# Making a Political Constitution for the European Union

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It is difficult to (re-)capture the sense of euphoria and excitement that was felt by the political elite at the achievement represented by the text of the Constitutional Treaty of the European Union before the negative referenda results in France and the Netherlands materialised. "All changed, changed utterly, a terrible beauty is born" – these striking words of the Irish poet, William Butler Yeats, come to mind. Can we speak now of a "terrible beauty", of a difficult moment, offering nonetheless very positive material for serious self-reflection on our understanding of the significance of the EU and the manner in which it is evolving as a legal and political system in these still early years of the twenty-first century? By choosing both the positive 'beauty' and the negative 'terrible' as the prism through which we look at what Neil MacCormick has termed the "health" of Europe[1] I wish to offer a critical but in the final analysis an optimistic view as to the future of the EU in these uncertain times.

By using the forward-looking title " Making a Political Constitution for the European Union" I wish to suggest an incremental and active process that will go on for the foreseeable future. It does not depend only on resolving the difficulties of the current Constitutional Treaty on the European Union. Nonetheless there are considerable lessons to be learnt from what happened this time around, at least for those willing to observe, reflect and move on. What is critical in my view is that the manner in which we now move on is consistent with a longer term perspective of a constitutional future of the EU and that we nurture in the process that longer term perspective. In taking this perspective I am not dogmatic about the form this constitutional future will take ɛ. J I am conscious of the need for considerable constitutional tolerance in terms of a healthy and balanced relationship with national constitutions.

My contribution can be divided in three main parts. *First*, I will explore whether the European Union already has a Constitution and if so, in what sense? *Second*, I will consider a different meaning of Constitution, namely as a democratic or normative concept and whether it can be applied *at all* to a non-state entity such as the EU. Linked is the question what sort of polity *is* the EU itself? *Finally*, I will offer some reflections as to the current state of European integration and the nature of the evolving political system of the EU in order to assess *where* we must go from here.

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[1]   N. MacCormick, *The Health of Nations and the Health of Europe*, 7 The Cambridge Yearbook of European Law Studies 1-16 (2004-2005).

# A.  A Juridical and Functional EU Constitution

In Alice in Wonderland there is a moment where Alice gets to an intersection between two roads. On the top of a tree she sees a Cheshire cat and asks him: "what road should I take?" The cat answers, rather pragmatically: "that depends on where you want to go"? Lawyers are in a certain sense the pragmatic cats of European integration.[2] Many of them point not to the road of a documentary political constitution but to a very different road that was familiar to them and well sign-posted. This is the road of the existing Constitution of the EU: a juridical and functional constitution as opposed to a documentary political constitution. In what sense then can it be said that the EU already has a Constitution?

The term 'constitution' can be conceptualised in many different ways in political and legal discourse.[3] One can refer to a constitution in an empirical sense, the way in which a polity, any polity, is organised as a matter of fact. A second meaning is that of a material Constitution referring to the totality of fundamental legal norms that make up the legal order of the polity. This includes the manner in which such norms have been interpreted by the judiciary.

The EU has a constitution in the first empirical sense and in the second or material sense. The EU material constitution of the EU in a juridical or functional sense refers to the idea that the existing Treaties form a constitution for the institutional structure of Commission, Council, European Parliament, Commission and Court. The role of the Court in this regard has traditionally been viewed as truly revolutionary, "declaring" and interpreting already years ago the constitutional effects of these treaties, a "Constitutional Charter" in one of its more famed pronouncements.[4]

In particular the famous *van Gend en Loos* and *Costa* judgments affirmed Community law as an autonomous legal order, implying that the Community legal order had a material constitution of its own. When the Court in its path-breaking decisions took EC law to be an autonomous legal order it did so on the basis of a presumed direct relation with the peoples of Europe. It was this premise that accorded an independent normative authority to the EU and its legal order.[5] The assumption of independent normative authority has required the adoption of constitutional doctrines to constrain and legitimate that authority –it was thus a constitutionalism instrumental to and limited by the claim of normative authority.[6]

Part of the constitutional fabric that has been knitted together over the years by the Court has related however not only to the legal order but also to the more

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[2]    *See also*, M. Poiares Maduro, *Europe and the Constitution: What if this is As Good As It Gets?*, *in* J. H. H. Weiler & M. Wind (Eds.), Rethinking European Constitutionalism (2000).

