socially inclusive hermeneutic circle or loop of *legitimisation without legitimacy*.[5]

Hence, in a post-representational democracy there are:

1. No longer any conceptual and constitutional limits to *democratisation* and democratic experiments within all branches of power. *Gesetzesbindung* or rule of parliamentary or popular law is never enough legitimisation to legitimate decisions of courts or administrative bodies democratically.
2. There are no longer any conceptual and constitutional limits for democracy *beyond the state* and within the (national, international or world) *society* (Möllers 2001:423). The famous Hegelian distinction between state and society primarily was a state-centred ideology of *methodological nationalism* (Beck and Grande 2004: 7): binding the society to the borders of the nation state and subsuming society to the higher legitimacy of the state.
3. Hence, there are no longer conceptual and constitutional limits for *democracy on inter-, trans- and supranational levels* because in a world of 'open states' (Wahl 2004, Di Fabio 1998), which does produce permanently binding norms on all levels. A democratic order is only as democratic as the continuum of national and international law is.

[5] Democratic legitimisation is inclusive because it governed by the one and only constitutional principle of democracy, and that is the principle of self-legislation or autonomy. This principle is socially inclusive because it presupposes that a procedure of legitimisation that is democratic has to include everybody who is concerned by legislation and jurisdiction, therefore all exceptions (e. g. babies) have to be justified publicly and need compensation through human rights (Müller 1997; Brunkhorst 2005, Chapter 3; Marks 2000).

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The European Union has affected national constitutions. To some extent, this implies a cosmopolitan turn in their content whilst, in parallel, national constitutions have been adopted to protect their core from the expansive tendency of European integration. The Europeanisation of national constitutions supplements and completes the unfinished process of constitutionalisation of the EU. The two processes can be seen as two sides of the same coin.

This report explores how this has happened and to what extent the model of a constitutional EU is emerging. It does so by investigating several topics, such as the Charter of Fundamental Rights, the processes for national ratification of EU Treaties, and the constitutional discourses in the media.

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