[3]    *See, in general*, J. H. H. Weiler, *On the Power of the Word: Europe's Constitutional Iconography*, 3 I-CON 173-190 (2005).

[4]    *See, in general* MacCormick, *supra* note 1.

[5]    *See*, M. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* N. Walker (Ed.), Sovereignty in Transition (2003).

[6]    *See in general* N. Walker, *EU Constitutionalism in the State Constitutional Tradition*, 59 Current Legal Problems (forthcoming 2007).

political order. The Court has discovered and applied a fundamental ordering principle with political implications, namely the *principle of institutional balance.* It has used that principle to mark out in a rather preliminary and basic fashion a certain balance in the powers of political institutions, rationalised in particular in terms of the interests or constituencies represented.

In conclusion the material Constitution of the EU as shaped by the Court in particular was there in outline form before the turn of the century. The problem however with this approach to constitution making is two-fold. First, it represents a rather haphazard and *ad hoc* approach to constitution making.[7] The strong aspect has been the conceptualisation and implementation of an autonomous legal order. The weak point has been the conceptualisation and implementation of a balanced and accountable political system. The latter can also be considered a step too far, simply too much to expect of judges as the oracle of the law in a context where the political authority has been left at the level of the national political systems. At the same time that reality was being outmatched by an evolving empirical reality of increasingly centralised sources of executive and regulatory power at the EU level itself.[8]

The second problem with the largely judicial approach to Constitution-making is the elitist and closed process itself. In other words, this legal habit of viewing the treaties as a juridical or functional constitution never received the kind of popular endorsement that would have legitimised it as a political constitution. According to this view, constitutionalised Europe to the extent that it exists, exists as an affront to democracy rather than as a product of it.[9] At any rate it was dominated by an intergovernmental legitimacy based on providing democracy to Europe through the constituent member states. The type of constitutionalism involved was low-intensity, rather defensive constitutionalism, which in the words of one author, "created a constitutional body without discussing its soul".[10] The constitutional concepts did not affect the way in which the political process operated- the domain of politics was dominated by their intergovernmental nature and constitutionalism as a form of deliberation was left to the domain of national political communities.

## B. The Shadow of the State

It can be concluded from the above that what the European Union does not have at present is a formal documentary constitution that is the product of a subjective act of approval by the people or their representatives. This idea of a Constitution can be referred to as a democratic or normative or political constitution. When we shift from a formal or juridical constitution to a much more demanding normative

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[7]    *See, in general,* MacCormick, *supra* note 1.

[8]    *See further,* D. Curtin, *European Legal Integration: Paradise Lost?, in* D. Curtin *et al* (Eds.), European Integration and Law 1-54 (2006).

[9]    *See further,* MacCormick, *supra* note 1.

[10]    The expression is that of Miguel Poiares Maduro in *Europe and the Constitution, supra* note 2.

concept of a Constitution we are confronted rather explicitly with what may be termed the "shadow of the state".[11] The reason is clear: the mature conventional meaning of the terms Constitution has emerged from the social and political context of the modern state and bears its imprint. Is big C constitutionalism translatable at all from the state tradition?[12]

The question of the EU's fit within a state dominated constitutional tradition has been the subject of considerable debate over the years, also prior to the current constitutionalisation process.[13] Leading the field at one side are those who see a democratic Constitution as only possible within a state tradition. The EU is not a state as it lacks legitimacy and the functional prerequisites of polity status. The EU does not have a *demos* in the sense of a prior political community identifying itself as such and having a sufficient sense of shared attachment to make common decisions and to commit resources in matters of common interest. On this view the idea of European constitutionalism is simply a "category error". To the extent we nonetheless continue to apply the label it is pseudo-constitutionalism or diminished constitutionalism of which we speak.[14]

Dieter Grimm, a former Justice of the Federal Constitutional Court of Germany, is a strong proponent of this view: "To the extent that the call "from Treaty to Constitution" is aimed at adding to the Treaties those elements that still separate it from a constitution in the full sense of the term, this would end up turning the EU into a State. Not everybody who today calls for a European Constitution is quite clear about this. The missing elements, after all, have to do with the popular legitimation of the legal act constituting the Union and the associated self-determination of Union citizens as to the form and content of their political unity. But this would alter the legitimating basis of the European Union."[15] The EU simply does not and cannot possess that attribute or combination of attributes without which the adequate realization of the distinctive normative potential proper to constitutionalism is deemed inconceivable.[16]

Another take on this issue is to locate EU constitutionalism within the state constitutional tradition without perceiving too many difficulties. In this perspective, the EU polity is regarded as sufficiently 'state-like' to enable the form of normative discourse that originally evolved in the context of the state to equally apply. This does not necessarily mean that that the EU must be conceived as a state or as becoming a state, rather that it bears enough of a family resemblance to the state to be susceptible to the same kind of constitutional treatment as the state.[17] And indeed this is what we see happening in practice where specific elements of constitutional discourse such as the rights of the citizen against

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[11]   The term is that of Walker, *supra* note 6.
[12]   N. Walker, *Big 'C' or Small 'c'?*, 12 European Law Journal 12-14 (2006).
[13]   This section draws from Walker, *supra* note 6.
[14]   *See, in general*, Walker, *supra* note 6.
[15]   D. Grimm, *Does Europe Need a Constitution?*, 1 European Law Journal 282 (1995).
[16]   *See also* D. Grimm, *The Constitution in the Process of Denationalization*, 12 Constellations 447-463 (2005).
[17]   *See also*, Walker, *supra* note 6.

government, the separation or balance of powers, the authority and accountability of the executive, the forms of legislation, the power of judicial review, are applied in the institutional context of the EU.

A third position is more modest but at the same time more flexible. It agrees that the state constitutional tradition cannot be ignored, as it remains the key contemporary frame of reference for meaningful discussion of constitutionalism. Yet, unlike the miscategorization perspective it maintains that the limits imposed by this frame are not rigid and that it is instead possible to imagine other types of polity, including post-state like polities like the EU becoming successfully constitutionalized even if that requires a considerable level of adjustment. It takes the state tradition seriously without however being paralysed by its legacy. Nor does it necessarily require the EU to become a state, federal or otherwise: it accepts it as it is as a largely undefined and unique constellation.

## C.  Understanding the EU as a Federal 'State'?

But *is* it possible to be more precise in our understanding of the nature of the EU? The European Union is after all often presented as *a sui generis* entity. With this is implied that the EU constitutes a distinct and unique polity. Lawyers are especially dogged in this regard. After all it was the European Court of Justice that as long ago as 1962 ordained that the European Community constitutes "a new legal order of international law for the benefit of which the states have limited their sovereign rights". That legal order, in its own words, has a "special and original nature". Political scientists phrase the issue of framing a little differently. They commonly refer to the European Community and its successor the European Union as representing an n of 1, as being unique and arguably requiring a theory and framing all of its own.[18]

But what is the case for uniqueness? It is of course possible to argue that the processes of integration in Europe are specialized, and qualitatively different from processes elsewhere that it truly represents a novelty that has no current analogies. On the other hand it can be counter-acted that to say that the EU is unique is simply shorthand for saying that we have not yet developed the categories abstract enough, to see the EU as an instance of a more general class of phenomena. The issue for comparison is whether one may conceptualize the differences as variations along some meaningful underlying dimension.

First and most obviously the EU can be conceptualised as an international organization and indeed at the formal level simply is one in remarkably sophisticated form. But it is no longer the only international organization with supranational components: NAFTA, Mercosur and the WTO can all be placed along a continuum with the EU.[19] However the EU can also be conceptualised as a polity, namely as a regime responsible for authoritative decisions concerning

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[18]   *See, for example*, J. Caporaso *et al., Does the EU Represent an n of 1?*, X(3) ECSA Review 1-5 (1997).
[19]   *See however*, B. Laffan, *The European Union: a Distinctive Model of Internationalization*, 5 Journal of European Public Policy 235-253 (1998).

the allocation of values in a society. An increasing number of political scientists and political philosophers discuss the EU in these terms. They argue that the EU is not just concerned with what can be termed pareto-efficient outcomes with no clear losers but rather that many EU regulatory policies have identifiable winners and losers as they allow choices with distributive or even redistributive effects.[20]

As a multi-level polity the EU may be compared to other polities in which authority is dispersed among constituent governments at two or more levels. A variety of federal and confederal polities share this characteristic. The EU is more diverse than any of these polities but the issue for comparison is whether one may conceptualize the differences as variations along a meaningful underlying dimension. Some years ago Federico Mancini, at the time the Italian judge at the European Court of Justice in Luxembourg rather controversially made what he termed a "case for the statehood" of the EU. He argued that a European federal State was conceivable and moreover that Europe needs, in his words, and I quote: "those well-tested institutions and procedures that only statehood can provide". I quote further: "the problem of democracy cannot be tackled at national level. It must be confronted where it was engendered, in the very fabric of the Union, and ridding the Union of the last- but still how powerful may only solve it! - vestige of its original constitution: the essentially international nature grafted onto its policy-making machinery".[21] In other words democracy could on this view only be achieved if the EU becomes a federal state.

This is what can be termed the federal model in a rather extreme form with the EU having essentially a state like vocation. This model conceives of the EU as a political community based on citizens' mutual acknowledgment of rights and duties, at least in terms of potential. From this perspective, the Union forms the *supranational level of government* in Europe. In this view it is easier to assume that the EU will embody the core tenets of the democratic constitutional state, but with a *post-national* rather than a national vocation and identity. This model has undoubted explanatory power for part of what the EU is about today.[22] Both bottom-up empirical practice and top-down constitutional reform discourse invite a comparison of the EU basically with a state-like development. Putting it in these terms is obviously controversial: the "s" word is today as unpalatable as the "f" word was in Margaret Thatcher's time. Yet the exercise in drafting a constitution for the EU further reinforced the state-like analogies also in the minds of citizens asked to vote in national referenda processes. Indeed how can we avoid state like analogies when we have an entity such as the EU with its own foreign minister, its own army, its own gendarmerie, its own defence agency, its own diplomatic service and so on and so forth.

When it comes to this analogy it is not just new state like institutions that need concern us but also state like policies and state like functions. Gone are the days

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[20]   *See, for example,* A. Follesdal & S. Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik,* European Governance Papers, No.C-05-02, http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf.

[21]   *See,* F. Mancini, *Europe: The Case for Statehood,* 4 European Law Journal 29-42 (1998).

[22]   *See further,* T. Christiansen, *Towards Statehood? The EU's Move Towards Constitutionalisation and Territorialisation,* ARENA Working Paper No. 21, August 2005, http://www.arena.uio.nl.

when the only core of European integration policies was related to the creation of an internal market. A market polity is of course something substantially and significantly different to a fully-fledged state like polity. Substantively State like policies dates back to the passing of the Treaty of Maastricht and the incremental inclusion of policy making in areas very much linked to a core notion of state sovereignty. The list includes in any event monetary policy, security and defence policy and immigration and policing matters.

But what is relatively new in the debate at the EU level is the acceptance in terms of legal instruments that there are legislative instruments properly speaking (laws) and a wide variety of executive measures that may include operational type measures too. We see that too quite clearly in the Constitutional treaty: there really is an attempt to name and locate political and legal phenomena rather than hide behind the traditionally neutral expressions such as 'directives', regulations and decisions. The same can be said of the move to debate and describe the core EU institutions in very state like terms of "government" or executive and legislature. Legislation is further defined for the first time and non-legislation is circumscribed if not sharply delineated. Some political scientists find evidence of a move towards rather overt state building in this process and view this as a new discourse on constitutionalism in the EU.

Personally I prefer to avoid the state – like analogies and to analyse the EU in much more neutral and non-state dependent terms, namely as an evolving political system. The term political system is a neutral category that can be applied to pre-state and non-state societies and which assumes that the same standards that have evolved in other contexts in terms of accountability etc can also be applied in this context. This is where a considerable problem lies. A well known political scientist, Peter Mair, puts it in these terms: "The EU has been constructed by national political leaders as a safeguarded sphere in which policy-making can largely evade the constraints imposed by representative democracy. This is not the same as saying that the political system of the EU is anti-democratic: it is after all open and accessible to interest representation, it invites participation and engagement from lobby groups, advocacy coalitions and the rest and the European Parliament is quite representative even if it is not mandated as such by its voters. At the same time the scope for meaningful input into the output of the Union by those it calls its citizens and for electoral accountability is exceptionally limited."[23]

This perspective reminds us of the fact that the EU is an emerging political system, which massively influences the lives of individuals. This political system does not only emerge through constitutional conventions and treaties but also in small steps behind our backs. Governance arrangements and instruments can be understood as part of a broad map of what might be termed EU administrative space. This EU administrative space covers a wide spectrum of actors and arrangements from the very formalized ones to very informal networks.

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[23]    *See*, P. Mair, *Popular Democracy and the European Union Polity*, EUROGOV Paper No. C-05-03, http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-03.pdf.

# D. Understanding the EU as a Regulatory 'State'?

Another model sees the EU however in much more low-key and pragmatic terms. This model of the EU can be labelled the *regulatory model*, as it conceives of the EU largely as a framework of *transnational governance* made up of a range of specialist agencies and regulatory bodies. It is a functional approach that sees the EU as taking on board, and compensating for, the declining problem-solving ability of each 'sovereign' member state. Some time ago political scientist Giadomenico Majone labelled such risk regulation and management in the EU as "the regulatory state".[24] This model still has important explanatory power today. Indeed in the contemporary EU we also find looser governance activities carried out under the auspices of the EU, sometimes in institutionalised fora and sometimes in much looser and informal networks of actors operating in the wider context of globalisation.

Those who view the EU's functions as low-key, non-politically salient tasks best performed by non-majoritarian institutions tend to regard it as pure folly to pursue a documentary constitutional ambition.[25] Rather, the view is that it derives its democratic aspect from the practices of the member states.[26] This accords with Robert Dahl's view that beyond a certain scale representative democracy cannot work. To extend representative democracy to the European level stretches democratic legitimation to such an extent that it may intensify citizens' alienation from the system.[27] The EU's own legitimacy becomes based on its performance. Legitimation is conditional. Support is withdrawn whenever public expectations are not met.

It can be argued however that it is precisely the attempt to technocratise and downplay the EU's functions as low-key, non-politically salient tasks that has exacerbated popular and social discontent within the EU. This has become all the more evident as the EU's functions have undeniably expanded into highly politically salient fields. Fields such as criminal justice, police cooperation, anti-terrorism, immigration and risk regulation are just some examples of areas that need to be open to political debate and not be relegated to the side-lines of specialized "technocratic" matters best decided by executive agents and experts.[28]

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[24] *See further*, G. Majone, Regulating Europe (1996).
[25] *See*, G. Majone, Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth (2005).
[26] *See*, A. Moravcsik, *In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union*, 40(4) Journal of Common Market Studies 603-624 (1998).
[27] *See*, R. Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109(1) Political Science Quarterly 23-34 (1994).
[28] *See further*, Curtin, *supra* note 8.

# E. Reconstituting the EU in Democratic Process

The Union may already be constituted materially but it stood to be reconstituted democratically. That was the fundamental nature of the challenge underlying and informing the current round of constitutional process. When it comes to the novel task of drafting a European Constitution in compliance with democratic standards of legitimacy two major goals can be discerned. *First*, to design the constitutional process in such a way that a coherent common will of Europeans on their constitution could be formed. *Second*, to construct the constitutional norms themselves so that the democratic participation of European citizens in the deliberation and decision making on ordinary legislation would be enhanced.

If one goes back in time to the beginning of the explicit constitutional process for a documentary and democratic Constitution of the EU, the basic claim raised was that the legitimacy deficit of the EU could be overcome (or, at the very least, significantly diminished) by means of a formal democratic Constitution. When the German Foreign Minister Joschka Fischer delivered a speech in 2000 he interpreted the underlying social discontent with the European Union as an unarticulated will to enact a Constitution for the European Union.[29] It was necessary, according to him, to engage in a thorough discussion of the future of the EU, in which the *finalite*, the purpose of Europe could be discussed and decided upon. The crowning outcome of such a process would be the drafting of a constitution for the Union "which will deserve its name": in other words it will not be unlike national constitutions. The idea was that the constitution would be a final political form appropriate to its maturity, a sort of coming of age of the EU.

Fischer's speech provoked a chain reaction of like-minded interventions by European Heads of State, prime ministers and foreign ministers. Finally in December 2001 what became known as the Laeken Declaration launched a new process of a constitutional convention. The keywords in substantive terms were *democracy and legitimacy* (next to efficiency). Not only the contents of the agenda are of an overt constitutional kind but the reform procedure is more similar to a constitution-making process than the established Treaty reform procedure the closed and diplomatic inter-governmental conferences. The hope was that it could and would pave the way for a more genuinely open and democratic EU. The evocative normative power of the term 'Constitution' was considerably used in the Laeken process. The expectation was that the final outcome of the process would be a democratic constitution.

It was a tall order but some elements of real progress were also made, especially with regard to the process: *first* a Convention and afterwards a more than usually open IGC. It would however be wrong to characterise the Convention as a constitutional assembly. Even if its members are politically representative as nominees of representative institutions (the majority by the national parliaments), it is clear that have not been directly elected by citizens in an electoral process in

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[29]  *See*, J. Fischer, *From Confederacy to Federation – Thoughts on the Finality of European Integration*, Speech at the Humboldt University in Berlin, 12 May 2000.

which their views of the constitutional future of the Union were publicly debated. It is more adequate to see the Convention as what can be termed a *strong public*, the main goal of which is to set an agenda for constitution making and to explore the potential outcomes of such an exercise.[30] The transparent way in which the Convention deliberated played a role in fostering the chances of meaningful input from European publics to the whole process. The Laeken declaration specifically provided for an institution, called the Forum, through which general publics could influence the Convention.

Let me quote an insider on this: "With two hundred and three full and alternate members, and quite a few observers with speaking rights, Convention sessions engaged a lot of people in each of the debates. There were also present in the room conventioneers' assistants, advisers to ministers, diplomats, press persons and Convention Staff. The remarkable thing was the extent to which the members attended to their task and both contributed to, and listened to others in, the debates. When the Convention was sitting there was always a considerable buzz in and around the large Committee Room ... in the European Parliament building in Brussels, and in the adjacent public space and Hemicycle Bar. It was not a perfect way to try to write a constitution, but it certainly had the merit of drawing the arguments out into open air and subjecting them to genuinely critical debate that led to modification of positions by all or most participants."[31]

It is clear that a quantum leap was made in terms of the openness of the process and discussions via the medium of the Internet. This in turn enabled political lobbying of members and governments and institutions by those members of the public interested and capable of following the often highly technical debates. This more open and inclusive process certainly contributed to what has been termed the "belated politicization of the EU".[32] Yet the pattern of deliberation that the process spurred did not have the presumed public sphere generating catalytic effects that analysts attribute to democratic constitution making. The process of formal constitution making that was attempted beyond the Laeken declaration was clearly *not* catalytic *enough* to *constitute* a shared public sphere and thus to make it possible for people across Europe to accept the Constitutional Treaty that finally emerged.[33]

## F.   Towards an EU Public Sphere?

Jurgen Habermas's warning on the eve of the French and Dutch referenda was that and I quote: "there is still no European public space, no transnational building of themes, no common discussion, each one of the votes takes place within the

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[30]   *See further*, J. E. Fossum, *The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the EU*, 11 European Law Journal 380-410 (2005).
[31]   *See*, McCormick, *supra* note 1, at 11-12.
[32]   *See*, J. Fossum & H-J. Trenz, *When the People Come in: Constitution-Making and the Belated Politicization of the EU*, European Governance Papers, C-06-03, http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-03.pdf.
[33]   *Id.*

bounds of the individual country's public sphere".[34] This explanation relates ratification failure to the process of constitution making on the basis that it was not sufficiently developed to launch public disputes and debates that are needed to promote citizen's involvement and understanding.

The absence of a European public sphere is often seen as a systemic constraint on the development of the EU as a democratic polity. The EU is after all probably the most linguistically diverse polity in the world and does not even have one agreed upon working language. Moreover the prospects for Europeanization of the communications systems are often considered non-existent. Increased reporting on European topics in the national media is directed at a national public and remains attached to national viewpoints and communication habits. One cannot in fact, as Renaud Dehousse, has pointed out, speak of democratic deliberation if the participants of the debate do not pay attention to the view points that are expressed in other parts of the Union.[35] According to this analysis the lack of a European public sphere will likely preclude all further attempts at developing a European constitution.

Yet another more optimistic analysis is possible as to the future prospects for a European public sphere.[36] At stake is the role of cultural versus legal-institutional factors in creating the communal supports for a public sphere. A more institutional approach does not rule out the emergence of a public sphere on the basis of cultural diversity. In contrast to an explanation that conceives of the public sphere as rooted in a pre-political community of citizens who are bound to each other by primordial ties of trust and solidarity, a more institutional analysis is focused on a political community of active citizens who challenge the legitimacy of existing institutions and styles of policy making. It is the Union's undemocratic character in legal-institutional terms that places strong *de facto* constraints on citizen's participation and involvement. This helps spur opposition, frustration and disenchantment, which are vented at any possible occasion, and notably during national popular referenda. On this analysis the Unions structure sustains a strong national imprint on the debate also on issues and questions that concern the European level.

The key to understanding the catalytic function of the public sphere is thus politicization in the sense of mobilizing citizens support or resistance.[37] Here there is still much work to be done as political parties, general publics and electorates finally in constitutional referenda processes turn their attention to Europe. And it

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[34]   *See,* J. Habermas, *Adopting the European Constitution to Strengthen Europe's Power to Act,* http://print.signandsight.com/features/163.html.
[35]   *See,* R. Dehousse, *The Unmaking of a Constitution: Lessons from the European Referenda,* 13 Constellations 151-164, at 158 (2006).
[36]   *See in general,* J. Fossum & P. Schlesinger, *The European Union and the Public Sphere, A Communicative Space in the Making?, in* J. Fossum & P. Schlesinger, (Eds.) The European Union and the Public Sphere: A Communicative Sphere in the Making? (forthcoming 2007).
[37]   *See,* Fossum & Schlesinger, *supra* note 36.

may well be that "it is only when there is a common European referendum rather than separate and discrete national referenda processes that the catalytic spark may indeed be ignited."[38]

# G. Concluding Remarks

The text of the Constitutional Treaty that emerged in 2004 and was put before national publics was a conceptually muddled and unsatisfactory document. The substance contained nothing that could not have been included in a normal treaty amendment process. It was more of the same with certain improvements being made but gaping accountability gaps remained too. Thus the Council of Ministers remained largely unaccountable for its collective exercise of substantial legislative and executive powers, both at the European and the national levels. In the circumstances the use of the term 'Constitution' could better have been avoided. As Giuliano Amato admitted, on being asked how he felt once the Constitutional Treaty had been signed, he said he felt like a father who on being told he would get a girl discovers he has a boy instead.

   One of the very reasons for adopting a documentary constitution for the EU may have contained within it the seeds of its own failure, at the least in the short term. The lack of social or popular legitimacy for the EU as an evolving political entity was at the same time a condition of the success of the political constitutional project this time round. The fact that it was not there dictated the virtual inevitability of failure at this moment in time. At the same time the complex nature of the EU, shifting between a more federal view of the EU as the supranational level of government in Europe and a more regulatory view of the EU as providing a framework of transnational governance, is linked to this failure. Both models imply different understandings of democratic legitimacy and of the relevance of an evolving public sphere.

   This is not to say that the recent constitutional process was not a useful exercise. It proves rather in my view the need to take a much longer term and more incremental perspective on the topic of moulding a Constitution for the EU. The generic objective of *polity legitimacy* in the sense of the fundamental acceptance of the polity as a legitimate political community can be considered to be the longer-term and still highly relevant constitutional objective. The recent efforts to adopt a documentary political constitution for the EU can be viewed as the *end* of the *beginning* of the process, rather than the beginning of the end.

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[38] *Id.*